

Federal Court of Appeal



Cour d'appel fédérale

Date: 20170328

Docket: A-138-16

Citation: 2017 FCA 59

**CORAM: NOËL C.J.
WEBB J.A.
WOODS J.A.**

BETWEEN:

NAM CHAU TANG

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Vancouver, British Columbia, on March 23, 2017.

Judgment delivered at Ottawa, Ontario, on March 28, 2017.

REASONS FOR JUDGMENT BY:

WOODS J.A.

CONCURRED IN BY:

**NOËL C.J.
WEBB J.A.**

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REASONS FOR JUDGMENT

WOODS J.A.

[1] In this application, Nam Chau Tang seeks judicial review of a decision of the Social Security Tribunal – Appeal Division (Appeal Division) issued on February 29, 2016.

[2] At the hearing, the Court raised a preliminary matter concerning the style of cause in the application which named the Appeal Division as the respondent. The appropriate respondent in

an application such as this is the Attorney General of Canada, and the Court accordingly ordered that the style of cause be amended to reflect this. The relevant provisions in Rule 303 of the *Federal Courts Rules*, SOR/98-106 are reproduced below:

Respondents

303 (1) Subject to subsection (2), an applicant shall name as a respondent every person

(a) directly affected by the order sought in the application, other than a tribunal in respect of which the application is brought; or

...

Application for judicial review

(2) Where in an application for judicial review there are no persons that can be named under subsection (1), the applicant shall name the Attorney General of Canada as a respondent.

...

Défendeurs

303 (1) Sous réserve du paragraphe (2), le demandeur désigne à titre de défendeur :

a) toute personne directement touchée par l'ordonnance recherchée, autre que l'office fédéral visé par la demande;

[...]

Défendeurs — demande de contrôle judiciaire

(2) Dans une demande de contrôle judiciaire, si aucun défendeur n'est désigné en application du paragraphe (1), le demandeur désigne le procureur général du Canada à ce titre.

[...]

[3] Turning to the main issue, on December 14, 2010 Mr. Tang applied for disability benefits under the *Canada Pension Plan*, R.S.C. 1985, c-8. The benefits were denied, and the matter came before the Review Tribunal which decided that Mr. Tang did not qualify because he had not established that he had a “severe and prolonged disability” at the minimum qualifying period.

[4] Mr. Tang sought leave to appeal this decision to the Appeal Division. In a decision dated April 28, 2014, the leave application was denied on the basis that the appeal had no reasonable

chance of success. In particular, the Appeal Division concluded that Mr. Tang had failed to adequately raise any relevant grounds of appeal. The grounds of appeal are set out in subsection 58(1) of the *Department of Employment and Social Development Act*, S.C. 2005, c. 34 (Act), except that the reference to the General Division is considered to be a reference to the Review Tribunal in these circumstances. The provision is reproduced below.

Grounds of appeal

58 (1) The only grounds of appeal are that

(a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or

(c) the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

...

Moyens d'appel

58 (1) Les seuls moyens d'appel sont les suivants :

a) la division générale n'a pas observé un principe de justice naturelle ou a autrement excédé ou refusé d'exercer sa compétence;

b) elle a rendu une décision entachée d'une erreur de droit, que l'erreur ressorte ou non à la lecture du dossier;

c) elle a fondé sa décision sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments portés à sa connaissance.

[...]

[5] On July 9, 2015, Mr. Tang applied to the Appeal Division to have the leave decision rescinded or amended. This procedure, which is provided for in section 66 of the Act, requires that the applicant provide a new material fact. The relevant provisions are set out below:

Amendment of decision

66 (1) The Tribunal may rescind or amend a decision given by it in respect

Modification de la décision

66 (1) Le Tribunal peut annuler ou modifier toute décision qu'il a rendue

of any particular application if

relativement à une demande particulière :

...

[...]

(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.

b) dans les autres cas, si des faits nouveaux et essentiels qui, au moment de l'audience, ne pouvaient être connus malgré l'exercice d'une diligence raisonnable lui sont présentés.

Time limit

Délai

(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.

(2) La demande d'annulation ou de modification doit être présentée au plus tard un an après la date où l'appelant reçoit communication de la décision.

...

[...]

[6] The Appeal Division dismissed the rescission or amendment application in a decision dated February 29, 2016. This is the subject of this application for judicial review.

[7] In order for this Court to allow the application, the Appeal Division must have made a reviewable error in refusing to rescind or amend the earlier leave decision. I am of the view that there is no such reviewable error.

[8] The Appeal Division rejected the application for rescission or amendment, in part, because Mr. Tang did not submit the application within the one year required time period provided for in subsection 66(2) of the Act. The Appeal Division found that Mr. Tang submitted his application more than two months late. This conclusion was reasonable and it did not give rise to a reviewable error.

[9] The Appeal Division also rejected the application on the basis that Mr. Tang had not satisfied the requirement to provide a new material fact as required by paragraph 66(1)(b) of the Act. There is also no reviewable error in this conclusion because it was a reasonable conclusion to make. In particular, the Appeal Division noted that Mr. Tang had provided new opinions which were prepared long after December 31, 2010, which was the minimum qualifying period. It was reasonable for the Appeal Division to conclude that a new material fact had not been provided.

[10] In essence, Mr. Tang is seeking a determination of the severity of his disability as it currently exists rather than as it existed at the minimum qualifying period. This is not a proper basis to appeal the denial of disability benefits which were applied for in 2010.

[11] For these reasons, I would dismiss the application for judicial review. The respondent has not sought costs and none will be ordered.

“Judith M. Woods”

J.A.

“I agree
Marc Noël Chief Justice”

“I agree
Wyman W. Webb J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-138-16

**THIS IS AN APPLICATION FOR JUDICIAL REVIEW OF A DECISION OF THE
SOCIAL SECURITY TRIBUNAL-APPEAL DIVISION**

STYLE OF CAUSE: NAM CHAU TANG v.
ATTORNEY GENERAL OF
CANADA

PLACE OF HEARING: VANCOUVER, BRITISH
COLUMBIA

DATE OF HEARING: MARCH 23, 2017

REASONS FOR JUDGMENT BY: WOODS J.A.

CONCURRED IN BY: NOËL C.J.
WEBB J.A.

DATED: MARCH 28, 2017

APPEARANCES:

Nam Chau Tang ON HIS OWN BEHALF

Hasan Junaid FOR THE RESPONDENT

SOLICITORS OF RECORD:

William F. Pentney FOR THE RESPONDENT
Deputy Attorney General of Canada