Citation: *D. K. v. Minister of Employment and Social Development*, 2015 SSTAD 1068

Appeal No. AD-15-441

BETWEEN:

D. K.

Appellant

and

Minister of Employment and Social Development
(formerly Minister of Human Resources and Skills Development)

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Summary Dismissal

SOCIAL SECURITY TRIBUNAL MEMBER: Janet LEW

DATE OF DECISION: September 11, 2015

REASONS AND DECISION

INTRODUCTION

[1] The Appellant appeals a decision dated May 16, 2015 of the General Division, whereby it summarily dismissed her application of October 6, 2011 for a Canada Pension Plan disability benefit, on the basis that it did not comply with subsection 66(2) of the *Department of Employment and Social Development Act* (DESDA). The General Division summarily dismissed her appeal, given that it was satisfied that it did not have a reasonable chance of success.

[2] The Appellant filed an appeal on July 8, 2015 (Notice of Appeal). No leave is necessary in the case of an appeal brought under subsection 53(3) of the DESDA, as there is an appeal as of right when dealing with a summary dismissal from the General Division. Having determined that no further hearing is required, this appeal before me is proceeding pursuant to subsection 37(a) of the *Social Security Tribunal Regulations.*

ISSUES

[3] The issues before me are as follows:

1. What was the nature of the application filed by the Appellant with the Office of the Commissioner of Review Tribunals on October 6, 2011?

2. Depending upon the nature of the October 6, 2011 application, did the General Division properly dispose of it? Did the General Division err in choosing to summarily dismiss the Appellant's claim? How should the General Division have disposed of the appeal?

3. Did the General Division err when it did not consider the Appellant’s submissions filed on May 15, 2015? If so, would the submissions have affected its decision?

FACTUAL OVERVIEW

[4] Some background information is necessary, given that the Appellant has made multiple applications for a Canada Pension Plan disability pension.

[5] The Appellant applied for a Canada Pension Plan disability pension on January 17, 2006 (GT1-127 to GT1-130). The Respondent denied the application initially on May 9, 2006 (GT1-125 to GT1-126). It does not appear that the Appellant requested a reconsideration of the Respondent's decision.

[6] The Appellant applied for a Canada Pension Plan disability pension a second time, on December 18, 2006 (GT1-114 to GT1-119). The Respondent denied the application initially (GT1-106 to GT1-107) and upon reconsideration (GT1-102 to GT1- 103/GT1-108 to GT1-109). A Canada Pension Plan Review Tribunal upheld the reconsideration decision of December 2, 2008, following a hearing on September 10, 2008, finding that the Appellant was not disabled in 1997, when she last met the minimum qualifying period (GT1-26 to GT1-31). The Appellant sought leave to appeal the decision of the Review Tribunal to the Pension Appeals Board. On April 1, 2009, the Pension Appeals Board refused leave to appeal, as it found that she had not raised an arguable case. The Pension Appeals Board determined that she had not met the contributory requirements for entitlement (GT1-23 to GT1-24). The Appellant did not seek judicial review of the decision of the Pension Appeals Board.

[7] The Appellant applied for a Canada Pension Plan disability pension a third time, on October 6, 2011 (GT1-15 to GT1-18). The Respondent denied the application initially (GT1-11 to GT1-12) and upon reconsideration (GT1-6 to GT1-7). The Respondent explained in its letter dated May 4, 2012 that it could not approve her current application, as she had made a previous application using the same minimum qualifying period of December 1997, and the decision of the Review Tribunal rendered on December 2, 2008 was therefore final and binding. The Respondent also advised the Appellant that she had 90 days within which to appeal its reconsideration decision to a Review Tribunal. On August 1, 2012, the Appellant filed an appeal with the Office of the Commissioner of Review Tribunals.

[8] On March 13, 2013, the Appellant filed an application to rescind or amend the 2008 decision of the Review Tribunal. The application included letters dated February 17, 2012 and March 8, 2013, wherein the Appellant clearly requested that her file be re-opened. On April 15, 2014, the General Division heard and decided the March 2013 rescind or amend application. The General Division did not consider nor make reference to this March 2013 rescind or amend application in its decision of May 16, 2015. The Respondent summarized the history of proceedings relating to the March 2013 rescind or amend application at paragraphs 17 to 19 of its submissions, but that matter is not before me.

