Citation: *AK v Canada Employment Insurance Commission*, 2022 SST 503

Social Security Tribunal of Canada
General Division – Employment Insurance Section

Decision

Appellant:	A. K.
Respondent:	Canada Employment Insurance Commission

Decision under appeal:	Canada Employment Insurance Commission reconsideration decision () dated (issued by Service Canada)

Tribunal member:	Teresa M. Day
Type of hearing:	On the Record
Decision date:	June 1, 2022
File number:	GE-22-478

Decision

[1] The decision in appeal file GE-20-2396 will not be rescinded or amended.

[2] The Appellant has not shown that there are new facts ***or*** that the decision was made without knowledge of or based on a mistake about a material fact.

Overview

[3] The Appellant applied for maternity and parental benefits. On her application, she had to elect between standard and extended parental benefits, and indicate how many weeks of benefits she wanted. She asked to receive 61 weeks of extended parental benefits. After her first payment of parental benefits was issued, she asked to change her parental benefits to the standard option. The Respondent (Commission) denied her request. The Appellant appealed to the Social Security Tribunal of Canada (Tribunal). Her appeal was assigned file number GE-20-2396, and was heard via teleconference on January 7, 2021.

[4] A decision dismissing the appeal in GE-20-2396 was issued on January 8, 2021. The Tribunal member found that the Appellant could not change her election to extended parental benefits.

[5] On December 25, 2021, the Appellant filed an application with the Tribunal asking that the decision in GE-20-2396 be rescinded or amended (RAGD02). Specifically, she asked that the decision be changed because she had new medical evidence and she believed that if the Tribunal member had this evidence, it would have led to a different outcome on her appeal.

[6] On January 14, 2022, the Tribunal member declined to rescind or amend the decision in GE-20-2396.

[7] The Appellant appealed that decision to the Tribunal's Appeal Division (the AD). On February 9, 2022, the AD allowed her appeal and returned her original application to rescind or amend to the Tribunal's General Division to be decided again by a different member.

[8] I am the different member.

[9] In accordance with the AD's directions, I gave the Appellant and the Commission a new 30-day window to file any and all additional documents or submissions related to the Appellant's original application to rescind or amend. The Appellant requested a teleconference to clarify the AD's directions and help her understand what was required at this step. I held a teleconference on April 4, 2022 to clarify this step, and then started another new 30-day period for filing additional materials[1]. This meant the parties had until May 6, 2022 to file anything they intended to rely on in connection with the Appellant's original application to rescind or amend the decision in GE-20-2396.

[10] The Appellant filed additional documents on April 25, 2022 (RGD08).

[11] The Commission gave notice of no additional representations on April 26, 2022.

[12] I have held a hearing On the Record because I have decided that a further hearing with the Appellant is not required[2].

Issue

[13] Should the decision in appeal file GE-20-2396 be rescinded or amended?

Analysis

[14] The Tribunal may rescind or amend a decision given by it in respect of any particular application if "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 about some material fact[3].

Issue 1: Were new facts presented to the Tribunal?

[15] No. The information submitted by the Appellant with her original application and afterward is not considered "new facts" for purposes of the law.

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[1] See RGD7-1.
[2] Section 48 of the *Social Security Tribunal Regulations*.
[3] Paragraph 66(1)(a) of the *Department of Employment and Social Development Act*.

[16] According to the Federal Court of Appeal, for facts to be considered "new facts" they must (a) have happened **after** the decision was rendered or (b) happened prior to the decision being rendered but could not have been discovered by a claimant acting diligently. The new facts must **also** be decisive of the issue.[4]

[17] The Appellant has provided medical evidence about her efforts to be assessed for Attention Deficit Hyperactivity Disorder (ADHD), and her ADHD diagnosis on August 5, 2021. She has also provided a detailed explanation of how her struggles with ADHD affected the choices she made when she was applying for EI maternity and parental benefits.

[18] I accept that this evidence relates to facts that happened **after** the decision dismissing her appeal was issued on January 8, 2021.

[19] But none of this evidence is decisive of the issue in her original appeal, namely whether the Appellant is permitted to change her election from extended to standard parental benefits.

[20] The Appellant elected the extended option for her parental benefits when she filed her application. In her application to rescind or amend, she says that her now-diagnosed ADHD prevented her from making the correct parental benefit election (namely, the standard option) because it caused her to act impulsively, feel overwhelmed by the application itself, hyper-focus on the wrong details during the process, and forget important factors. She submits that her ADHD caused her to make a mistake when she elect the extended option, and asks the Tribunal to allow her to correct her mistake and switch to the standard option.

[21] The law allows a claimant to change their election prior to the first payment of parental benefits. After that, the claimant's election becomes irrevocable[5].

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[4] *Chan* A-185-94
[5] Subsection 23(1.2) of the *Employment Insurance Act* (EI Act).

