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

Citation: *M. L. v Canada Employment Insurance Commission*, 2019 SST 1241

Tribunal File Number: AD-19-566

BETWEEN:

**M. L.**

Appellant

and

**Canada Employment Insurance Commission**

Respondent

# SOCIAL SECURITY TRIBUNAL DECISION
## Appeal Division

Rescind or Amend Decision by: Stephen Bergen

DATE OF DECISION: September 26, 2019

Canada

## DECISION AND REASONS

### DECISION

[1] The application to rescind or amend the Appeal Division's decision dated May 16, 2019, is refused.

### OVERVIEW

[2] The Appellant, M. L. (Claimant), left Canada to have surgery for a medical condition. The Respondent, the Canada Employment Insurance Commission (Commission), determined that the Claimant was disentitled to Employment Insurance benefits while she was outside of Canada because she had not proved that her medical treatment was not readily or immediately available in Canada. The Commission maintained this decision after the Claimant requested a reconsideration.

[3] The Claimant appealed to the General Division of the Social Security Tribunal but her appeal was dismissed. She appealed the General Division decision to the Appeal Division. On May 16, 2019, the Appeal Division found that the General Division erred but confirmed that the Claimant was disentitled to benefits.

[4] On August 12, 2019, the Claimant filed an application to rescind or amend the decision of the Appeal Division pursuant to section 66 of the *Department of Employment and Social Development Act* (DESD Act).

[5] The application is refused. The Claimant has not presented new facts or shown that the Appeal Division made its decision without knowledge of a material fact or based its decision on a mistake of material fact.

### ISSUE

[6] Does the information supplied by the Claimant in support of her application to rescind or amend constitutes new facts?

[7] Did the Appeal Division make its decision without knowledge of, or was it was based on, a mistake as to some material fact?

**ANALYSIS**

[8] Section 66 of the current DESD Act sets out the conditions under which the Appeal Division may rescind or amend its decision:

> Amendment of decision
>
> 66. (1) The Tribunal may rescind or amend a decision given by it in respect of any particular application if
>
> > (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

**Issue 1: Does the information supplied by the Claimant in support of her application to rescind or amend constitutes new facts?**

[9] The conditions under which the Appeal Division may grant a rescind and amend application are essentially the same they were under the now-repealed section 120 of the *Employment Insurance Act* (in force prior to April 1, 2013). That legislation read as follows:

> Amendment of decision
>
> 120. The Commission, a board of referees, or the umpire, may rescind or amend a decision given in any particular claim for benefit if new facts are presented or if it is satisfied that the decision was given without knowledge of, or was based on a mistake as to, some material fact.

[10] The Federal Court of Appeal developed a test for new facts in relation to section 86 (of an even earlier version of what was then the *Unemployment Insurance Act*) in *Canada v Chan*[1]. It later confirmed the legal test in *Canada v Hines*[2] as being just as applicable to section 120 (which had replaced section 86). *Hines* repeated the language of *Chan* as follows:

> … "New facts", for the purpose of the reconsideration of a decision of an umpire sought pursuant to section 86 of the Act, are **facts that either**

[1] *Canada v Chan, A-185-94*
[2] *Canada v Hines*, 2011 FCA 252

> **happened after the decision was rendered** or had happened prior to the decision but **could not have been discovered by a claimant acting diligently** and in both cases the facts alleged must have been decisive of the issue put to the umpire. (Emphasis added)

[11] This same definition of "new facts" originally developed for section 86 of the U*nemployment Act* and applied to section 120 of the *Employment Insurance Act* may now be applied to interpret section 66(1)(a) of the *Department of Employment and Social Development* Act (DESD Act).

