Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

[TRANSLATION]

Citation: *D. S. v. Minister of Employment and Social Development*, 2018 SST 673

Tribunal File Number: AD-17-717

BETWEEN:

D. S.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Jude Samson

Date of Decision: June 14, 2018

Canada

DECISION AND REASONS

DECISION

[1] Leave to appeal a decision rendered by the General Division of the Tribunal is refused.

OVERVIEW

[2] This case has a long and complex history.

[3] D. S. (Applicant) stopped working as a care assistant in February 2003. Her main disabling conditions include chronic kidney failure, neck and back pain, and depression. Based on these conditions, she filed three disability pension claims under the *Canada Pension Plan* in 2005, 2009, and 2014. The Respondent, the Minister of Employment and Social Development (Minister), denied each of her applications.

[4] In May 2015, the Applicant filed a notice of appeal with the General Division. The notice of appeal created some confusion: was it filed as part of her second or third disability pension claim? The Applicant maintains that a new hearing should be granted and that the gathering of further information justifies her application.

[5] Finally, the General Division processed the file as an application to rescind or amend the decision of the Office of the Commissioner of Review Tribunals (OCRT) as part of her second disability pension claim. However, the General Division refused the application on the basis that she had filed outside the set time limit.

[6] Before the matter can move forward, the Applicant needs leave to appeal the General Division's decision. Leave to appeal is refused for the reasons stated below.

BACKGROUND AND HISTORY OF PROCEEDINGS

[7] The Applicant submitted her first disability pension claim on January 17, 2005, but it was refused by the Minister, and a reconsideration was not requested.[1]

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[1] RA1F-143 and RA1F-165.

[8] The Applicant submitted her second claim for a disability pension on October 1, 2009, but it was refused by the Minister initially and on reconsideration.[2] The Applicant appealed the reconsideration decision to the OCRT. The parties appeared at a hearing before the OCRT, but it dismissed the appeal, finding that the [translation] "[Applicant's] problems was not serious to the point that it prevented her from working" and that she [translation] "could perform work adapted to her condition."[3]

[9] The Applicant then submitted an application for leave to appeal the OCRT decision to Pension Appeals Board (PAB). However, based on a letter from the PAB dated November 23, 2012, the application was deemed incomplete and there was nothing in the file that led the Board to believe that the Applicant had completed her file before April 1, 2013, the date on which the PAB was replaced by the Tribunal.[4]

[10] The Applicant submitted her third disability pension claim on December 3, 2014.[5] In this claim, the Applicant stated that, with a friend's assistance, she gathered a great deal more information that was missing from her previous claims.[6] However, the Minister refused the third claim on March 23, 2015, applying the principle of *res judicata*.[7]

[11] On May 6, 2015, the Applicant filed a notice of appeal with the General Division, which was accompanied by a letter from the Minister dated March 23, 2015.[8] First, the notice of appeal was deemed invalid, and the Tribunal could not record it because the Minister had not yet rendered its reconsideration decision.

[12] Based on information she later received from a Service Canada agent, the Applicant sent her file to the Tribunal a second time and asked for the [translation] "reopening of [her] file."[9] The General Division thus opened a file not as part of an appeal of her third disability pension claim, but as an application to rescind or amend the 2012 OCRT decision (meaning as part of her

[2] RA1F-64, RA1F-73, and RA1F-79.
[3] RA1F-34, at paras. 30 and 31.
[4] RA1-13; RA1F-3 to RA1F-250.
[5] RA4-2 and RA1-4.
[6] RA1-16.
[7] RA1-4.
[8] RA1-1 to RA1-12.
[9] RA1A-1.

second disability pension claim). Applications to rescind or amend are currently provided for under s. 66 of the *Department of Employment and Social Development Act* (DESD Act), but this procedure is sometimes known as reopening a file based on new facts.

[13] The General Division decided the claim on the basis of the documents and submissions filed. In its decision, it cited s. 66(2) of the DESD Act, which states that an application to rescind or amend a decision must be made within one year after the day on which a decision is communicated to the appellant. In the General Division's view, this one-year period started on April 1, 2013, the date this provision came into force. Since the Applicant's application to rescind or amend was received in 2015, the General Division dismissed it on the ground it was beyond the time limit.

