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

Citation: *C. M. v. Minister of Employment and Social Development*, 2016 SSTADIS 382

Tribunal File Number: AD-15-1141

BETWEEN:

C. M.

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: September 30, 2016

REASONS AND DECISION

OVERVIEW

[1] At its core, this appeal is about whether the General Division erred in determining that the matter before it was *res judicata* and whether, at the outset, it ought to have converted the Appellant's appeal to an application to rescind or amend the decision of the Canada Pension Plan Review Tribunal rendered on June 16, 2005.

[2] The Appellant appeals a decision dated October 5, 2015 of the General Division, which summarily dismissed her appeal of a decision denying her application for a disability pension under the *Canada Pension Plan*, on the basis that it was *res judicata.* The Appellant filed an appeal of the decision of the General Division on October 23, 2015 (the "Notice of Appeal"). The Appellant generally does not contest the applicability of the doctrine of *res judicata.* Rather, she argues that the General Division ought to have converted her appeal to an application to rescind or amend the decision of the Review Tribunal.

[3] 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 paragraph 37(a) of the *Social Security Tribunal Regulations.*

ISSUES

[4] The issues before me are as follows:

1. Was the General Division required to convert the Appellant's appeal to an application to rescind or amend the decision of the Canada Pension Plan Review Tribunal rendered on June 16, 2005?

2. Did the General Division err in determining that the matter before it was *res judicata*?

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

HISTORY OF PROCEEDINGS

[5] The relevant history is as follows:

- The Appellant applied for a Canada Pension Plan disability benefit in March 2004. The Appellant's minimum qualifying period ended on December 31, 2004. The Minister denied her application initially and upon reconsideration. She appealed the reconsideration decision to a Review Tribunal. On June 16, 2005, a Review Tribunal heard the matter and dismissed her appeal, as it found that her disability was not severe and prolonged (GD4-456 to GD4-460). The Appellant sought to appeal the decision of the Review Tribunal to the Pension Appeals Board. The PAB refused to allow an extension of time to appeal.

- The Appellant applied for a Canada Pension Plan disability benefit a second time, on August 24, 2006. The minimum qualifying period remained unchanged. The Respondent denied her second application. The Appellant did not seek a reconsideration.

- The Appellant applied for a Canada Pension Plan disability pension a third time, on November 12, 2009. The minimum qualifying period remained unchanged. The Respondent denied this third application. Again, the Appellant did not seek a reconsideration.

- The Appellant applied for a Canada Pension Plan disability pension a fourth time, on July 13, 2010. The minimum qualifying period remained unchanged. The Respondent denied this fourth application initially and upon reconsideration. The Appellant did not appeal this reconsideration decision.

- The Appellant applied for a Canada Pension Plan disability pension a fifth time, on May 6, 2013. The minimum qualifying period remained unchanged. The Respondent denied this fifth application initially and upon reconsideration.

The Appellant appealed the reconsideration decision to the General Division. The General Division denied her appeal on October 5, 2015.

GROUNDS OF APPEAL

[6] Subsection 58(1) of the DESDA sets out the only grounds of appeal to the Appeal Division. 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: CONVERSION OF APPEAL TO RESCIND OR AMEND APPLICATION

[7] The Appellant claims that the General Division was required to convert the appeal to an application to rescind or amend, as there were "new facts" before it. The Appellant relies on *Callihoo v. Canada (Attorney General),* 2000 CanLII 15292 (FC) at para. 22, in arguing that "new facts" is an exception to the doctrine of *res judicata*. That decision however deals with applications for leave, and I find that it has no applicability to the proceedings before me.

[8] The Appellant contends that the General Division has jurisdiction to convert appeals to applications to rescind or amend, as "there does not appear to be any time limit imposed for such an application" (AD4-2). She argues that as section 66 of the DESDA is the "successor section to the previous Section 82 [*sic*] *of* the *Canada Pension Plan",* previous case law is persuasive regarding treatment of such applications.