[9] Under section 257 of the *Jobs, Growth and Long-term Prosperity Act,* any appeal filed before April 1, 2013 under subsection 82(1) of the *Canada Pension Plan,* as it read immediately before the coming into force of section 229, is deemed to have been filed with the General Division of the Social Security Tribunal on April 1, 2013. On April 1, 2013, the Office of the Commissioner of Review Tribunals transferred both the Appellant's appeal of the reconsideration decision to the Social Security Tribunal and the Appellant's rescind or amend application.

[10] On May 29, 2013, the Appellant filed a Notice of Readiness with the Social Security Tribunal advising that she did not have any additional documents or written submissions with respect to her appeal of the October 2011 decision of the Review Tribunal.

[11] On March 30, 2015, the General Division gave notice in writing to the Appellant, advising that it was considering summarily dismissing the appeal of the October 2011 decision of the Review Tribunal because:

> In December 2006 the Review Tribunal found that the Appellant did not have sufficient contributions to be eligible for a disability pension.
>
> Under section 66 of the *Department of Employment and Social Development Act* (DESD Act) the Tribunal may rescind or amend a previous decision of the Tribunal in certain circumstances. To be successful an application to rescind or amend must be made within one year of the previous Tribunal decision and must include new material evidence that could not be discovered at the time of the previous hearing.
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> The Appellant, in this case, did not submit new material evidence and her application was approximately five years after the Tribunal decision of December 18, 2006.

[12] The General Division invited the Appellant to provide detailed written submissions by no later than May 11, 2015, explaining why her appeal had a reasonable chance of success.

[13] On May 8, 2015, the Appellant sent additional documents by registered mail to the Social Security Tribunal. They consisted of the following:

(a) letter dated August 1, 2012 from the Appellant to Gerald Keddy, MP;

(b) letter dated January 17, 2013 from Minister of Human Resources and Skills Development to Gerald Keddy, MP;

(c) letter dated May 7, 2015 from Dr. Timothy J. Riding; and

(d) letter dated May 8, 2015 from Tim German.

[14] The Social Security Tribunal acknowledged that it had received her letter with attachments on May 15, 2015 but the General Division had already issued a summary dismissal decision by then, so the Social Security Tribunal did not provide the General Division with a copy of the Appellant's submissions.

[15] On May 16, 2015, the General Division rendered its decision. The General Division relied upon the following provisions, in coming to its decision:

a) Subsection 53(1) of the *Department of Employment and Social Development Act,* which states that the General Division must summarily dismiss an appeal if it is satisfied that it has no reasonable chance of success;

b) Section 22 of the *Social Security Tribunal Regulations,* which states that before summarily dismissing an appeal, the General Division must give notice in writing to the appellant and allow the appellant a reasonable amount of time to make submissions; and

c) Subsection 66(2) of the DESDA, which states that an application to rescind or amend a decision must be made within one year after the day on which a decision is communicated to an appellant.

[16] The General Division made no mention of the Respondent's position set out in its letter of May 4, 2012, that it considered the matter *res judicata.* Instead, the General

Division treated the Appellant's October 6, 2011 application for a disability pension as an application to rescind or amend.

[17] The General Division found that it could rescind or amend a previous decision of the General Division (or a Review Tribunal) under section 66 of the DESDA if an appellant met certain requirements, such as if the request to amend or rescind was made within one year of the previous decision and if the new material provided could not have been discovered at the time of the previous hearing. The General Division found that a previous decision had been made by a Review Tribunal in December 2008 and that the Appellant's subsequent application for a disability pension, which was the subject of the appeal, was made in October 2011, almost three years after the Review Tribunal had rendered its decision. The General Division found that the Appellant's application to rescind or amend the 2008 decision of the Review Tribunal was statute-barred, as it had not been made within one year of the decision.

[18] On July 8, 2015, the Appellant filed an appeal from the summary dismissal decision of the General Division.

SUBMISSIONS

[19] In the Notice of Appeal filed on July 8, 2015, the Appellant submitted that the General Division failed to consider submissions which she had sent to the Social Security Tribunal by registered letter on May 8, 2015. The Social Security Tribunal acknowledged that it had received her letter with attachments on May 15, 2015 but the General Division had already issued a summary dismissal decision. The General Division rendered its decision on May 16, 2015 (although the letter from the Social Security Tribunal indicated that the decision had been issued on May 19, 2015). The Appellant submits that the General Division should have considered her submissions before rendering its decision. In addition to those documents which she had sent to the Social Security Tribunal on May 8, 2015, the Appellant also enclosed the following with her submissions of July 8, 2015:

(a) letters dated March 12 and September 11, 2009 from Dr. Catherine Ellis and

(b) x-ray dated March 8, 1994.

