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

Citation: *HB v Minister of Human Resources and Skills Development*, 2014 SSTGDIS 48

Appeal No: GT-87053

BETWEEN:

H. B.

Applicant

and

Minister of Human Resources and Skills Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security

SOCIAL SECURITY TRIBUNAL MEMBER: Virginia Saunders

DATE OF DECISION: April 10, 2014

DECISION

[1] The Tribunal finds that the application was not made within the time limit set out in s. 66 of the *Department of Employment and Social Development Act*, and is statute-barred.

[2] In the alternative, the Tribunal finds that the information submitted by the Applicant is not a new material fact that could not have been discovered at the time of the 2005 Review Tribunal hearing with the exercise of reasonable diligence.

INTRODUCTION

[3] The Applicant has made several applications for a Canada Pension Plan (CPP) disability pension. The one that is the subject of this proceeding was date stamped by the Respondent on February 27, 2004. The Respondent denied the application at the initial and reconsideration levels and the Applicant appealed to the Office of the Commissioner of Review Tribunals (OCRT). After a hearing on December 21, 2005, a Review Tribunal determined that the Applicant was not disabled within the meaning of the CPP. This decision was communicated to the Applicant on February 8, 2006.

[4] The Applicant applied to have this decision rescinded or amended under subsection 84(2) of the CPP. A hearing was held on September 29, 2011 and a decision rendered on December 1, 2011, dismissing the application.

[5] On February 13, 2012, the Applicant applied a second time to have the decision of the 2005 Review Tribunal rescinded or amended under subsection 84(2) of the CPP.

[6] The *Jobs, Growth and Long-term Prosperity Act* of 2012 (JGLPA) changed the procedure for applications to rescind or amend Review Tribunal decisions. Applications for which no decision had been made by April 1, 2013 were transferred from the OCRT to the Social Security Tribunal (the Tribunal).

[7] As no decision had been made on it by April 1, 2013, the Applicant's February 13, 2012 application is now before this Tribunal.

[8] Previously, applications made under subsection 84(2) were dealt with at in-person hearings. Sections 47 and 48 of the *Social Security Tribunal Regulations* now provide that the Tribunal may make a decision based on the documents and submissions already filed by the parties, unless it determines that a further hearing is required.

[9] After reviewing the evidence and submissions filed by the parties to the application, the Tribunal decided that no further hearing was required. In reaching this decision, the Tribunal gave consideration to:

a) The fact that each party had been given a meaningful opportunity to present its case; and

b) The fact that no further information was required to make a decision.

THE LAW BEFORE APRIL 1, 2013

[10] Before April 1, 2013, a person who was dissatisfied with a decision made by the Respondent under the CPP could appeal to a Review Tribunal. If dissatisfied with the decision of the Review Tribunal, he or she could seek leave to appeal to the Pension Appeals Board.

[11] Subsection 84(1) of the CPP provided that the decision of a Review Tribunal was final and binding, unless overturned by the Pension Appeals Board. However, subsection 84(2) allowed a Review Tribunal to rescind or amend a decision where "new facts" were presented.

[12] The test for "new facts" was established by the courts through case law. All parts of the test had to be met before information was considered to be "new facts." The test was as follows:

a) The Applicant had to show that the information existed at the time of the original Review Tribunal hearing, but was not discoverable through reasonable diligence at that time; and

b) The Applicant had to show that, had the new information been available at the time of the original Review Tribunal hearing, it might reasonably be expected to have affected the outcome (*Canada* (*A.G.*) v. *MacRae*, 2008 FCA 82).

THE LAW AFTER APRIL 1, 2013

[13] The *Jobs, Growth and Long-term Prosperity Act* of 2012 (JGLPA) changed the procedure for applications to rescind or amend Review Tribunal decisions in the following ways:

1. The General Division of the Social Security Tribunal (the Tribunal) was established under section 44 of the *Department of Employment and Social Development Act,* previously the *Department of Human Resources and Skills Development Act* (DESDA*)*;

2. Section 229 of the JGLPA repealed subsection 84(2) of the CPP, so that as of April 1, 2013 the CPP no longer contains a provision allowing for requests to rescind or amend a decision of a Review Tribunal. Such requests are now made to a Tribunal under section 66 of the DESDA.

3. Subsection 261(1) of the JGLPA deals with requests made under subsection 84(2) before it was repealed, where no decision had been made before April 1, 2013. It provides that such a request is deemed to be an application made on April 1, 2013 under section 66 of the DESDA.

