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

Citation: *D. W. v Canada Employment Insurance Commission*, 2019 SST 516

Tribunal File Number: AD-19-269

BETWEEN:

D. W.

Appellant

and

Canada Employment Insurance Commission

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: May 28, 2019

Canada

DECISION AND REASONS

DECISION

[1] The application to rescind or amend is refused.

OVERVIEW

[2] The Applicant, D. W. (Claimant), sustained a work-related injury on July 24, 2015. He received Workers' Compensation benefits until November 10, 2016. He applied for Employment Insurance benefits on April 9, 2017, and sought to have his application antedated to November 18, 2016, when he first became available and was able to resume working after his injury. The Respondent, the Canada Employment Insurance Commission (Commission), refused his request to antedate, initially and on reconsideration. The Claimant appealed to the General Division of the Social Security Tribunal. The General Division found that the Claimant had not shown that he had good cause for the delay in making his claim for employment insurance benefits, and it therefore dismissed his appeal.

[3] The Claimant sought leave to appeal to the Appeal Division. However, he was late in filing his application with the Appeal Division. On July 31, 2018, the Appeal Division determined that it would not serve the interests of justice to allow his application to proceed. It refused to grant an extension of time for the Claimant to file his application.

[4] The Claimant is now applying to rescind or amend the Appeal Division's decision of July 31, 2018, based on new evidence that he did not have before. I must determine whether the Claimant meets the requirements under section 66 of the *Department of Employment and Social Development Act* (DESDA), to enable me to consider whether to rescind or amend the Appeal Division's decision of July 31, 2018.

[5] I find that the Claimant has not met the requirements under section 66 of the DESDA and the application to rescind or amend is therefore refused.

ISSUE

[6] Does the Claimant meet the requirements under section 66 of the DESDA so that I may consider whether to rescind or amend the Appeal Division's decision of July 31, 2018?

ANALYSIS

Does the Claimant meet the requirements under section 66 of the DESDA so that I may consider whether to rescind or amend the Appeal Division's decision of July 31, 2018?

[7] No. The Claimant does not meet the requirements under section 66 of the DESDA to allow me to consider rescinding or amending the Appeal Division's decision.

[8] Under section 66 of the DESDA, the Appeal Division may rescind or amend a decision given by it if an applicant meets the requirements set out in the section. Subsection 66(1) reads as follows:

> Amendment of decision
>
> **66.** (1) The Tribunal may rescind or amend a decision given by it in respect of any particular application if
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> (a) in the case of a decision relating to the Employment Insurance Act, new facts are presented to the Tribunal or the Tribunal is satisfied that the decision was made without knowledge of, or was based on a mistake as to, some material fact; or
>
> (*b)* in any other case, a new material fact is presented that could not have been discovered at the time of the hearing with the exercise of reasonable diligence.

[9] Subsection 66(1)(a) applies because the Appeal Division's decision relates to the *Employment Insurance Act*.

[10] The subsection requires that there are either new facts or the Tribunal is satisfied that the decision was made without knowledge of or was based on a mistake as to some material fact. The Federal Court of Appeal defined a "new fact" as being one that could not have been

discovered by a claimant acting diligently.[1] In addition, the “new fact” would have been material, i.e. decisive, of the issue that the Appeal Division considered.

[11] The Claimant relies on a letter dated March 29, 2019, from the Workers’ Compensation Board (Board), in support of his application to rescind or amend. The letter confirms that the Board may have failed to notify the Claimant in November 2016 that he might be eligible for Employment Insurance benefits and that he could apply for assistance after age 65.

[12] The Claimant claims that the Board’s letter meets the requirements under subsection 66(1) of the DESDA because this letter did not exist when he applied for leave to appeal. He also claims that the Board’s letter is material because if it had been before the Appeal Division, it would have reached a different outcome. He claims that the Appeal Division would have determined that he had an arguable case that the General Division erred under subsection 58(1) of the DESDA. He further claims that the Appeal Division would have granted an extension of time for him to file an application requesting leave to appeal and that it would have also granted leave to appeal.

[13] While there is no doubt that the Board’s March 29, 2019 letter did not exist when the Appeal Division rendered its decision in July 2018, it does not represent “new facts” as defined by subsection 66(1) of the DESDA. The information or the facts that the Claimant relies on—that the Board may not have told him of his eligibility for Employment Insurance benefits—already existed. The Claimant could have obtained this letter or the information from the Board if he had been acting diligently. In the absence of “new facts” within the meaning of subsection 66(1) of the DESDA, I do not have any authority to rescind or amend the Appeal Division’s decision of July 31, 2018.

[14] There is also the issue of whether I am satisfied that the Appeal Division’s decision was made without knowledge of, or was based on a mistake as to, some material fact.

[1] *Canada (Attorney General) v. Hines*, 2011 FCA 252 at para. 14.

[15] I find that the Board's letter or the fact that the Board may not have notified the Claimant of his eligibility for Employment Insurance benefits immaterial to the issues before the Appeal Division.

[16] The Board's letter could have explained why the Claimant did not apply for Employment Insurance benefits until April 2017. However, for the "new fact" to fall within subsection 66(1), it had to be material to the issues that were before the Appeal Division.

[17] The Appeal Division considered whether it should exercise its discretion and extend the time for the Claimant to file his application requesting leave to appeal. In considering this issue, it examined whether there was an arguable case that the General Division had committed any errors under subsection 58(1) of the DESDA.

[18] Clearly, the Board's letter would have been immaterial to the Appeal Division's determination as to whether it should extend the time for filing the application requesting leave to appeal. Specifically, the Board's letter did not respond to the questions of why the Claimant was late in filing an application requesting leave to appeal, whether he had a continuing intention to pursue an appeal with the Appeal Division, or whether any delay caused any prejudice to the Commission.

[19] Moreover, the letter also would have been immaterial to the Appeal Division's determination as to whether there was an arguable case. The letter did not respond to the questions of whether the General Division failed to observe a principle of natural justice or whether it had based its decision on any erroneous findings of fact that it made without regard for the material before it. As the Appeal Division member noted in his decision of July 31, 2018, there is no suggestion by the Claimant that the General Division made any erroneous findings or that it ignored any of the evidence. The Board's letter does not offer any evidence that the General Division might have made any erroneous findings or that it ignored any of the evidence, such that the Appeal Division member might have come to a different conclusion when he decided that the Claimant did not have an arguable case.

[20] The Claimant's application to rescind or amend is essentially an attempt to re-argue his case. Section 66 of the DESDA allows the Appeal Division to rescind or amend a decision given by it, but it is not a means by which claimants can re-argue their appeals altogether.

CONCLUSION

[21] In the absence of new facts or without being satisfied that the Appeal Division's decision was made without knowledge or of was based on a mistake as to some material fact, there is no authority for me to reconsider the Appeal Division's decision. The application to rescind or amend the Appeal Division's decision of July 31, 2018 is refused.

Janet Lew
Member, Appeal Division

METHOD OF PROCEEDING:	On the Record
APPEARANCES:	D. W., Appellant S. Prud'Homme, Representative for the Respondent