[20] On July 13, 2015, the Social Security Tribunal confirmed with the parties that the Appellant had filed a Notice of Appeal. The Social Security Tribunal advised that parties had until August 23, 2015 to file submissions or file a notice with the Appeal Division advising that they had no new submissions. On August 19, the Appellant filed a letter dated August 13, 2015, advising that she did not have any new submissions.

[21] The Respondent filed written submissions on August 24, 2015. The Respondent took no position with respect to what he understood to be the Appellant's allegation that the General Division breached the principles of natural justice by denying her the right to be heard. However, the Respondent noted that the Social Security Tribunal received the Appellant's letter dated May 8, 2015 after its May 11, 2015 deadline. The Respondent submits that if indeed the letter was filed late, the General Division was within its authority to refuse to consider it, as it had put the Appellant on notice that failure to file submissions by May 11, 2015 would result in the matter being decided on the basis of the documents already on file. The Respondent submits that moreover, the General Division had an obligation under section 22 of the *Regulations* to render its decision without delay.

[22] It is interesting, perhaps curious, that the Respondent takes this position that the Appellant was late with filing her submissions of May 8, 2015, given that the Respondent too is late with filing his submissions of August 24, 2015.

[23] Nonetheless, the Respondent submits that the May 8, 2015 letter failed to comply with the notice of summary dismissal as it did not address the issues raised in the notice or state why the appeal has a reasonable chance of success. The Respondent submits that rather, it re-argued the issue of the Appellant's disability, which was finally decided by a Review Tribunal in 2008. Accordingly, the Respondent submits that even if the May 8, 2015 letter had been considered by the General Division, the result would likely have been the same.

[24] The Respondent further submits that the appeal has no reasonable chance of success because the Appellant is unable to establish a new minimum qualifying period in support of

her October 2011 application, and that her minimum qualifying period therefore remains December 31, 1997. This is the same minimum qualifying period which had been determined by the Review Tribunal in 2008. The Respondent submits that the 2008 decision of the Review Tribunal is final and binding and that the issue therefore of whether the Appellant was disabled on or prior to December 31, 1997 is *res judicata*.

[25] The Respondent further submits that when the Appellant filed an application under the former subsection 84(2) of the *Canada Pension Plan,* she had exhausted her right to make an application to rescind or amend the 2008 decision of the Review Tribunal by the time it was heard and decided by the General Division in 2014. The Respondent cites subsection 66(3) of the DESDA as a further bar to rescind or amend the 2008 decision of the Review Tribunal. That section limits the number of rescind or amend applications to one per decision. I do not see how subsection 66(3) has any applicability, given that I am unaware of any previous rescind or amend applications -- other than the March 13, 2013 application -- which the Appellant is alleged to have made.

[26] The Respondent submits that the General Division's decision to summarily dismiss the appeal was reasonable as the appeal has no reasonable chance of success. The Respondent asks that the Appeal Division dismiss the appeal.

[27] Although I am compelled to disregard the Respondent's submissions of August 24, 2015 on this occasion, so that there is some consistency in the history of these proceedings where late submissions are filed, I note that the submissions are, to some extent, consonant with my own views. Apart from that, however, the difference between the Appellant's late filing and the Respondent's late filing is that in the case of the General Division, it had already rendered its decision. Here, I had yet to review the matter, let alone render a decision, when the Respondent filed its submissions on August 24, 2015. There is discretion afforded to me as to whether I should accept the late submissions for filing. In this particular instance, I am prepared to accept the Respondent's submissions, despite the fact that they are late, given that it would be in the best interests of justice to have a complete argument and body of jurisprudence available.

ISSUE 1: WHAT WAS THE NATURE OF THE APPLICATION FILED BY THE APPELLANT WITH THE OFFICE OF THE COMMISSIONER OF REVIEW TRIBUNALS ON OCTOBER 6, 2011?

[28] What was the nature of the application filed by the Appellant on October 6, 2011? The Appellant saw it as an application for Canada Pension Plan disability benefits whereas the General Division characterized the application as one to rescind or amend the decision of the Canada Pension Plan Review Tribunal of December 2, 2008. If the application was properly an application to rescind or amend, then the Appellant may well have had to meet the statutory requirements or been confronted with the statutory bars under section 66 of the DESDA.