[14] The Applicant filed the application for leave to appeal the General Division decision on October 18, 2017.[10] In support of her application, the Applicant stated again that additional information has been added to the file (pages RA1A-35 to RA1A-441) and that it justifies a new hearing. Furthermore, she cited ss. 83(1), 84(1), and 84(2) of the *Canada Pension Plan* (CPP) (as it read before April 1, 2013). All of these provisions, and others I have deemed relevant, are reproduced in the annex.

[15] After reviewing the file, I have determined that there was information missing that was essential to the Applicant's application for leave to appeal. As a result, on January 24, 2018, the Tribunal sent the Applicant a letter asking her to clarify the grounds of appeal cited in support of her application.

[16] The Tribunal received the response on February 28, 2018, but it mostly repeated the information that accompanied the application for leave to appeal.[11] In addition, the Applicant pointed out her concerns about the 2012 OCRT decision, cited the subsections of the CPP mentioned above again, and claimed that the Tribunal would be depriving her of the right to plead her case based on her complete medical file if it dismissed her application.

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[10] AD1.
[11] AD1B.

[17] Since the Applicant's arguments remained unclear, I invited the parties to submit their submissions on the question of whether the application for leave to appeal should be accepted. In particular, I stressed that some provisions cited by the Applicant concern an appeal of a decision and not an application to rescind or amend. Furthermore, all of the provisions cited have been repealed, and the corresponding provisions in the DESD Act call for periods of more than one year.[12] I asked how the CPP provisions cited by the Applicant apply in the present case and how they can help her.

[18] The Applicant answered the Tribunal's questions in a letter dated May 27, 2018.[13] Unfortunately, the response shed little light on her arguments.

[19] On the one hand, the Applicant states that she is relying instead on the corresponding provisions of the DESD Act and she confirms that the Tribunal can overlook her referrals to s. 84(1) of the CPP (as it read at the time) [translation] "because it does not exist."[14] On the other hand, the Applicant stresses that the provisions cited are those that were in force in 2012 when the OCRT rendered its decision.

[20] On May 30, 2018, the Respondent confirmed that it would not make submissions on the question of whether the application for leave to appeal should be accepted.[15]

ISSUES

[21] The Applicant's arguments are not in line with the legal framework in which the Tribunal operates. Consequently I addressed the following questions in determining this matter:

a) Is there an arguable ground that the General Division made an error of law by finding that the Applicant's application to rescind or amend was filed beyond the time limit?

b) Is there another arguable ground on which the appeal might succeed?

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[12] DESD Act, ss. 52(2), 57(2), and 66.
[13] AD1D.
[14] AD1D-4.
[15] AD2.

ANALYSIS

The Tribunal's legal framework

[22] At the Appeal Division, the emphasis is on determining whether the General Division made at least one of the three errors (or grounds of appeal) stated in s. 58(1) of the DESD Act. In general terms, did the General Division:

a) fail to observe a principle of natural justice or otherwise err in jurisdiction;

b) err in law; or

c) base its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it?

[23] Most appeals to the Appeal Division must take place in two stages: leave to appeal and the hearing on the merits. This appeal is currently at the leave to appeal stage, which means that the Tribunal must grant permission for the appeal to continue.

[24] This preliminary step is intended to filter out appeals that have no reasonable chance of success.[16] At this point, applicants have a minimal legal test to meet: is there any arguable ground on which the appeal might succeed?[17] Applicants are responsible for showing that the legal test has been met.[18]

Issue 1: Is there an arguable case that the General Division erred in law by finding that the Applicant's application to rescind or amend was beyond the time limit?

[25] Except as otherwise provided by the CPP, the OCRT decision rendered in August 2012 was final and binding.[19] Since the Applicant disagreed with the OCRT's decision, the CPP (as it read at the time) offered her the following options:

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[16] DESD Act, at s. 58(2).
[17] *Osaj v. Canada (Attorney General)*, 2016 FC 115; *Ingram v. Canada (Attorney General)*, 2017 FC 259.
[18] *Tracey v. Canada (Attorney General)*, 2015 FC 1300, at para. 31.
[19] CPP, at s. 84(1) (as it read at the time).

a) Ask for authorization to appeal to the Pension Appeals Board (PAB) under s. 83(1). According to this provision, such an application had to be submitted "within ninety days after the day on which that decision was communicated to the party or Minister, or within such longer period as the Chairman or Vice-chairman of the Pension Appeals Board may either before or after the expiration of those ninety days allow."

b) Apply to rescind or amend the decision under s. 84(2). According to this provision, there was no deadline for submitting such applications.

