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

Citation: *B. G. v. Minister of Employment and Social Development*, 2016 SSTGDIS 67

Tribunal File Number: GP-14-3345

BETWEEN:

B. G.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Income Security Section

DECISION BY: Jude Samson

DATE OF DECISION: August 30, 2016

Canada

REASONS AND DECISION

OVERVIEW

[1] The Appellant is a 60-year-old woman with a grade 12 education who claims to be disabled on account of her lupus, fibromyalgia, depression, osteoarthritis, diabetes, headaches, loss of balance, and lower back, groin and leg pain. She first applied for *Canada Pension Plan* (CPP) disability benefits on February 8, 2008 (2008 Application), but that application was denied by the Respondent at the initial and reconsideration levels, and her subsequent appeal to the Office of the Commissioner of Review Tribunals (OCRT) was dismissed on May 22, 2012.

[2] On March 22, 2013, the Appellant submitted a second application for CPP disability benefits (2013 Application). It too was denied by the Respondent at the initial and reconsideration levels. The reasons why the 2013 Application was denied were quite different from the reasons why the 2008 Application was denied. The 2013 Application was never considered on its merits. Rather, it was denied by the Respondent on the basis of *res judicata*, a legal doctrine meaning that the Appellant's application for disability benefits had been fully and finally decided by the OCRT in the course of the 2008 Application and should not be considered again.

[3] It is the reconsideration decision dated May 27, 2014, and resent to the Appellant on October 14, 2014 (GD2-6), that is now being appealed before the Social Security Tribunal (Tribunal).

[4] For the reasons that follow, the appeal is dismissed.

METHOD OF PROCEEDING

[5] This appeal proceeded by way of written questions and answers for the following reasons (GD0):

a) the issues under appeal are not complex;

b) there are gaps in the information in the file and/or a need for clarification;

c) credibility is not a prevailing issue; and

d) this method of proceeding respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

[6] The Tribunal's questions were set out in the Notice of Hearing dated April 11, 2016 (GD0). The Respondent's answers were received on May 27, 2016 (GD11), and the Appellant's answers were received on July 4, 2016 (GD12). The parties were given additional time to submit their answers and the Respondent was given additional time for reply, but no reply submissions were ever received from either party.

[7] In its submissions, the Respondent asked that the method of proceeding be changed from written questions and answers to a hearing by videoconference or teleconference due to the nature of the questions and the complexity of the issues raised (GD11-8). The Tribunal is satisfied with the answers and extensive submissions that it has received, both in documents GD4 and GD11. Accordingly, the Tribunal is not convinced that the method of proceeding should be changed and the Respondent's request is denied.

THE LAW

[8] Paragraph 44(1)(b) of the CPP sets out the eligibility requirements for obtaining a CPP disability pension. To qualify for the disability pension, an applicant must:

a) be under 65 years of age;

b) not be in receipt of the CPP retirement pension;

c) be disabled; and

d) have made valid contributions to the CPP for not less than the minimum qualifying period (MQP).

[9] The calculation of the MQP is important because a person must establish a severe and prolonged disability on or before the end of the MQP.

[10] Paragraph 42(2)(a) of the CPP defines disability as a physical or mental disability that is severe and prolonged. A person is considered to have a severe disability if he or she is incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death.

[11] As mentioned, however, the 2013 Application was denied on the basis of *res judicata*. Whether that doctrine applies must be decided first, prior to considering the merits of the Appellant's application (i.e. whether she meets the CPP's definition of "disabled").

ISSUE

[12] The issue that the Tribunal must decide, therefore, is whether the Respondent correctly denied the Appellant's 2013 Application on the basis of *res judicata*.

[13] The Appellant's MQP remains important for deciding this issue. The Appellant raised no objection to the way that the Respondent calculated her MQP. The Tribunal also agrees with that calculation and finds that the Appellant's MQP ended on December 31, 2009.

SUMMARY OF EVIDENCE AND ANALYSIS

[14] The Appellant first applied for CPP disability benefits on February 8, 2008 (GD2-136). As part of that application, she submitted a Questionnaire in which she stated that the illnesses or impairments that prevented her from working included lupus, fibromyalgia, diabetes, depression, osteoarthritis and upset stomach (GD2-268). She also mentioned that she is in constant pain, always tired, keeps losing her balance, has diabetic neuropathy, and is unable to stand for long periods because of her low back pain.

[15] Her application was denied by the Respondent at the initial and reconsideration levels. She appealed the reconsideration decision to the OCRT, which has since been replaced by this Tribunal. It appears as though her appeal was scheduled to be heard on November 3, 2009, but was adjourned to give her a chance to undergo further treatment and to obtain additional medical evidence (GD2-109 to 112). According to the OCRT's reasons for granting the adjournment (at GD2-112), the Appellant "was advised that the hearing should not be rescheduled unless she has submitted all of the reports that she intends to rely upon for the purpose of her appeal."

