Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *E. L. v. Minister of Employment and Social Development*, 2016 SSTADIS 214

Tribunal File Number: AD-15-1649

BETWEEN:

E. L.

Appellant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

DECISION BY: Janet Lew

DATE OF DECISION: June 17, 2016

REASONS AND DECISION

OVERVIEW

[1] The Appellant appeals a decision dated September 25, 2015 of the General Division, whereby it summarily dismissed her appeal of a decision denying her application for a disability pension under the *Canada Pension Plan*. The General Division summarily dismissed the appeal, given that it was satisfied that the matter was *res judicata* and that the appeal therefore did not have a reasonable chance of success.

[2] The Appellant filed an appeal of the decision of the General Division on December 22, 2015 (the "Notice of Appeal"). She also filed supporting medical records. No leave is necessary in the case of an appeal brought under subsection 53(3) of the *Department of Employment and Social Development Act* (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. Did the General Division err in determining that the matter before it was *res judicata*?

2. Did the General Division fail to observe a principle of natural justice or otherwise act beyond its jurisdiction?

3. Did the General Division err in choosing to summarily dismiss the Appellant's appeal?

HISTORY OF PROCEEDINGS

[4] The key dates and facts for the purposes of this appeal are as follows:

(a) June 13, 2008 - the Appellant initially applied for a Canada Pension Plan disability pension. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to a Canada Pension Plan Review Tribunal (Review Tribunal) which dismissed the appeal on January 25, 2010, as it found that her appeal was not severe and prolonged, as defined by the *Canada Pension Plan*, by the end of her minimum qualifying period of December 31, 2007. The Appellant appealed this decision to the Pension Appeals Board, which, after granting leave to appeal, and later hearing the matter on July 18, 2012, dismissed her appeal;

(b) April 4, 2014 - the Appellant re-applied for a Canada Pension Plan disability pension. The Respondent denied this second application on the ground that the issues were *res judicata*, as her minimum qualifying period of December 31, 2007 remained unchanged, it considered that a determination had already been made with respect to disability and all appeal rights had been exhausted. The Appellant appealed the reconsideration decision to the General Division;

(c) September 25, 2015 – after inviting the parties to make submissions, the General Division summarily dismissed the appeal as it found the appeal had no reasonable chance of success. On December 22, 2015, the Appellant filed an appeal from the summary dismissal decision of the General Division.

SUBMISSIONS

[5] The Appellant submits that the General Division erred in law and based its decision on an erroneous finding of fact that it made in a perverse and capricious manner or without regard for the material before it. In particular, she claims that the General Division erred in relying on the doctrine of *res judicata* and in finding that her initial and second application for a Canada Pension Plan disability pension are “the same”, when they are not. She claims that the General Division neglected to consider that the Appellant’s medical condition has deteriorated since her first application have “significantly diminished”.

[6] The Appellant further submits that both the General and Appeal Divisions failed and are failing to observe a principle of natural justice and otherwise acting beyond its jurisdiction, when they have not and are not permitting the appeal to proceed "with her best foot forward", now that she has legal representation, which she did not have when her first application was being considered.

[7] The Respondent submits that as a determination had already been made with respect to disability as of the minimum qualifying period of December 31, 2007, and all appeal rights were exhausted with respect to that decision, the issue on appeal before the General Division was *res judicata.* The Respondent further argues that the facts and the applicable law are uncontested, and that there was only one possible conclusion, which allowed the General Division to summarily dismiss the appeal.

GROUNDS OF APPEAL

[8] Subsection 58(1) of the DESDA sets out the only grounds of appeal. They are as follows:

(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.

ISSUE 1: *RES JUDICATA*

[9] The Appellant submits that the General Division erred in law and based its decision on an erroneous finding if fact that it made in a perverse and capricious manner or without regard for the material before it, as it relied on the doctrine of *res judicata*. She denies that her initial and second applications were "the same" and argues that the General

Division should have given consideration to the fact that her overall medical condition significantly deteriorated after her initial application, and given that she had made contributions to the Canada Pension Plan.