4. Subsection 66(1) of the DESDA provides that the Tribunal may rescind or amend a decision given by it if a new material fact is presented that could not have been discovered at the time of the hearing with the exercise of reasonable diligence. Subsection 66(2) provides that such applications must be made within

one year after a decision is communicated to an appellant, and subsection 66(3) provides that each person who is the subject of a decision may make only one application to rescind or amend that decision.

5. Section 68 of the DESDA states that the decision of the Tribunal on any application made under the Act is final and, except for judicial review under the *Federal Courts Act*, is not subject to appeal to or review by any court.

ISSUE

[14] The issues before this Tribunal are:

1. Is the Applicant's request to rescind or amend the Review Tribunal decision statute-barred (the "limitation issue")?

2. If the Tribunal is incorrect on the limitation issue, then:

a) Is the evidence submitted by the Applicant in support of his request a new material fact that could not have been discovered at the time of the hearing with the exercise of reasonable diligence?

b) If the evidence meets the test set out in subparagraph 2(a), the Tribunal must then decide, based on all of the evidence, including the evidence found to be a new material fact, if the Applicant was disabled within the meaning of the CPP on or before his minimum qualifying period (MQP).

EVIDENCE

[15] The Applicant was a member of the Canadian Armed Forces (CAF) between 1975 and 1992. In his 2004 disability application, the Applicant stated that he could no longer work as of August 31, 1992 because of post-traumatic stress disorder (PTSD), Raynaud's phenomenon in hands and feet, cervical disc disease, degenerative disc in the thoracic spine and left shoulder tendonitis. He stated that "It is a job in itself to deal with my

PTSD and with chronic pain & depression it *[sic]* very debilitating." Among other functional limitations, he noted that he was forgetful, and had difficulty concentrating when it was cold or when he was in pain. He stated that he had last worked at a sawmill lifting lumber between May 16 and June 22, 2001; and prior to that between May and September 1999.

[16] In his letter requesting reconsideration of the decision to deny his application for disability benefits (pp. GT1-506-510), the Applicant stated that "In 1983 I was at the end of my rope. I did not know what to do. At this time I did not understand . . . PTSD. . . ." He stated that he turned to drugs and alcohol to cope, but that after going to a rehabilitation clinic in 1983 he became clean and sober and remained so for the rest of his career. He had difficulty with cold, and was given a medical restriction not to work in temperatures below 5 degrees Celsius, but this was disregarded. He retired from the military in 1992, and attempted to work because he felt he had no choice. He relapsed into drug and alcohol abuse in 1997, entered detox, and then tried to work again in 1999. He stated that he suffered through cold and rainy days and was laid off. He stated that he was now working with his doctor to deal with stress.

[17] This letter was in the Applicant's file and was before the 2005 Review Tribunal, as were the documents enclosed with it.

[18] A medical report from Dr. Braganza, the Applicant's family physician, was submitted in support of the disability application and was before the 2005 Review Tribunal. In it, Dr. Braganza repeats the diagnoses listed by the Applicant in his disability application, and adds hearing loss and frost-bite sequelae. The Applicant's relevant physical findings and functional limitations were stated to be cool extremities, decreased pain perception in the toes, hyperthesia in mid feet, poor nasal airway and decreased power in the right shoulder. No further investigations were planned and treatment was listed as extra leg and foot coverings in the cold and a possible septoplasty. The Applicant's prognosis was poor for frost-bite sequelae and spine osteoarthritis.

[19] Medical reports in evidence at the 2005 Review Tribunal include Dr. Braganza's report as set out above; medical documents from 1976 to 2003; a letter from Dr. Joseph Harrison dated May 11, 2004; a letter from Dr. Conrad Doiron dated February 3, 2005; two photographs; and an application and decision with respect to proceedings before the Veterans Review and Appeal Board Canada.

[20] There is no mention of PTSD or other mental conditions in this evidence, except as mentioned by Dr. Braganza, and the following:

a) Mention of alcohol and drug abuse in 1980 to 1983, with no further incidents as of May 29, 1984, and mention of alcoholism treatment in April 1985 (pp. GT1-444, GT1-570-571);

b) The Applicant's release documents from the CAF reveal that in July 1992 his current diseases were listed as alcoholism, osteoarthritis and Raynaud's phenomenon (p. GT1-445); and

c) On May 5, 2005 the Applicant was receiving a partial pension from Veterans' Affairs for Raynaud's phenomenon in both hands and feet, cervical disc disease, left shoulder tendonitis and PTSD.

