

Social Security Tribunal



Tribunal de la sécurité sociale

Citation: *M. D. v. Minister of Employment and Social Development*, 2016 SSTADIS 154

Date: April 28, 2016

File Number: AD-16-114

Appeal Division

BETWEEN:

M. D.

Appellant

and

**Minister of Employment and Social Development
(Formerly Minister of Human Resources and Skills Development)**

Respondent

Decision by: Hazelyn Ross. Member, Appeal Division

DECISION

[1] The Appeal is dismissed.

BACKGROUND

[2] On October 21, 2015 a Member of the General Division of the *Social Security Tribunal*, (the Tribunal), dismissed the Appellant's appeal of a reconsideration decision denying her a disability benefit under the *Canada Pension Plan*, (CPP). The General Division dismissed the appeal pursuant to ss. 53 (1) of the *Department of Employment and Social Development*, (DESD) *Act*. Under this provision the General Division must summarily dismiss an appeal if it is satisfied that the appeal has no reasonable chance of success.

[3] This appeal derives from the Appellant's second application for a CPP disability pension. She made her first application in January 1988.

[4] When this application was denied, the Appellant requested a reconsideration of the decision. The Respondent maintained the denial and the Appellant appealed to the Office of the Commissioner of Review Tribunals. On June 6, 2000 a Review Tribunal issued its decision dismissing her appeal of the reconsideration decision. On October 4, 2000 the Pension Appeals Board denied the Appellant's application for leave to appeal the Review Tribunal decision. (GD4-81) At this point the Review Tribunal decision became final.

[5] The Appellant made a second application for a CPP disability pension in March 2013, with the same results. In denying this second application the Respondent explained that the previous Review Tribunal decision was both final and binding. The Respondent also explained that it could not approve this second application because the Appellant had made no additional contributions since December 1998, her minimum qualifying period, ("MQP"), or the date by which she would have had to be found to be disabled. (GD4-6 &73)

[6] Reasoning that there had been a final decision in regard to whether or not the Appellant qualified for a CPP disability pension and also that the issue to be decide as well as the parties were unchanged, the General Division found the principle of *res judicata*

applicable to the Appellant's appeal. Being satisfied that the appeal did not have a reasonable chance of success, the General Division dismissed the appeal.

GROUND OF THE APPLICATION

[7] The Appellant cites paragraph 58(1)(a) of the *Department of Employment and Social Development, (DESD) Act* as the basis of the application. She submitted that she has medical documents that her representative failed to tender during the first application and subsequent proceedings. She alleged the representative had been less than professional in dealing with her and stated that she has remained out of the workforce due to her disability.

THE ISSUE

[8] Did the General Division err in dismissing the appeal summarily?

SUBMISSIONS

[9] As required by section 36 of the *Tribunal Regulations*¹ the Tribunal allowed the parties 45 days from the date the Appellant filed the appeal to make submissions. In this case the parties had until February 15, 2016 to file submissions or to file a notice of no submissions with the Appeal Division. Acting as her Counsel, the Appellant's son tendered submissions that detailed the history of the Appellant's applications and her medical and mental conditions. He attached a number of medical reports that he stated supported the Appellant's longstanding mental health issues and, therefore, her disability. (AD4)

[10] The Respondent's representative took the position that the appeal before the Appeal Division did not raise any grounds of appeal under s. 58(1) of the DESD Act and that the General Division had properly found that *res judicata* applied, therefore, the appeal cannot succeed. (AD3)

THE LAW

The Decision to Summarily Dismiss the Appeal

¹ *Social Security Tribunal Regulations, S.O.R./2013-60 as amended by S.C.2013, c. 40, s. 236.*

[11] DESD s. 53 mandates (1) that the General Division must summarily dismiss an appeal if it is satisfied that the appeal has no reasonable chance of success. In Canada (*Minister of Human Resources Development*) v. *Hogervorst*, 2007 FCA 41, the Federal Court of Appeal equated a reasonable chance of success to an arguable case. More recently, Members of the Appeal Division have articulated the test for summary dismissal as “whether it is plain and obvious on the face of the record that an appeal is bound to fail.” *M.C. v. Canada Employment Commission*, 2015 SSTAD 237. The Appeal Division is of the view that where the facts are not in dispute; the applicable law is clear; and where on the undisputed facts the law supports only one clear decision that is not in an appellant’s favour then s. 53 is properly applied.