[26] After the OCRT's decision, the Parliament of Canada made substantial changes to the relevant legal framework.[20] The amending statute received royal assent on June 29, 2012. A number of its provisions came into force on that day, while others were postponed until April 1, 2013. Notably, s. 66 of the DESD Act currently states that applications to rescind or amend must be made within one year after the day on which the decision is communicated to the appellant.[21]

[27] In determining this matter, the General Division applied the DESD Act. It found that the OCRT decision dated August 2, 2012 had been communicated to the Applicant by November 9, 2012, at the latest because it was on this date that she filed her application for leave to appeal to the PAB.[22] The General Division also found that the Applicant filed her application to rescind or amend on September 25, 2015.[23]

[28] As a result, the Applicant's application to rescind or amend was filed more than one year after receiving the OCRT decision. Alternatively, the General Division stated that her application to rescind or amend was filed more than a year after the date s. 66 of the DESD Act came into force. In any event, the application was refused on the ground that it was filed beyond the time limit.

[29] In my view, the Applicant has not raised an arguable ground that the General Division made an error of law by finding that her application to rescind or amend was filed beyond the time limit. The transitional provisions in the Tribunal's home statute make it clear that the

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[20] *Jobs, Growth and Long-term Prosperity Act*, S.C. 2012, c. 19, at ss. 223 to 281.
[21] DESD Act, at s. 66(2).
[22] RA1-13.
[23] In fact, the Applicant's application lacked information and was deemed complete only on March 7, 2016.

matters it deals with would be subject to the DESD Act.[24] Since the DESD Act imposes a one-year limit on filing an application to rescind or amend, the Applicant's application was filed late, and the Tribunal does not have the jurisdiction to extend that period.

[30] Even if the General Division had considered that the Applicant filed her application to rescind or amend on May 6, 2015 (the date on which the Tribunal received her notice of appeal for the first time), the outcome would be the same.

Issue 2: Is there another arguable ground on which the appeal might succeed?

[31] Even so, I will still take into account the Federal Court's decisions in which it instructed the Appeal Division that it must go beyond written documents and examine whether the General Division might have misinterpreted or mischaracterized some evidence.[25] If such is the case, leave to appeal should normally be granted, regardless of technical deficiencies in the application.

[32] After reviewing the case in question and analyzing the decision under appeal, I am satisfied that the General Division considered the relevant evidence in drawing the conclusion that the application to rescind or amend was filed beyond the time limit.

[33] I asked myself whether the General Division may have mischaracterized the November 23, 2012, letter from the PAB.[26] A related issue is whether it is possible that the Applicant wanted to reactivate her file with the PAB rather than file an application to rescind or amend the OCRT decision.

[34] As I mentioned previously, the PAB could extend the time to apply for leave to appeal the OCRT decision at any time.[27] Furthermore, the legislation governing the PAB's transition to

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[24] *Belo-Alves v. Canada (Attorney General)*, 2014 FC 1100, at para. 79; *Minister of Employment and Social Development v. P. F.*, 2017 SSTADIS 476, 2017 CanLII 73273.
[25] *Griffin v. Canada (Attorney General)*, 2016 FC 874, at para. 20; *Karadeolian v. Canada (Attorney General)*, 2016 FC 615, at para. 10.
[26] RA1-13.
[27] CPP, at s. 83(1) (as it read at the time).

the Tribunal stated that the CPP provisions repealed by the legislation continue to apply to appeals before the PAB.[28]

[35] However, it is very clear that the provisions cannot help the Applicant.

a) The letter from the PAB informed the Applicant that her application for leave to appeal was incomplete because she had failed to list the reasons why she disagreed with the OCRT's decision. The Applicant should have provided the missing information by January 4, 2013, at the latest for her file to remain open. The earliest the information was provided was on May 6, 2015, well after the dissolution of the PAB.

b) The Applicant did not complete her notice of appeal with the PAB within the imposed time limit. Furthermore, when she provided the additional information in May 2015, s. 83(1) of the CPP had been repealed and the one-year time limit set out in the DESD Act had expired.

c) Since the coming into force of s. 58(1) of the DESD Act, the introduction of new evidence is no longer a ground of appeal the Applicant can rely on.[29]

d) Finally, since the Applicant did not complete her file with the PAB before its dissolution, she is not entitled to benefit from the provision protecting those with a file before the PAB.[30]

[36] Therefore, even if the Applicant had tried to reactivate her file with the PAB instead of filing an application to rescind or amend the OCRT's decision, the outcome would have been the same.