[21] The 2005 Review Tribunal noted that the Applicant had made multiple applications for CPP disability benefits. One of these resulted in a Review Tribunal decision of January 6, 1995 which found that the Applicant was not disabled at that date. The 2005 Review Tribunal found that it was therefore limited to determining whether the Applicant became disabled between January 6, 1995 and December 31, 1997, when his MQP ended.

[22] The 2005 Review Tribunal decision noted the Applicant's claim of PTSD as well as his long-standing problems with drugs and alcohol. It noted the Applicant's evidence that he did not have significant problems with his 1999 job, but quit because he "had had enough and his shoulder and back bothered him." It noted that the Applicant's employer

at the time stated that he had stopped work due to a slowdown, had no recorded absences and no evidence of limitations due to medical conditions.

[23] On the basis of this evidence, the 2005 Review Tribunal found that the Applicant's work in 1999 demonstrated that he was capable regularly of pursuing substantially gainful employment, and denied his appeal.

[24] The Applicant submitted a report by Dr. Njoku, a psychiatrist, dated April 23, 2011, which he claims contains new material facts that warrant rescinding or amending the 2005 Review Tribunal decision. This report is at pp. GT1-199-202.

[25] Dr. Njoku stated that the Applicant had been referred to him for psychiatric assessment on April 23, 2011. The Applicant told him that he was diagnosed with PTSD related to his fear of the cold, stemming from severe frost bite he suffered in 1976. Dr. Njoku stated that it was unclear when the Applicant was diagnosed with PTSD or by whom. He stated that the Applicant's PTSD was likely in remission, as he currently did not meet the criteria for such a diagnosis.

[26] Dr. Njoku noted that the Applicant had been mostly unemployed since leaving the Army "other than a brief unsuccessful attempt to return to work."

[27] Dr. Njoku discussed the Applicant's past problems with alcohol and drugs, and stated that they appeared to be mostly related to significant periods of stress in his life. He concluded that:

> " In summary regarding his suitability for rehabilitation and subsequent work I consider this veteran remains significantly vulnerable to relapse if faced with major stressor and he is therefore very unlikely to do well in any form of regular long term employment."

SUBMISSIONS

[28] The parties were invited to file documents or submissions addressing the requirements of section 66 by November 5, 2013.

[29] The Applicant made no submissions on the limitation issue.

[30] The Applicant submitted that the April 23, 2011 report by Dr. Njoku constitutes a new material fact because:

a) At the time of the original hearing, much was unknown about his condition, and had he been aware of its effects he would have provided evidence of it, and

b) It shows that his work attempt after his MQP was a failed one.

[31] The Respondent submitted that:

a) The present application is statute-barred because it is deemed to have been made on April 1, 2013, which is more than one year after the Review Tribunal decision was communicated to the Applicant on February 8, 2006;

b) The present application is statute-barred because it is the second application made in relation to the Review Tribunal decision;

c) The test to determine whether evidence is a new material fact that could not have been discovered at the time of the hearing with the exercise of reasonable diligence is the same as the test was for "new facts" under subsection 84(2) CPP, and the evidence submitted by the Applicant does not meet that test; and

d) If the evidence does meet that test, it does not support a finding that the Applicant was disabled pursuant to the CPP at his MQP.

ANALYSIS

Is the Applicant's request to rescind or amend the 2005 Review Tribunal decision statute-barred?

[32] Before April 1, 2013, subsection 84(2) of the CPP allowed an unlimited number of new facts applications on any decision, and placed no time limit on when they could be brought. When the Applicant applied on February 13, 2012, to have a Review Tribunal rescind or amend the decision of February 8, 2006, the request was properly brought under subsection 84(2), and the Applicant had the right to have it proceed to an oral hearing and for a decision to be made.

[33] The Respondent submits that the effect of subsection 261(1) of the JGLPA and section 66 of the DESDA is to remove that right, and to effectively bar the application because it was made beyond the new one-year time limit and because it is the Applicant's second such request.

Section 66(2):

[34] Legislation may not be interpreted in a manner that removes existing rights or entitlements unless Parliament's intention to do so is clear. If the plain and obvious meaning of legislation requires that it be retrospective and interfere with vested rights, it is valid, regardless of any perceived unfairness (*Tabingo* v. *Minister of Citizenship and Immigration*, 2013 FC 377).

[35] Subsection 261(1) of the JGLPA states that:

> 261. (1) If no decision has been made before April 1, 2013, in respect of a request made under subsection 84(2) of the Canada Pension Plan, as it read immediately before the coming into force of section 229, it is deemed to be an application made on April 1, 2013 under section 66 of the *Department of Human Resources and Skills Development Act* and is deemed to relate to a decision made. . . by
>
> > (a) the General Division of the Social Security Tribunal, in the case of a decision made by a Review Tribunal. . .