[16] The hearing was rescheduled for June 9, 2010, but was adjourned again (GD2-108). The Tribunal is unaware whether the OCRT provided reasons for the second adjournment; however, the Appellant wrote this at GD12-3:

> There was a second tribunal meeting at which point it was suggested that my doctor send me for further tests to maybe help my case. I was sent for another MRI on my back which showed a few more areas of decreased sensitivity. I also had a total bone scan with the dye injection and it showed increased areas of arthritis. My doctor also made an appointment with a psychiatrist for me and this was suggested by Mr. Seguin from CPP but as you know these appointment[s] take a while to get into."

[17] "Mr. Seguin from CPP" appears to be a reference to the Respondent's Representative who appeared before the OCRT.

[18] In the end, the OCRT heard the Appellant's appeal on March 27, 2012, and rendered its decision on May 22, 2012 (GD2-94 to 107). It is mentioned in the decision that the Appellant's family physician had sent a referral in November 2011 for her to see a Psychiatrist, Dr. Cattan, but that she was still waiting for her first appointment (GD2-99 and 100). However, there was no mention in the decision of there being a request for a further adjournment until Dr. Cattan's opinion could be obtained. On the subject of the Appellant's depression, the OCRT wrote this (at GD2-107):

> [53] With respect to her depression, it must be remembered that both the Appellant and her family doctor related the depression to her other medical issues, especially her pain. It is true that the Appellant also related her depression to some family issues; however, there is a total lack of supporting medical opinion that the depression was of such a severity as to constitute a severe medical condition as defined in the CPP.

[19] The Appellant was assessed by Dr. Cattan on November 16, 2012, though it appears that there was some delay before his reporting letter was received by the Appellant's family physician, which was then provided to the Respondent along with a fresh application for CPP disability benefits (i.e. the 2013 Application). Though this psychiatric evaluation may be what prompted the 2013 Application, the Appellant's condition has continued to evolve over time and she has undergone additional assessments and investigations, which have resulted in additional documents being submitted that were not part of the record before the OCRT. For example, she has recently undergone a knee replacement.

Application of the *res judicata* doctrine

[20] *Res judicata* is a legal doctrine, the principles of which were set out by the Supreme Court of Canada in various cases such as *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 (GD4-30), *British Columbia (Worker's Compensation Board) v. Figliola*, 2011 SCC 52 (GD11-105), and *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 (GD11-71).

[21] Generally speaking, *res judicata* means that, once a dispute has been finally decided, it cannot be litigated again. This doctrine is motivated in part by public policy reasons and is intended to advance the interests of justice. As stated by Justice Binnie in *Danyluk* (at para. 18): "[a]n issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided." As a result, it is often said that litigants must present their strongest case or "put their best foot forward" when they are first able to do so: *Danyluk* at para. 18. "Issue estoppel" is a branch of the *res judicata* doctrine, and the two terms are used somewhat interchangeably.

[22] *Danyluk* and subsequent decisions have confirmed that the *res judicata* doctrine can apply to administrative tribunals generally and to decisions of the OCRT in particular: *Penner* at para. 31, *Canada (MHRD) v. Macdonald*, 2002 FCA 48, and *Alves v. Canada (A.G.)*, 2014 FC 1100.

[23] In order for *res judicata* to apply, the following three preconditions must first be met:

a) the same question has already been decided;

b) the decision which is said to give rise to *res judicata* was final; and

c) the parties to the two proceedings are the same.

[24] There should be little doubt that these three preconditions have been met on the facts of this case:

a) First, the issue before the OCRT was identified at para. 7 of its reasons (GD2-98) as whether "it is more likely than not that the Appellant had a severe and prolonged disability on or before December 31, 2009." That is precisely the question that is also raised by the Appellant's 2013 Application. Her MQP has not changed. Since the 2008 Application, the Appellant has not made any further contributions to the CPP that would extend her MQP and provide a further time period that could be adjudicated upon.

b) Second, the decision made by the OCRT was final. Though the Appellant had the option of appealing to the Pension Appeals Board or of trying to re-open her case before the OCRT, she chose not to do so. Section 84 of the CPP, as it was written at the time of the OCRT decision in May 2012, stated the following:

> **Authority to determine questions of law and fact**
>
> **84. (1)** A Review Tribunal and the Pension Appeals Board have authority to determine any question of law or fact as to
>
> (a) whether any benefit is payable to a person,
>
> (b) the amount of any such benefit,
>
> (c) whether any person is eligible for a division of unadjusted pensionable earnings,
>
> (d) the amount of that division,
>
> (e) whether any person is eligible for an assignment of a contributor's retirement pension, or
>
> (f) the amount of that assignment,
>
> And the decision of a Review Tribunal, except as provided in this Act, or the decision of the Pension Appeals Board, except for judicial review under the *Federal Courts Act*, as the case may be, is final and binding for all purposes of this Act.

c) And third, the parties in both proceedings are the same.