[12] The Claimant submitted a number of documents relevant to confirm her visits to doctors and for diagnostic tests, and to her diagnosis. They are as follows:

1. A letter of June 14, 2019, that confirms the Claimant was seen at a fertility program in 2017 on April 24, June 12 and July 18 (Doc 1);[3]
2. A patient summary printout of June 14, 2019, showing that the Claimant was seen for a gynecological concern on December 16, 2014, September 30, 2015, January 23, 2017, and February 13, 2017 (Doc 2);[4]
3. A radiology report for a hysterosonogram dated June 2, 2017 (Doc 3);[5]
4. A radiology report for a pelvic ultrasound dated January 30, 2017 (Doc 4);[6]
5. A letter of April 3, 2018, from Dr. R, M.D., confirming that the Claimant was disabled from January 29, 2018, surgery to May 1, 2018. (Doc 5)[7]

[13] However, on her application to rescind and amend form, the Claimant listed only three documents. One of those was Doc 4 (above), and the two other documents listed are described as "gynecologist" dated February 13, 2017, and "fertility program", dated July 18, 2017.

[14] The Claimant attached Doc 2, which confirmed several occasions on which was seen for a gynecological concern including February 13, 2017. The document is not dated February 13, 2017, but I will presume this is the second document to which the Claimant refers in her list of documents. The Claimant also supplied Doc 1, which confirms her appointments at a fertility program, but it is dated June 14, 2019, not July 18, 2017. The most recent appointment

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[3] RA1-18
[4] RA1-19
[5] RA1-22
[6] RA1-29
[7] RA1-32

confirmed in the letter is an appointment of July 18, 2017, so I will presume this is the first document in the Claimant's document list.

[15] None of these documents relate to new "new facts". The Claimant submitted Doc 5 to the General Division in her first appeal. The other four documents all concern facts that were known to the Claimant prior to the Appeal Division decision. The documents themselves, as evidence of those facts, could also have been obtained prior to the hearing if the Claimant had acted diligently.

**Issue 2: Did the Appeal Division make its decision without knowledge of, or was it based on, a mistake as to some material fact?**

[16] The Appeal Division decision was based on the finding that the Claimant had not established that the treatment that she obtained outside of Canada was not readily or immediately available in Canada. I had found that the General Division erred because it required the Claimant to demonstrate that treatment for her condition was both readily available and immediately available. However, when I substituted my decision for the General Division, I confirmed that the Claimant had not been able to establish that her treatment was not readily available or that it was not immediately available.

[17] In my decision, I accepted the Claimant's evidence that she had once been on a wait list for about a year before she was called for the same surgery that she eventually obtained outside of Canada. The Claimant refused the surgery on the earlier occasion because she had wanted to deal with her fertility issues first, but also because she was not particularly symptomatic at the time.

[18] However, the Claimant had not supported her past experience with any medical opinion or other evidence. Furthermore, there was no evidence whatsoever of how long it would take to obtain the same surgery or how difficult it would be to obtain, at any time after she removed herself from the waitlist. I did not accept that the Claimant's evidence of her history was sufficient to establish that the procedure would not have been readily or immediately available at the end of 2017, at a time when her symptoms had become significant.

[19] None of the documents that the claimant submitted in this rescind or amend application help to establish that myomectomies were not readily available in the Claimant's area of residence in Canada or that the procedure was not immediately available.

[20] The Claimant now asserts that the onset or worsening of her symptoms does not mean that treatment was urgently required.[8] I presume she is arguing that this means her previous experience with wait times in 2016 should be just as applicable at the end of 2017 when she determined to go outside of the country for surgery. However, the Claimant testified at the General Division to a change in her condition just before she left Canada for the surgery, which included an acute attack that involved significant pain and temporary paralysis. She had said that she understood from her own research that onset of these symptoms or their increased frequency meant that she could not put off the surgery.[9]

[21] Her present suggestion that her symptoms were normal for her condition is just an attempt to recast the evidence in a different light, and to reargue the case after it has already been decided. That is not the purpose of the rescind or amend process under section 66 of the DESD Act.

[22] The Claimant has not identified any material fact of which I was unaware. Likewise, the Claimant has not established that I was mistaken as to any material fact on which my decision was based.

**CONCLUSION**

[23] The application to rescind or amend the Appeal Division's decision of May 16, 2019, is refused.

Stephen Bergen
Member, Appeal Division

[8] RA1-27
[9] See Appeal DivisionAD-18-836, at para. 38.

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| METHOD OF PROCEEDING: | On the Record |
| Submissions | M. L., Applicant<br><br>S. Prud'Homme, Representative for the Respondent, the Canada Employment Insurance Commission |