[36] The intent of subsection 261(1) is clear. The plain and obvious meaning of its language is to provide a transition for subsection 84(2) applications that had not been heard by a Review Tribunal by April 1, 2013. It does so by deeming them to have been made under section 66 of the DESDA, and to relate to a decision made by a Tribunal. It further provides a date – April 1, 2013 – on which they are deemed to have been made.

[37] Subsection 66(2) of the DESDA states that:

> (2) 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.

[38] Subsection 27(5) of the *Interpretation Act* states that:

> (5) Where anything is to be done within a time after, from, of or before a specified day, the time does not include that day.

[39] The combined effect of these provisions is that a request under subsection 84(2) CPP that had not been heard by April 1, 2013 is treated as an application under s. 66 DESDA that was made on April 1, 2013. If it relates to a decision that was communicated to a person before April 1, 2012, it is barred by subsection 66(2) DESDA because it was not made within one year.

[40] The 2005 Review Tribunal decision was communicated to the Applicant on February 8, 2006. As a result, his application to rescind or amend that decision is statute-barred.

[41] As harsh as these provisions may seem to those who filed s. 84(2) applications in good faith and intended to proceed with them, there is no other way to interpret them, and the Tribunal must abide by them.

Section 66(3):

[42] The Tribunal finds that the present application is not barred by subsection 66(3), in spite of the fact that the Applicant previously made a request under subsection 84(2) of the CPP to rescind or amend the decision of February 8, 2006.

[43] The rules of statutory interpretation require the legislature to indicate clearly any desired retroactive or retrospective effects of legislation (*British Columbia* v *Imperial Tobacco Canada Ltd*, 2005 SCC 49, [2005] 2 SCR 473, para 71).

[44] Subsection 66(3) states that:

> (3) Each person who is the subject of a decision may make only one application to rescind or amend that decision.

[45] "Application" is not defined in the DESDA or in the relevant portions of the JGLPA. Subsection 261(1) JGLPA deems a s. 84(2) CPP request to be an application under s. 66 DESDA, but only if no decision was made before April 1, 2013. There is nothing in the legislation that specifically deems a s. 84(2) CPP request to be an "application" if a decision was made in respect of it before that date. Thus, the most logical interpretation of the word as used in subsection 66(3) DESDA is that it refers to applications to rescind or amend a Tribunal decision made pursuant to subsection 66(1) DESDA, including those that are deemed to be applications by subsection 261(1) JGLPA. The legislature's failure to clearly include s. 84(2) CPP applications that were decided on before April 1, 2013 in this deeming provision means that they must be excluded from the scope of s. 66 DESDA, as to do otherwise would give the provision retrospective effect.

[46] The Applicant's first request under subsection 84(2) CPP was heard by a Review Tribunal, and a decision was made on December 1, 2011. It is therefore not an "application" under subsection 66(3), and the limitation contained in that provision does not apply to it.

[47] Unfortunately for the Applicant, this conclusion is of no use to him, because the Tribunal has concluded that the one-year time limit contained in subsection 66(2) does apply and that his application is statute-barred as a result.

[48] In case the Tribunal is wrong in its interpretation of s. 66(2) DESDA, it considered whether the application would have succeeded, had it been heard by April 1, 2013.

Is the evidence submitted by the Applicant a new material fact that could not have been discovered at the time of the 2005 Review Tribunal hearing with the exercise of reasonable diligence?

[49] Subsection 66(1) states that a Tribunal may rescind or amend a decision if "a new material fact is presented that could not have been discovered at the time of the hearing with the exercise of reasonable diligence."

[50] The Tribunal finds that, although the wording has been rearranged, subsection 66(1) codifies the previous test for determining what constitutes "new facts," and that the case law that developed around the interpretation of subsection 84(2) also applies to the interpretation of subsection 66(1).

[51] In order to meet the requirements of subsection 66(1):

a) The Applicant must show that the evidence that is presented as a new material fact is relevant to the Applicant's condition at his MQP (*Murphy* v. *Canada (Attorney General)* 2008 FC 351);

b) The Applicant must show that the information existed at the time of the original Review Tribunal hearing, or that it reveals a condition that was not known or well-understood at the time (*Canada (Attorney General)* v. *MacRae* 2008 FCA 82);

c) The Applicant must show that, had the new information been available at the time of the original Review Tribunal hearing, it might reasonably be expected to have affected the outcome (*MacRae, supra*); and

d) The Applicant must show that the information could not have been discovered at the time of the hearing with the exercise of reasonable diligence.

