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

Citation: *K. S. v Minister of Employment and Social Development*, 2019 SST 18

Tribunal File Number: AD-18-454

BETWEEN:

K. S.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: January 10, 2019

Canada

DECISION AND REASONS

DECISION

[1] The application to rescind or amend the Appeal Division decision is refused.

BACKGROUND

[2] The Applicant, K. S., is a former factory worker who has been diagnosed with fibromyalgia, chronic pain disorder, and depression. In June 2015, she applied for a *Canada Pension Plan* (CPP) disability pension. The Respondent, the Minister of Employment and Social Development (Minister), refused the application because it found that her disability was not "severe and prolonged," as defined by the CPP, during her minimum qualifying period (MQP), which ended on December 31, 2009.

[3] The Applicant appealed the Minister's refusal to the General Division of the Social Security Tribunal. The General Division held a hearing by videoconference and, in a decision dated December 11, 2017, dismissed the appeal because it found, on balance, that the Applicant was capable of substantially gainful work as of the MQP.

[4] The Applicant then requested leave to appeal from the Tribunal's Appeal Division, alleging various errors on the part of the General Division. In a decision dated June 7, 2018, I refused leave to appeal because I did not see an arguable case for any of the Applicant's submissions.

[5] On July 10, 2018, the Applicant's daughter filed a letter with the Tribunal asking for "reconsideration" of the decision dated "June 12, 2018."[1] Tribunal staff deemed the letter to be an attempt to rescind or amend the Appeal Division decision and asked the Applicant to provide additional reasons.

[6] The Applicant then retained a legal representative. On October 17, 2018,[2] the Applicant's representative submitted to the Tribunal documents that he felt "could be helpful" in determining

[1] RA1.
[2] RA3.

whether the Applicant's condition was severe and prolonged: a report dated September 21, 2018, from Dr. Sanja Paleksic, physiatrist, and two reports dated September 6, 2018 from Dr. R. Arbitman, psychiatrist. On November 23, 2018,[3] the Applicant's representative submitted an update from Dr. Paleksic dated November 2, 2018.

[7] On December 21, 2018, the Applicant's representative submitted a brief[4] arguing that his client had a severe and prolonged disability and was thus entitled to a Canada Pension Plan disability pension. The brief summarized the contents of the four reports mentioned above and added another: an MRI of the right shoulder dated October 21, 2018.

[8] The *Social Security Tribunal Regulations* allow the Tribunal to proceed as informally and quickly as circumstances, fairness, and natural justice permit. With that in mind, I have decided that the record is sufficiently complete to enable me to make an informed decision without an oral hearing. I will proceed by way of documentary review.

ISSUE

[9] Does the evidence filed in support of the application to rescind or amend establish a new material fact?

ANALYSIS

[10] My review of the application materials leaves me in some doubt as to whether the Applicant, in fact, seeks rescission or amendment of my decision dated June 7, 2018, to refuse leave to appeal. It is true that the Applicant's daughter explicitly referred to that decision in her letter of July 10, 2018, and cited the file number (AD-18-95) associated with that proceeding, but her representative's later correspondence suggests that (i) the Applicant and her helpers misunderstand the applicable law and (ii) their actual target is the General Division's decision, dated December 11, 2017, on the merits of the Applicant's disability claim.

[11] Under section 66(1) of the *Department of Employment and Social Development Act* (DESDA), an application to rescind or amend a decision succeeds if an applicant submits a "new

[3] RA5.
[4] RA6.

fact" that was both material (that is, relevant and significant) to the decision and not discoverable, with the exercise of reasonable diligence, at the time of hearing. This test was refined in *Canada v MacRae*,[5] a decision made in the context of the former section 84(2) of the CPP, which is almost identical to section 66(1) of the DESDA. The Federal Court of Appeal held that a new fact is material if it can be shown that it could reasonably be expected to have affected the outcome of the decision. The Court also held that discoverability goes to the timing of the existence of the proposed new fact.

[12] An application to rescind or amend is not an appeal, nor is it an opportunity to reargue the merits of an applicant's disability claim. Instead, it is a tool designed to allow the Tribunal to reopen one of its decisions if new and relevant information comes to light that existed at the time of hearing but, for whatever reason, was inaccessible. The Applicant has submitted five medical reports, all of which were prepared several months after my leave to appeal decision was issued. The reports themselves could not have been discovered with reasonable diligence because they simply did not yet exist on June 7, 2018.

[13] The dates of the reports alone do not settle the matter, but there are other, more substantive, reasons why none of the newly-submitted reports can serve as a basis to rescind or amend my leave to appeal decision.

[14] First, the essential **content** of the reports was known and discoverable at the time of my leave to appeal decision. The reports do not disclose any new information that was unavailable to me in June 2018, or, for that matter, to the General Division when it considered the merits of the Applicant's disability claim in December 2017. Dr. Arbitman's recent reports contain similar information to his earlier psychiatric report, dated October 18, 2016, that was considered by the General Division.[6] Although Dr. Paleksic did not see the Applicant until September 2018, her reports contain histories and treatment recommendations that do not significantly differ from the findings of earlier consultations with a pain specialist (Dr. Pev Perelman[7]), a sports medicine

[5] *Canada (Attorney General) v MacRae*, 2008 FCA 82.
[6] See para 45 of the General Division decision.
[7] See paras 29, 31, 34, 37, 39 and 40 of the General Division decision.

specialist (Dr. Chris Fortier[8]), and a rheumatologist (Dr. Alan Kagal[9]). Their reports were in the hearing file that was before the General Division, whose decision, in turn, was reviewed by me.

[15] Second, the content of the five reports was not material to the General Division's decision and, therefore, not to mine either. All of them were prepared in late 2018, nearly nine years after the end of the Applicant's MQP. Moreover, the reports are evidence that goes to the substance of the Applicant's claimed disability and, as such, beyond my scope as a member of the Appeal Division, whose jurisdiction is constrained by its governing statute. I refused leave to appeal last year because none of the grounds that the Applicant advanced fell into the specific categories set out in section 58(1) of the DESDA; I doubt that the reports in question, had I known about them in June 2018, would have had any effect on the outcome of my decision.

CONCLUSION

[16] I find that the material submitted by the Applicant does not meet the test for new facts set out in section 66(1) of the DESDA. As a result, I see no reason to rescind or amend my leave to appeal decision of June 7, 2018.

Member, Appeal Division

METHOD OF PROCEEDING:	On the record
REPRESENTATIVE:	Collin Bennett, for the Applicant

[8] See para 23 of the General Division decision.
[9] See para 46 of the General Division decision.