ANALYSIS

[12] In determining this appeal, the Appeal Division is mindful of the position of the Federal Court and Federal Court of Appeal that when the Appeal Division hears appeals under ss. 58 (1) of the DESD Act, the governing statute of the Tribunal, the enquiry is to be confined to the mandate provided by sections 55 to 69 of the DESD Act. *Canada (Attorney General) v. Jean*; *Canada (Attorney General) v. Paradis*, 2015 CAF 242 (CanLII), 2015 FCA 242; *Maunder v. Canada (Attorney General)*, 2015 FCA 274, affirming the position it set out in *Jean /Paradis*; *Tracey v. Canada (Attorney General)* 2015 FC 1300.

[13] The question under this head is whether by summarily dismissing the appeal, the General Division breached a principle of natural justice or otherwise committed a reviewable error pursuant to section 58 of the DESD Act? For the reasons that follow, the Tribunal answers this question in the negative.

[14] The facts in the instant case are not in dispute. The Appellant made two applications for a disability pension. Both were denied. In the first instance she appealed to a Review Tribunal which dismissed her appeal. The Pension Appeals Board refused leave to appeal. Thirteen years later the Appellant filed a second application for a CPP disability pension. The Appellant has admitted that she has not worked during this intervening period. (see AD1) Based on these facts, the Review Tribunal dismissed her appeal.

[15] Before the General Division the Appellant pled the incompetence of her former legal representative (s). (General Division decision para. 12) She maintains her position. She stated that she has medical documents that her former legal representative (s) ought to have submitted to the Review Tribunal during her first appeal. The Appeal Division finds that the current legislative scheme does not include the submission and consideration of new evidence as a ground of appeal. (*Alves v. Canada (Attorney General)*, 2014 FC 1100. These medical documents could amount to new evidence and thus they cannot be considered in this appeal. Accordingly, the Appeal Division finds that there has not been a breach of natural justice on the part of the General Division; therefore, the appeal cannot succeed on this basis.

[16] The Appeal Division agrees that the principle of *res judicata*, specifically issue estoppel, applies to this matter. The Appeal Division relies on the decision in *Danyluk v. Ainsworth Technologies Inc.*, [2001] S.C.R. 460. At paragraph 25 of the decision, the Supreme Court of Canada stated that “the preconditions to the operation of issue estoppel were set out by Dickson J. in *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248, at p. 254.” The Supreme Court set out the preconditions of which there are three as:-

- 1) That the same question has been decided;
- 2) That the judicial decision which is said to create the estoppel was final; and
- 3) That the parties to the judicial decision or their privies were the same persons as the parties to the proceeding in which the estoppel is raised or their privies.

[17] The Appeal Division finds that *res judicata* is properly invoked in respect to the Appellant’s second application for a CPP disability pension. The question that had to be decided was the status of the Appellant pursuant to paragraph 42(2)(a)(i) of the CPP. In June 2000 the Review Tribunal found she did not fit the criteria of “severe and prolonged” disability as defined in the CPP. Leave to appeal the Review Tribunal decision having been refused, the Review Tribunal Decision acquired the status of a final decision. Thus the second precondition is met. Finally, the parties to both the proceedings before the Review Tribunal and the present proceedings are the same. The General Division made this determination at paragraph 20 of its decision. The Appeal Division finds no error in its identification of the applicable law or its application thereof.

[18] Given that all preconditions for the application of *res judicata* were met, the Appeal Division finds that the appeal before the General Division did not have a reasonable chance of success. The appeal to the Appeal Division also cannot succeed. Therefore, General Division appropriately applied ss. 53(1) of the DESD Act to summarily dismiss the appeal.

CONCLUSION

[19] In light of the foregoing analysis, the appeal is dismissed.

Hazelyn Ross
Member, Appeal Division