[22] The Commission issued the first payment of extended parental benefits to the Appellant on November 6, 2020. This means her election of extended parental benefits became irrevocable on November 6, 2020.

[23] She contacted the Commission on November 16 or 17, 2020 and asked to change her election to standard parental benefits. Since she made her request after her election became irrevocable, the Commission denied her request.

[24] I am sympathetic to the Appellant's experiences with ADHD. I am moved by her description of the journey she has been on to obtain a diagnosis and address her condition. I acknowledge the efforts she has made to fix her parental benefits, and her frustration that she cannot simply switch her election to the option she wishes she had chosen.

[25] I also understand that she is trying to bring herself within a line of cases where the AD has said that a Claimant can make a new election if their first election was not valid[6]. In coming to this conclusion, the AD distinguished a Federal Court decision[7], which requires applicants to seek information about the benefits they are applying for and ask the Commission questions if there are things they don't understand. The AD highlighted the need to determine whether the claimant merely lacks the knowledge to answer clear questions (in which case they cannot change their election), ***or*** if the claimant was actually misled by relying on incorrect information that the Commission provides (in which case they can change their election).

[26] However, a very recent decision by the Federal Court of Appeal overturned the AD line of cases, which means I can no longer consider them and must agree with the Commission[8]. This is because the Federal Court of Appeal has now definitively ruled that a claimant **cannot change their election once benefit payments have started flowing** because subsection 23(1.2) of the EI Act expressly prohibits such a change.

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[6] See *Canada Employment Insurance Commission v. MO,* 2021 SST 435 and *Canada Employment Insurance Commission v. SA,* 2021 SST 406.
[7] *Karval v. Canada (Attorney General),* 2021 FC 396
[8] See *Attorney General of Canada v. Hull,* A-198-21, issued on May 13, 2022.

[27] This recent Federal Court of Appeal decision is binding on me, and it confirms that I do not have discretion to waive or disregard the law.

[28] As a result of this decision, there is no legal remedy available to claimants who based their election on a misunderstanding of the parental benefit scheme and want to change their election **after** parental benefits have been paid.

[29] Unfortunately for the Appellant, this means that no matter what additional evidence she presents, it will not be decisive of the issue because the law does not allow her to make a new election and be paid standard parental benefits on her claim[9].

[30] I therefore find that the evidence submitted in support of the Appellant's Application to Rescind or Amend is not decisive of the issue in her original appeal. This means she has not met the test for "new facts".

Issue 2: Was the decision made without knowledge of, or a mistake as to some material fact?

[31] A claimant cannot switch parental benefits election after the first payment of parental benefits has been issued.

[32] This is the conclusion the first Tribunal member came to when she dismissed the Appellant's appeal in GE-20-2396.

[33] In her application to rescind or amend, the Appellant expands upon her original submissions that she made a mistake when she elected the extended option for her parental benefits and asks again that she be allowed to switch to the standard option. She relies on the additional medical evidence about her ADHD diagnosis to further explain what caused her to make a mistake in her election.

[34] But this is not a material fact because it does not allow her to correct her mistake.

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[9] Although there may previously have been recourse if a claimant was misled by the Commission, the Federal Court of Appeal in *Hull, supra* appears to say that a claimant must have been "misdirected" by the Commission in order for the court to consider any potential remedy (see paragraphs 31 and 32 of *Hull, supra*). Misdirected would require an act by the Commission to have caused the Appellant's mistaken election. But the Appellant submits that her ADHD – not an act by the Commission – caused her mistaken election.

[35] The analysis set out in the decision in GE-20-2396 includes a detailed consideration of the Appellant's submissions that she made a mistake when she selected the extended option for her parental benefits. While it does not specifically cite her ADHD diagnosis as the reason why she made her mistake, the reason for the mistake is not relevant. This is because the Federal Court of Appeal has now said that a claimant **cannot change their election once benefit payments have started flowing**[10].

[36] I see no evidence in the application that proves the Tribunal member's decision in GE-20-2396 was made without knowledge of a material fact or was based on a mistake about a material fact.

[37] For the reasons set out under Issue 1and 2 above, I find that the Appellant has not met the test set out in paragraph 66(1)(a) of the *Department of Employment and Social Development Act* for the decision in GE-20-2396 to be rescinded or amended.

Conclusion

[38] The Appellant has not shown there are "new facts" to be considered, or that the decision in GE-20-2396 was made without knowledge of or was based on a mistake about a material fact. Therefore, the decision cannot be rescinded or amended.

[39] The Appellant's application to rescind or amend the decision in appeal file GE-20-2396 is dismissed.

[40] The decision in appeal file GE-20-2396 is **not** rescinded or amended, and remains in full force and effect.

Teresa M. Day

Member, General Division – Employment Insurance Section

[10] See footnote 8 above.