[10] If a matter is *res judicata,* it precludes the rehearing or re-litigation of matters that have been previously determined. The Respondent argues that the Appellant is prevented from re-litigating the issue as to whether she was disabled on or prior to December 31, 2007, because the Pension Appeals Board Review Tribunal definitively settled this issue.

[11] The Respondent argues that the doctrine applies if the three conditions set out in *Danlyuk v. Ainsworth Technologies Inc.,* [2001] 2 S.C.R. 460 are met:

(a) the issue must be the same as the one decided in the prior decision;

(b) the prior decision must have been final; and

(c) the parties to both proceedings are the same.

[12] The Respondent submits that the three conditions are met in this:

> (1) The relevant facts and issues of the matter remain the same on this appeal of the second application for disability benefits dated April 4, 2014: whether the Appellant is disabled within the meaning of the *Plan* on or before December 31, 2007 and continuously thereafter. The Appellant's MQP date did not change even though she had made some CPP contributions in 2012 and 2013.
>
> (2) Both the Appellant and the Respondent are the same parties to both appeals.
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> (3) The Pension Appeals Board's August 27, 2012 is final and binding. The appeal rights with respect to the second application and decision of the Review Tribunal are exhausted. As such, the previous decision of the PAB is final and binding on the issue of disability as of the MQP of December 31, 2007.

[13] The Respondent submits that, as these three conditions were met, that the appeal before the General Division necessarily had to be dismissed for being *res judicata.*

[14] I reviewed the issue of whether a matter can properly be determined as *res judicata* in *D.K. v. Minister of Employment and Social Development,* 2015 SSTAD 1068 and noted there that in fact *Danlyuk* is generally cited for the proposition 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, even if the three conditions are met, one must still determine whether, "as a matter of discretion, issue estoppel ought to be applied". There is a two-step analysis involved in determining whether it is appropriate to apply the doctrine of *res judicata.* The General Division addressed the first of these two steps.

[15] 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.

[16] 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 held that "issue estoppel should be applied flexibly where an unyielding application of it would be unfair to a party who is precluded from re-litigating an issue". There is an overriding question of fairness involved, to avoid a potential injustice.

[17] The General Division did not undertake this second step analysis. In considering whether the General Division should have exercised its 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 Pension Appeals Board in July 2012, 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 appealed the decision of the Review Tribunal to the Pension Appeals Board, she did not further seek judicial review of the decision of the Pension Appeals Board, nor did she try to re-open the decision of the Pension Appeals board on the basis of former subsection 84(2) of the *Canada Pension Plan*. 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.

[18] The Appellant suggests that the doctrine should not apply, as her medical condition has changed since her initial application. She filed supporting medical records in this regards, as follows:

(a) initial referral and assessment forms; initial report dated April 30, 2014 and discharge summary dated July 22, 2014, from the Timmins & District Hospital (AD1-17 to AD1-23);

(b) diagnostic reports, various dates (AD1-24 to AD1-32); and

(c) emergency and out-patient records from Timmins and District Hospital, January 15, 2008 and August 13, 2008 (AD1-26 and AD1-28).

[19] Setting aside the issue of the admissibility of these additional records upon appeal, I note that they were produced after the end of the Appellant's minimum qualifying period of December 31, 2007, and therefore likely would not have been of any assistance in establishing that she was disabled by then. The doctrine of *res judicata* however does not consider the availability of any additional or updated records, or whether an appellant's medical condition has changed, as a factor in determining the appropriateness in applying it.

[20] The Appellant indicates that she has made additional contributions to the *Canada Pension Plan*. Valid contributions to the *Canada Pension Plan* could have extended the end of the minimum qualifying period. In such a case, the matter would not have been *res*

judicata. The General Division however noted that the Appellant's contributions in 2012 and 2013 did not extend her minimum qualifying period and that it remained unchanged at December 31, 2007.