[29] The General Division's characterization that it was dealing with an application to rescind or amend was, with respect, misplaced, given that the Appellant had not filed any "new facts" or records at all in support of the application filed on October 6, 2011, other than those sent by registered mail on May 8, 2015 (which the General Division was unaware of when it rendered its decision). Indeed, there is no indication by the Appellant that she intended to rescind or amend the decision of the Review Tribunal. As well, the Respondent denied the application at the reconsideration stage, on the basis that it was *res judicata,* suggesting also that it did not consider the application a request to rescind or amend the 2008 decision of the Review Tribunal. The Respondent also notes that an application to rescind or amend a decision must be filed in accordance with the procedure set out in sections 45 to 49 of the *Regulations*. While I agree with the Respondent that that is the case for applications to rescind or amend filed on or after April 1, 2013, these requirements were not extant in October 2011, when the Appellant filed her application for a Canada Pension Plan disability benefit; clearly these provisions would not apply.

[30] The Respondent submits that although the March 2013 application to rescind or amend might now be raised for the first time on appeal to the Appeal Division, "exceptionally, the [Appeal Division] should consider the [General Division's] 2014 new facts decision in its analysis as the [General Division's] 2014 new facts decision provides a secondary basis on which the appeal should be summarily dismissed". Essentially these

submissions amount to seeking dismissal of an appeal from the 2014 decision of the General Division. I know of no authority that would confer jurisdiction upon the Appeal Division to decide upon a matter which is not properly before it and I therefore decline making any orders in respect of the 2014 decision of the General Division.

[31] The General Division may have chosen to characterize the October 2011 application as one to rescind or amend, as this might have breathed some life into an application that might have otherwise been quickly dismissed for being *res judicata*, but I do not see any solid foundation for this characterization.

[32] In short, I see the application filed on October 6, 2011 as simply the third application for a Canada Pension Plan disability pension. The General Division should not have considered the appeal before it as an application to rescind or amend the 2008 decision of the Review Tribunal. I therefore need not consider whether the General Division appropriately summarily dismissed the appeal before it on the basis that it was statute-barred under subsection 66(2) of the DESDA.

ISSUE 2: DISPOSITION

[33] As the General Division erred in law in its characterization of the application and ultimately in the matter of the disposition of the appeal, this allows me to dismiss the appeal, render the decision that the General Division should have given, refer the matter back to the General Division for reconsideration, or to rescind or vary the decision of the General Division in whole or in part.

[34] The Respondent submits that I should dismiss the appeal as the issue of disability is *res judicata* and the Appellant has exhausted her right to have the 2008 Review Tribunal decision amended based on new facts.

[35] I have already determined that the March 2013 application to rescind or amend the 2008 decision of the Review Tribunal was not before nor considered by the General Division when it came to a summary decision on May 16, 2015. The appeal of any decision

regarding the application to rescind or amend the 2008 decision of the Review Tribunal is not properly before me, so I cannot make any determination on the issue.

Doctrine of *res judicata*

[36] If a matter is *res judicata,* it precludes the rehearing or re-litigation of matters that have been previously determined. The Respondent submits that the Appellant is estopped or precluded from re-litigating the issue as to whether she was disabled on or prior to December 31, 1997, because a Review Tribunal definitively settled this issue in its 2008 decision.

[37] The Respondent relies upon *Danlyuk v. Ainsworth Technologies Inc.,* [2001] 2 S.C.R. 460. There, the Supreme Court of Canada listed the three preconditions to the operation of issue estoppel (a form of *res judicata),* which had been set out by Dickson J. (later C.J.) in *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248:

> (a) that the same question had been decided;
>
> (b) that the judicial decision which is said to create the estoppel was final; and
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> (c) that the parties to the judicial decision were the same person as the parties to the proceedings in which the estoppel is raised.

[38] The Respondent submits that the three conditions are met in this case, with respect to the issue of whether the Appellant could be found disabled on or before December 31, 1997:

> (1) The issue in the third application for a Canada Pension Plan disability pension is the same as the issue that was before the Review Tribunal in 2008. The 2011 application is an application for a disability pension pursuant to subsection 60(1) of the *Canada Pension Plan.* Given her lack of contributions to the Canada Pension Plan since 2002, the Appellant is unable to establish a new minimum qualifying period. As such, the only issue to be decided in relation to her 2011 application is whether or not the Appellant was disabled on or prior to December 31, 1997 and continuously thereafter. This same issue was determined by the Review Tribunal in 2008.
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> (2) The decision of the Review Tribunal is final and binding. A designated member of the former Pension Appeals Board dismissed the Appellant's application for

leave to appeal on April l, 2009 and the period for applying for judicial review of the designated member's decision has expired.