[52] If these requirements are met, the Tribunal may then consider whether the new evidence is sufficient to rescind or amend the decision of the 2005 Review Tribunal.

[53] Because the issue before the 2005 Review Tribunal was whether the Applicant was disabled on or before his MQP of December 31, 1997, any evidence put forward as a new material fact must be relevant to the question of the Applicant's condition at his MQP.

[54] Although evidence that did not exist at the time of the Applicant's MQP may be material if it reveals a condition that was not known or well-understood at the MQP, if the evidence simply reiterates what is already known or has been diagnosed, it cannot be said that it would have affected the outcome of the previous hearing, and it will not be considered to be material (*Canada (Attorney General)* v. *MacRae* 2008 FCA 82).

[55] The Applicant submitted that if he had known about the effects of PTSD at the time of the hearing he would have provided evidence of them. The diagnosis of PTSD was made some time before 2005. The Applicant and his family physician listed it as a disabling condition in the 2004 disability application. Dr. Njoku's report does not elaborate on the PTSD or provide new evidence or insight as to how it might have affected the Applicant in ways unknown in 2005. The Applicant has not identified any evidence arising out of Dr. Njoku's discussion of his PTSD diagnosis that he was not able to provide at the 2005 Review Tribunal hearing.

[56] The Applicant submitted that Dr. Njoku's report is a new material fact because it showed that his 1999 work attempt was a failed one. The Applicant was not Dr. Njoku's patient before 2011, and the report does not indicate what evidence formed the basis for

Dr. Njoku's statement that the 1999 work attempt was unsuccessful. It is likely that Dr. Njoku was simply repeating what the Applicant told him, and was not stating a medical conclusion. Even if he was stating a conclusion, the Tribunal finds that Dr. Njoku's statement is not a new material fact because it did not exist at the time of the hearing, nor does it shed new light on facts that existed at that time.

[57] The Tribunal considered whether Dr. Njoku's discussion of the Applicant's alcohol problems and coping skills was evidence that amounted to a new material fact. The Applicant's drug and alcohol abuse issues were noted in the medical evidence that was before the 2005 Review Tribunal, as well as in the reasons for its decision. The reasons did not specifically analyze these issues, but did state that the decision was based on a review of all the evidence as well as the oral testimony of the Applicant.

[58] Although Dr. Njoku states that the Applicant's alcohol and drug abuse problems affect his ability to maintain regular long-term employment, he does not state that this was the case in 1999. The 2005 Review Tribunal reviewed the evidence of the Applicant's job performance and limitations in 1999, and concluded that his work attempt was successful to the extent necessary to support a finding that he was not then disabled. Dr. Njoku's report does not contain a diagnosis or specific evidence that relates to the Applicant's condition in 1999, which was not already before the 2005 Review Tribunal or which could not have been provided to it with the exercise of reasonable diligence.

[59] The decision of the 2005 Review Tribunal was that the Applicant's 1999 work attempt indicated that he was capable regularly of substantially gainful employment after his MQP. The Applicant knew at the time that he had PTSD and a history of drug and alcohol abuse. He submitted medical information of these and other conditions to the Respondent and the 2005 Review Tribunal. Apparently he did not provide sufficient evidence of symptoms related to these to persuade the 2005 Review Tribunal that he was experiencing difficulties working. Such evidence would have come from the Applicant, his employer, his doctor, or his friends and family members, and would have been discoverable at the time of the hearing. The Applicant's ability to identify such symptoms

or limitations did not depend on a psychiatrist's finding or any greater understanding of PTSD that developed in subsequent years.

[60] The present Tribunal does not have broad authority to re-visit the evidence that was before the 2005 Review Tribunal, or to consider new evidence to see if it would have reached a different conclusion. The law only allows the Tribunal to make a different determination as to the Applicant's disability at his MQP if it finds that the new evidence constitutes a new material fact that existed but could not have been discovered by due diligence at the time of the first hearing. A material fact is one that could reasonably have been expected to affect the outcome of the first hearing. None of the material presented by the Applicant meets this test.

CONCLUSION

[61] The application is statute-barred because it was not made within one year after the 2005 Review Tribunal decision was communicated to the Applicant. Even if it had not been statute-barred, the application would fail as none of the evidence submitted is a new material fact that existed but could not have been discovered by due diligence at the time of the 2005 Review Tribunal hearing, as required by the law.

Virginia Saunders
Member, General Division