[21] The Appellant's second application was bound to fail because there were no special circumstances which I can detect that would have brought the appeal within the exception to the doctrine of *res judicata.* Despite the fact that it did not undertake the second-step analysis, I am not persuaded that the General Division ought to have exercised its discretion and that it should have refused to apply the doctrine of *res judicata* in the circumstances of this case.

[22] The appeal amounts to a collateral attack on the decision of the Pension Appeals Board. The very issues that the Appellant raises in the present appeal were decided previously by the Pension Appeals Board. The decision of the Pension Appeals Board was final and conclusive and cannot now be attacked collaterally by this appeal.

ISSUE 2: NATURAL JUSTICE

[23] The Appellant contends that both the General and Appeal Divisions failed and are failing to observe a principle of natural justice and otherwise acting beyond its jurisdiction, when they have not and are not permitting the appeal to proceed "with her best foot forward", now that she has legal representation, which she did not have when her first application was being considered, by the Pension Appeals Board.

[24] The principles of natural justice are concerned with procedural fairness and serve to ensure that a claimant has been afforded adequate notice and a reasonable opportunity to prepare and present his claim and to defend against the case that might be brought against him. Essentially the Appellant's submissions amount to attacking the fairness of the procedures before the Pension Appeals Board, as she alleges that she was not afforded the opportunity to fully present her appeal without the assistance of legal representation. The Appellant's appeal before the Pension Appeals Board was conducted on a *de novo* basis. Had there been any concerns about the fairness of the hearing before the Pension Appeals Board, the Appellant's recourse was to pursue an application for judicial review of its

decision. The Appeal Division does not have any authority or jurisdiction to re-visit the decision of the Pension Appeals Board and determine whether she had been denied the opportunity to fairly present her case in those proceedings. In any event, there is no entitlement to a re-hearing on the basis that an appellant had not been represented in earlier proceedings. This does not amount to a failure to observe a principle of natural justice, by either the General Division or the Appeal Division.

[25] The Appellant retained counsel in August 2015, in response to the notice from the Social Security Tribunal that the General Division Member intended to summarily dismiss the appeal. Hence, it cannot be said that she had been deprived of the opportunity to have legal representation in the proceedings before the General Division. Indeed, counsel filed submissions and approximately 100 pages of medical documentation with the Social Security Tribunal on behalf of the Appellant.

[26] The Appellant continues to be represented by counsel, in the proceedings before me, and has not been deprived of an opportunity to proceed "with her best foot forward" in her appeal before the Appeal Division.

[27] I am not persuaded that General and Appeal Divisions failed to observe a principle of natural justice.

ISSUE 3: SUMMARY DISMISSAL

[28] The Appellant did not contest the appropriateness of the summary dismissal of her appeal before the General Division. A summary dismissal is appropriate when there are no triable issues or when there is no merit to the claim, or as the statute reads, there is "no reasonable chance of success". On the other hand, if there is a sufficient factual foundation to support an appeal and the outcome is not "manifestly clear", then the matter is not appropriate for a summary dismissal. A weak case is not appropriately summarily dismissed, as it involves assessing the merits of the case and examining the evidence and assigning weight to it.

[29] In this particular instance, the General Division ought to have examined any factors which might have existed for and against the exercise of its discretion in determining

whether to apply the doctrine of *res judicata*. However, these factors do not strike at the merits of the claim. The substance of the grounds advanced by the Appellant, namely, that her condition has significantly diminished over time, do not address any of the factors one might consider in the *Danlyuk* second-step analysis (or for that matter, any of the enumerated grounds of appeal under subsection 58(1) of the DESDA). For that reason, failing to consider these factors does not render the matter inappropriate for a summary dismissal.

DISPOSITION

[30] Although the General Division did not undertake the *Danlyuk* second- step analysis and determine whether it should exercise its discretion and apply the doctrine of *res judicata*, I find that the General Division ultimately arrived at the same conclusion I would have made, although for slightly different reasons. On that basis, the appeal is dismissed.

Janet Lew
Member, Appeal Division