[25] If these criteria are satisfied, then *res judicata* can and will frequently apply. However, the Supreme Court of Canada recognized in *Danyluk* that a rigid application of the doctrine could result in an injustice. As a result, decision-makers retain a residual discretion to

determine whether *res judicata* should be applied on the facts of any given case or not. Indeed, the Supreme Court in *Danyluk* went on to set out a non-exhaustive list of seven relevant factors that can be considered when faced with such a decision. Those factors are:

a) the wording of the statute pursuant to which the first decision was made;

b) the purpose of the legislation;

c) the availability of an appeal;

d) safeguards available to the parties in the administrative procedure;

e) the expertise of the administrative decision-maker;

f) the circumstances giving rise to the prior administrative proceeding; and

g) potential injustice.

[26] In this respect, the Respondent submits that the residual discretion available to the Tribunal is different from the discretion that is available to the courts. He submits that the Tribunal's discretion is more limited since, for example, the Tribunal has only the powers given to it by its enabling statutes and lacks the jurisdiction to make decisions based on principles of equity.

[27] In his submissions, the Respondent has not set out the precise scope of the Tribunal's residual discretion in much more detail. But in short, the Respondent argues that the Tribunal's residual discretion is narrow and that prior decisions have shown that it should only be exercised in extraordinary circumstances, none of which are present here.

[28] Though not stated in these precise terms, the Appellant's argument appears to be that there is new evidence from her psychiatrist – evidence that the Respondent's Representative encouraged her to obtain – that she has recently received and ought to be considered. This argument might be considered under a few of the factors listed above:

a) **Insufficient safeguards.** At the time the appeal was heard in March 2012, it was recognized that the Appellant had an outstanding referral to a psychiatrist, though the

OCRT did not wait to obtain that additional information prior to making its decision. However, the OCRT demonstrated that it was open to granting adjournments so that the Appellant could obtain additional medical information. The hearing was originally scheduled for November 3, 2009, but appears to have been adjourned twice for precisely this reason. At the time of the first adjournment, the Appellant was advised not to reschedule her appeal unless she had submitted all of the reports on which she intended to rely for the purpose of her appeal (GD2-112, para. 7). It should also be noted that there is no evidence of an additional adjournment being sought (or denied) for the purpose of obtaining this psychiatric assessment. In the circumstances, the Tribunal cannot find that there was a lack of safeguards available to the Appellant.

b) **Relevant Circumstances.** The Appellant has been unrepresented throughout these lengthy proceedings and claims to have been encouraged by the Respondent's Representative to obtain a psychiatric assessment, though it is unclear when he might have made that recommendation. It is well known, according to the Appellant, that psychiatrists have long wait lists, meaning that she was unable to obtain this assessment in a timely way.

c) **Potential Injustice.** This factor is entitled to considerable weight. Overall, would the application of *res judicata* cause an injustice to the Appellant? In the present case, there is little doubt that the Appellant was aware of the case that she had to meet and was provided with an adequate opportunity to respond. The Appellant's 2008 Application was submitted on February 8, based in part on her depression, though that claim was not supported by the evidence of a psychiatrist. Even if, as the Appellant claims, the Respondent's Representative suggested that she obtain a psychiatric assessment to bolster her case, she does not claim to have been told that she had an indefinite length of time to do so. Her MQP expired on December 31, 2009. And her appeal was not heard by the OCRT until March 27, 2012. Within all of that time, the Appellant never obtained the opinion of a psychiatrist; she failed to "put her best foot forward" prior to the hearing before the OCRT. In the circumstances, the Tribunal concludes that the Appellant's interests must yield to the interests of efficiency and finality.

[29] In reaching its decision, the Tribunal has also considered that the 2008 and 2013 Applications were brought essentially in the same context and pursuant to the same statutory scheme. While the OCRT and Tribunal are different, the Tribunal succeeded the OCRT in 2013, and the two have similar expertise. In addition, the Appellant had options to try and appeal or re-open the OCRT decision on the basis of new evidence, but she chose not do so.

CONCLUSION

[30] The Appellant's 2008 Application first came before the OCRT in 2009. She was given two adjournments to explore further treatments and to obtain additional medical evidence before her appeal was fully and finally decided by the OCRT in 2012. In 2011, she was referred to see a psychiatrist, but did not obtain the report of his assessment until 2013. Although the Appellant's MQP did not change in the intervening years, she asked that additional evidence, including the psychiatric assessment, be considered by the Respondent as part of a fresh application.

[31] Allowing the Appellant's request in circumstances such as these would encourage duplicative litigation, inconsistent results, undue costs, and inconclusive proceedings, all of which the Supreme Court of Canada has said should be avoided.

[32] For all of these reasons, the Tribunal is satisfied that the Respondent correctly denied the 2013 Application on the basis of *res judicata*. The three preconditions for the application of *res judicata* have been satisfied and the Tribunal was unable to find special circumstances that would justify an exercise of its residual discretion to prevent the application of that legal doctrine.

[33] The appeal is dismissed.

Jude Samson
Member, General Division - Income Security