Citation: ***D. B. v. Minister of Employment and Social Development,*** **2015 SSTAD 1357**

Date: November 25, 2015

File number: AD-15-1046

APPEAL DIVISION

Between:

D. B.

Applicant

and

Minister of Employment and Social Development

Respondent

Rescind or Amend

Decision by: Hazelyn Ross, Member, Appeal Division

DECISION

[1] The Appeal Division refuses to rescind or amend its decision of June 25, 2015.

INTRODUCTION

[2] On June 25, 2015, the Appeal Division of the Social Security Tribunal of Canada, (the Tribunal), issued a decision refusing leave to appeal the decision of the Tribunal's General Division dated November 7, 2014. By way of this Application, the Applicant seeks an order rescinding or amending the decision refusing leave (the Application).

GROUNDS OF THE APPLICATION

[3] The Applicant submitted that there is new evidence that warrants the Appeal Division rescinding or amending its decision refusing leave to appeal.

ISSUE

[4] The Appeal Division must decide if the Application satisfies the test for new material facts set out in subsection 66(1) of the *Department of Employment and Social Development Act*, (the DESD), to wit,

> Do the information and documents presented by the Applicant constitute new material facts that could not have been discovered with the exercise of reasonable diligence at the time the Appeal Division rendered its decision refusing leave to appeal the General Division decision?

APPLICABLE LAW

Rescind or Amend

[5] The applicable statutory provision provides that:

> **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; 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.
> **(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.

> **(3)** Each person who is the subject of a decision may make only one application to rescind or amend that decision.
> **(4)** A decision is rescinded or amended by the same Division that made it.

[6] To succeed on an application to rescind or amend a decision, an applicant must establish that the "new evidence" being proffered is both evidence that was not discoverable, with the exercise of reasonable diligence, prior to the hearing in respect of which the Application issues; and evidence that was material to the outcome of the decision. In the context of an Application for Leave to Appeal, the words "at the time of the hearing" must be read as "at the time the Application was decided."

[7] Discoverability goes to the timing of the existence of the proposed "new fact". A new fact will be material if it can be shown that it could reasonably be expected to have affected the outcome of the decision.

ANALYSIS

[8] By an email dated September 23, 2015, the Applicant submitted a request to rescind or amend the Appeal Division decision refusing leave to appeal.[1] Along with the Application, the Applicant attached:

a. a description of the proposed new evidence;

b. a copy of a driver's licence history;

c. a copy of vehicle registration history.

[9] In the document describing the proposed new evidence, the Applicant indicated that he had been unable to obtain the proposed new evidence prior to the hearing. As the Applicant had made a prior reference to his failure to appear at the General Division hearing of October 22, 2014 (RA1-2) and also because the Applicant asked that his hearing be rescheduled, the Appeal Division inferred that the Applicant was referring to the General Division hearing of October 22, 2014. (RA1-4)

[1] The Application is addressed to the Tribunal and is stated as being in regards of Tribunal File AD-15-112, to wit,
To Whom it may concern:
Regards Tribunal File AD-15-112
I attach hereto my application to rescind with exhibits.

[10] Counsel for the Respondent argued that the Applicant's submissions do not address the Appeal Division decision of June 25, 2015. He made the further submission that they relate to the General Division decision and, therefore, the Appeal Division has no basis in law to consider them as applying to an application to rescind or amend the Appeal Division decision. The Appeal Division agrees.

[11] Two provisions of section 66 of the DESD are particularly important to this Application. They are paragraph 66(1)(b) which sets out the test for "new material fact" and subsection 66(4) which provide that a decision is rescinded or amended by the same Division that made it.

[12] Having found that the Applicant's submissions address the prior General Division decision, the Appeal Division also finds that, pursuant to subsection 66(4) of the DESD, it lacks the requisite jurisdiction to rescind or amend the General Division decision. Further, as submitted by Counsel for the Respondent the Applicant's proposed new facts do not relate to the Appeal Division decision refusing leave to appeal and there is no evidentiary basis on which the Appeal Division could rescind or amend that decision.

[13] Counsel for the Respondent also put forward an alternative argument with which the Appeal Division agrees, namely that the proposed new facts do not meet the test for "new material facts".

[14] The question that had to be answered is whether in relation to the Appeal Division decision of June 25, 2015, the Applicant has put forward any mew material fact that could not have been discovered with the exercise of reasonable diligence? For the reasons that follow, the Appeal Division finds that he has not done so.

[15] The Applicant started the process of applying for an Old Age Security, (OAS), pension and Guaranteed Income Supplement in 2010. He was aware since August 2010 that he would have to submit documents to the Respondent to establish his residence in Canada. His driver's licence and vehicle registration history were always available and, therefore, discoverable with the exercise of reasonable diligence well prior to the General Division hearing. So too, were copies of the Federal Court filings and the copy of his school attendance for the academic year 1963-64. Accordingly, none of this evidence can meet the discoverability test. Even, if they

could have met the discoverability test, in the opinion of the Appeal Division, they cannot meet the materiality test as, with the exception of the school attendance record, they can do no more than establish that the Applicant maintained an Ontario address, which is qualitatively and factually different from maintaining residence in Canada.

[16] The evidentiary value of the school attendance record is limited to the year to which it related. The witness testimony and the Applicant's testimony would clearly not be new evidence as this would have existed at the time the Applicant made his application. As the Appeal Division does not find that the proposed new facts meet the discoverability test, it is not necessary for it to explore whether they meet the materiality test as the test is conjunctive not disjunctive.

CONCLUSION

[17] The Applicant requested the Appeal Division to rescind or amend its decision of June 25, 2015 in which it refused leave to appeal decision of the General Division which held that he had not met his evidentiary burden to establish the required period of residence in Canada for purposes of receipt of an OAS pension and guaranteed income supplement. On the basis of the above, the Appeal Division finds that the Applicant has not presented any new material fact that could not have been discovered with the exercise of reasonable diligence at the time the decision refusing leave was made.

[18] The application to rescind or amend the decision of the Appeal Division issued June 25, 2015 is refused.

Hazelyn Ross
Member, Appeal Division