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[28] *Jobs, Growth and Long-term Prosperity Act*, at s. 262.
[29] *Belo-Alves*, *supra*, note 24, at para. 73.
[30] For that same reason, the Applicant did not have the acquired rights and benefits and also cannot benefit from s. 43(*c*) of the *Interpretation Act*, R.S.C., 1985, c. I-21.

CONCLUSION

[37] It may not be the answer that the Applicant was hoping for, but it is important to stress that the Tribunal is a legislative entity that has only the powers that the law gives it. The Tribunal interprets and applies the provisions as they are stated and cannot invoke principles of equity or take specific situations into account to override the requirements set out in the legislation.

[38] The application is refused.

Jude Samson
Member, Appeal Division

REPRESENTATIVE:	Guilda Fournier, Representative for the Applicant

ANNEX

Canada Pension Plan (as it read before April 1, 2013)

Appeal to Pension Appeals Board

83. (1) A party, or subject to the regulations, any person on behalf thereof, or the Minister, if dissatisfied with a decision of a Review Tribunal made under section 82, other than a decision made in respect of an appeal referred to in subsection 28(1) of the *Old Age Security Act*, or under subsection 84(2), may, within ninety days after the day on which that decision was communicated to the party or Minister, or within such longer period as the Chairman or Vice-Chairman of the Pension Appeals Board may either before or after the expiration of those ninety days allow, apply in writing to the Chairman or Vice-Chairman for leave to appeal that decision to the Pension Appeals Board.

[…]

Authority to determine questions of law and fact

84. (1) A Review Tribunal and the Pension Appeals Board have authority to determine any question of law or fact as to

a) whether any benefit is payable to a person,

b) the amount of any such benefit,

c) whether any person is eligible for a division of unadjusted pensionable earnings,

d) the amount of that division,

e) whether any person is eligible for an assignment of a contributor's retirement pension,

f) the amount of that assignment,

g) whether a penalty should be imposed under this Part, or

h) the amount of that penalty,

and the decision of a Review Tribunal, except as provided in this Act, or the decision of the Pension Appeals Board, except for judicial review under the *Federal Courts Act*, as the case may be, is final and binding for all purposes of this Act.

Rescission or amendment of decision

(2) The Minister, a Review Tribunal or the Pension Appeals Board may, notwithstanding subsection (1), on new facts, rescind or amend a decision under this Act given by him, the Tribunal or the Board, as the case may be.

***Jobs, Growth and Long-term Prosperity Act,* S.C. 2012, c. 19.**

256. An appeal from a decision of a Review Tribunal that could have been appealed to the Pension Appeals Board, but for the repeal of subsection 83(1) of the *Canada Pension Plan* by section 229, may be brought to the Appeal Division of the Social Security Tribunal.

[…]

261. (2) An application made under section 66 of the *Department of Human Resources and Skills Development Act* after March 31, 2013, is deemed to relate to a decision made, as the case may be, by

a) the General Division of the Social Security Tribunal, in the case of a decision made by a Review Tribunal; or

b) the Appeal Division of the Social Security Tribunal, in the case of a decision made by the Pension Appeals Board.

262. The provisions of the *Canada Pension Plan* and *Old Age Security Act* repealed by this Act, and their related regulations, continue to apply to appeals of which a Review Tribunal or the Pension Appeals Board remains seized under this Act, with any necessary adaptations.

Department of Employment and Social Development Act

Appeal — time limit

57. (1) An application for leave to appeal must be made to the Appeal Division in the prescribed form and manner and within,

a) in the case of a decision made by the Employment Insurance Section, 30 days after the day on which it is communicated to the appellant; and

b) in the case of a decision made by the Income Security Section, 90 days after the day on which the decision is communicated to the appellant.

Extension

(2) The Appeal Division may allow further time within which an application for leave to appeal is to be made, but in no case may an application be made more than one year after the day on which the decision is communicated to the appellant.

***Interpretation Act*, R.S.C. (1985), c. I-21.**

Effect of repeal

43. Where an enactment is repealed in whole or in part, the repeal does not

[…]

c) affect any right, privilege, obligation or liability acquired, accrued, accruing or incurred under the enactment so repealed,