

**Federal Court of Appeal**



**Cour d'appel fédérale**

**Date: 20170510**

**Docket: A-305-16**

**Citation: 2017 FCA 99**

**CORAM: PELLETIER J.A.  
WEBB J.A.  
NEAR J.A.**

**BETWEEN:**

**MOHSEN GHOLIPOUR**

**Applicant**

**and**

**ATTORNEY GENERAL OF CANADA**

**Respondent**

Heard at Toronto, Ontario, on May 9, 2017.

Judgment delivered at Toronto, Ontario, on May 10, 2017.

**REASONS FOR JUDGMENT BY:**

**NEAR J.A.**

**CONCURRED IN BY:**

**PELLETIER J.A.  
WEBB J.A.**

**Federal Court of Appeal**



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**REASONS FOR JUDGMENT**

**NEAR J.A.**

[1] The applicant, Mohsen Gholipour, unsuccessfully applied for disability benefits under the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (CPP). The General Division of the Social Security Tribunal of Canada (the General Division) dismissed the applicant's appeal from this denial of benefits in 2014. The applicant then sought leave to appeal the General Division's decision, which was denied by the Appeal Division of the Social Security Tribunal of Canada (the Appeal

Division) in 2015. The applicant applied to rescind or amend the Appeal Division's leave decision, which the Appeal Division refused on August 11, 2016. This is an application for judicial review of the Appeal Division's refusal to rescind or amend the earlier leave decision.

[2] Pursuant to paragraph 66(1)(b) of the *Department of Employment and Social Development Act*, S.C. 2005, c. 34 (the Act), the Appeal Division may rescind or amend one of its own previous decisions 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."

[3] The applicant submits that the Appeal Division correctly articulated this test but erred in law in applying it to the additional evidence that he had presented, which included an affidavit of the applicant's daughter, Karen Gholipour, detailing observations of the applicant's physical and psychological condition, and a letter from the applicant's family physician, Dr. Saeedi.

[4] The Tribunal's findings of fact and interpretation of the Act are reviewable on the standard of reasonableness (*Reinhardt v. Canada (Attorney General)*, 2016 FCA 158 at para. 15, 484 N.R. 67 [*Reinhardt*]; *Atkinson v. Canada (Attorney General)*, 2014 FCA 187, [2015] 3 F.C.R. 461).

[5] To succeed in his application, the applicant must establish that the Appeal Division's decision refusing to rescind or amend the earlier leave decision was unreasonable. In my view, the applicant has been unable to do so.

[6] Despite the Appeal Division's apparent confusion with respect to the import of the dates on which the documents were prepared, it is my view that it was not unreasonable for the Appeal Division to determine that the applicant's additional evidence did not present a new material fact. The only additional evidence submitted by the applicant were the affidavits of his daughter, Karen Gholipour, and the family physician, Dr. Saeedi. Karen Gholipour's evidence only addressed the applicant's condition as of 2015 and did not relate to his condition as of his minimum qualifying period (MQP), December 31, 2005, the date on which the applicant had to establish that he suffered from a severe and prolonged disability. The letter of Dr. Saeedi, dated April 27, 2016, was virtually identical to an earlier report that he had prepared, dated August 15, 2010. The General Division had considered Dr. Saeedi's earlier report in 2014 when it decided that the applicant was not entitled to CPP benefits as of the MQP. Therefore, in my view, the Appeal Division reasonably refused to rescind or amend its earlier leave decision as the applicant had failed to satisfy the test set out in paragraph 66(1)(b) of the Act (see *Reinhardt* at paras. 28-29; *Tang v. Canada*, 2017 FCA 59 at paras. 9-10).

[7] As an alternative to allowing the application for judicial review of the Appeal Division's refusal to rescind or amend the earlier leave decision, the applicant requests an extension of time to file an application for judicial review of the actual leave decision made by the Appeal Division in 2015. In my view, the applicant's request is not properly before this Court. A request for an extension of time to judicially review the Appeal Division's leave decision must be brought before the Federal Court. This Court does not have jurisdiction to hear applications for judicial review of decisions made under section 58 of the Act, which includes leave decisions made by

the Appeal Division. As such, this Court only has the authority to hear an *appeal* of an application for judicial review of a leave decision made by the Appeal Division.

[8] The applicant also asks that, should this Court refuse to hear his request for an extension of time, his request be transferred to the Federal Court. I would decline to do so. Requests for extensions of time are properly made in a separate *motion* rather than by way of an alternative remedy in an application for judicial review (*Rhéaume v. Canada (Attorney General)*, 2009 FC 1273 at para. 52, 362 F.T.R. 49, aff'd 2010 FCA 355). Rule 49 in the *Federal Courts Rules*, SOR/98-106 provides that this Court may order that a *proceeding* be transferred to the Federal Court. The *Rules* have been interpreted such that a motion is not considered a proceeding (*Vaughan v. Canada*, (2000) 184 F.T.R. 197 at para. 23; Rule 2, Definitions). This Court previously rejected the argument that motions for extensions of time commence a proceeding:

The appellant's application for judicial review is initiated by the filing of a notice of application, which is the originating document. If a notice of application has not been filed within the time provided in the Act, then an extension of time must be obtained. The motion seeking an extension of time does not initiate the application for judicial review. If granted, it allows the applicant to file his notice of application; if refused, there is no application for judicial review.

(*Nanavaty v. Canada (Public Safety and Emergency Preparedness)*, 2008 FCA 323, at para. 12)

[9] For the foregoing reasons, I would dismiss the application for judicial review. As the respondent does not seek costs, none will be awarded.

"David G. Near"

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J.A.

"I agree

J.D. Denis Pelletier J.A."

"I agree

Wyman W. Webb J.A."

**FEDERAL COURT OF APPEAL**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:**

A-305-16

**APPEAL FROM A JUDICIAL REVIEW OF A DECISION OF THE SOCIAL SECURITY TRIBUNAL OF CANADA, IN FILE NO. AD-16-592 AND DATED AUGUST 10, 2016.**

**STYLE OF CAUSE:**

MOHSEN GHOLIPOUR v.  
ATTORNEY GENERAL OF  
CANADA

**PLACE OF HEARING:**

TORONTO, ONTARIO

**DATE OF HEARING:**

MAY 9, 2017

**REASONS FOR JUDGMENT BY:**

NEAR J.A.

**CONCURRED IN BY:**

PELLETIER J.A.  
WEBB J.A.

**DATED:**

MAY 10, 2017

**APPEARANCES:**

Brian Pickard

FOR THE APPLICANT

Hasan Junaid

FOR THE RESPONDENT

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