(3) The parties before the General Division were the same as those which had been before the Review Tribunal in 2008.

[39] The Respondent submits that once these three conditions are met, that the matter must necessarily be dismissed for being *res judicata.*

[40] In fact, *Danlyuk* is generally cited for the premise that the rules governing issue estoppel should not be mechanically applied, as "the underlying purpose is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case". In other words, there is a two-step analysis. The first step involves determining whether the respondent has established the three preconditions. The Respondent has addressed only this first step.

[41] The Supreme Court of Canada in *Danlyuk* has held that if the three preconditions are met, the court must still determine the second step, whether, "as a matter of discretion, issue estoppel ought to be applied".

[42] In *Danlyuk,* the Supreme Court of Canada held that the list of factors for and against the exercise of the discretion is open. In *Danlyuk,* it identified seven relevant factors in that case, including:

1. the wording of the statute from which the power to issue the administrative order derives;
2. the purpose of the legislation;
3. the availability of an appeal;
4. the safeguards available to the parties in the administrative procedure;
5. the expertise of the administrative decision-maker;
6. the circumstances giving rise to the prior administrative proceedings; and
7. the potential injustice.

[43] These factors may not merit equal consideration. There may be other considerations too. In *Minott v. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321 (Ont. CA), the Ontario Court of Appeal found that it be would be appropriate to exercise discretion to refuse to apply issue estoppel to the finding of misconduct made by an administrative decision-maker. The Court of Appeal also found that procedural differences between a hearing before an administrative tribunal and a civil trial or deficiencies in the procedure relating to the first decision could trigger the exercise of the court's discretion to refuse to apply issue estoppel, i.e. *res judicata,* in appropriate cases. The Ontario Court of Appeal held that "issue estoppel should be applied flexibly where an unyielding application of it would be unfair to a party who is precluded from relitigating an issue". There is an overriding question of fairness involved, to avoid a potential injustice.

[44] In considering whether to exercise my discretion, and as stated in *Minott,* in trying to achieve a "certain balance between the needs for fairness, efficiency and predictability of outcome," I find that in the proceedings before the Review Tribunal in 2008, the Appellant knew the case she had to meet, she had been given a reasonable opportunity to meet it and she was given an opportunity to state her own case. I find also that while the Appellant sought leave to appeal this decision to the Pension Appeals Board, she did not further seek judicial review of the decision of the Pension Appeals Board when it dismissed her application for leave to appeal. It cannot be said that the Appellant has been deprived of the opportunity to have her claim to a Canada Pension Plan disability pension properly assessed and adjudicated. In considering the relevant factors, I am not satisfied that I ought to exercise my discretion and refuse to apply the doctrine of *res judicata* in the circumstances of this case.

[45] The Appellant's third application is bound to fail because there are no special circumstances that would bring the appeal within the exception to the doctrine of *res judicata.*

ISSUE 3: THE APPELLANT'S SUBMISSIONS FILED ON MAY 15, 2015

[46] Subsection 58(1) of the DESDA states that the only grounds of appeal are the following:

(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.

[47] The Appellant submits that the General Division should have considered her submissions before rendering its decision and that this therefore amounts to a breach of the principles of natural justice.

[48] The Respondent submits that the contents and attachments to the May 8, 2015 letter of the Appellant do not respond to the invitation from the General Division to explain why the appeal had a reasonable chance of success, and instead, attempted to re-argue the issue of the Appellant's disability. Given that the General Division had mis-characterized the nature of the October 2011 application, one cannot reasonably expect that the Appellant would have appropriately made submissions on the summary dismissal issue, particularly when she had been invited to do so from the perspective of dismissal of a rescind or amend application.

[49] I concur with the submissions of the Respondent to the extent that the "new facts" amount to an attempt to re-argue the Appellant's claim to a disability pension. This does not properly address any of the grounds of appeal under subsection 58(1) of the DESDA.

CONCLUSION

[50] In summary, the General Division erred in determining that the appeal should be summarily dismissed on the basis that the Appellant was statute-barred in making an application to rescind or amend. The appeal before the General Division was not an application to rescind or amend. Rather, the appeal involved an appeal of a reconsideration decision denying her application for a Canada Pension Plan disability pension.

[51] While I could have returned this appeal to the General Division for a reconsideration, it is inescapable that the October 6, 2011 application for a Canada Pension Plan disability pension is *res judicata* and that there are no circumstances that would warrant exercising my discretion to refuse to apply the doctrine. The Appeal is dismissed.

Janet Lew

Member, Appeal Division