[9] The Respondent submits that the Appellant has not raised any grounds of appeal and claims that there is no authority or any basis in law which required the General Division to convert the appeal to an application to rescind or amend. The Respondent argues that the application of May 6, 2013 is well past the one-year time limit for bringing on an application to rescind or amend and is therefore statute-barred under subsection 66(2) of the DESDA. The Respondent further argues that the Appellant has not raised any "new facts", as that term is defined under the DESDA, with this May 6, 2013 application and that she therefore cannot avail herself of the provisions of section 66 of the DESDA.

[10] The Respondent suggests that the Appellant was required to give notice that she intended to have her May 6, 2013 application heard as a "new facts" application. The Appellant suggests that her submissions of October 23, 2015 (i.e. the Notice of Appeal) serve as notice. The Appellant asserts that any "new facts" applications are not limited or barred by time, and that, provided that there are "new facts", the General Division has the discretion to convert an appeal to a new facts application at any time.

[11] Notwithstanding the notice issue, the Respondent contends that only the General Division has jurisdiction to hear an application to rescind or amend a decision of the Review Tribunal, as the General Division is limited to considering rescinding or amending its own decisions. The Respondent maintains that, as the application to rescind or amend is statute-barred, the General Division does not have any jurisdiction to exercise any discretion to convert the Canada Pension Plan disability application to a new facts application. I concur with these submissions that a rescission or amendment of a decision can be performed by only the Division of the Social Security Tribunal (or by the Respondent) that made that decision. Subsection 66(4) of the DESDA stipulates that a decision is rescinded or amended by the same Division that made it. The Appeal Division is empowered under section 66 of the DESDA to rescind or amend its own decision.

[12] The Appellant claims that there are no time limits for applications to rescind or amend. However, subsection 66(2) reads as follows:

> **66.** (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.

[13] The decision which the Appellant seeks to have rescinded or amended was rendered in June 2005, several years before the DESDA came into force and effect.

[14] I examined the issue of a statutory time limit in *J.C. v. Minister of Employment and Social Development,* 2016 SSTADIS 223, where an applicant had made an application to rescind or amend on April 24, 2013, fifteen months after the decision of the Review Tribunal had been communicated to her. The Respondent argued that the application to rescind or amend in that case was statute-barred under subsection 66(2) of the DESDA. I dismissed this argument, as effectively it would have the effect of imposing a time limitation and bar applicants from ever being able to apply to rescind or amend any decisions which had been communicated on or prior to April 1, 2012, if they had not already made such an application by April 1, 2013. I determined that Parliament could not have intended that an applicant's right to make an application to rescind or amend could be retroactively extinguished by imposing a deadline that never existed when the Review Tribunal decision was communicated. Ultimately, I found there to be a deeming provision under the *Jobs, Growth and Long-term Prosperity Act* (JGLPA), whereby the one-year limitation period under subsection 66(2) of the DESDA commences as of April 1, 2013, rather than from the date when the decision was communicated. I find *J.C.* to be applicable in these same circumstances, to the extent that an application to rescind or amend had actually been made.

[15] A review of the jurisprudence suggests that the General Division can take the initiative and convert an appeal into a new facts application, provided that the presiding member advises the parties prior to the hearing that the appeal has been converted to a new facts application and invites submissions from the parties as to the appropriateness of proceeding in that manner.

[16] In *Adamo v. Canada (Minister of Human Resources Development),* 2006 FCA 156, the Federal Court of Appeal held at paragraph 36 that the Review Tribunal was required to notify the parties that it was considering the grant of a remedy pursuant to the former subsection 84(2) of the *Canada Pension Plan* and to invite submissions as to whether this remedy was available, although the applicant had not sought such relief. The Federal Court of Appeal determined that the Review Tribunal "could not dispose of the matter pursuant to

subsection 84(2) without giving the parties the occasion to be heard on the issues which arise under that provision". The Review Tribunal proceeded to hear the appeal under subsection 84(2) of the *Canada Pension Plan*.

[17] Similarly, in *Canada (Attorney General) v. Jagpal*, 2008 FCA 38 at para. 31, the Federal Court of Appeal held that the Pension Appeals Board was required to inform the applicant and invite submissions from him on the respondent's application to rescind a Board's decision pursuant to subsection 84(2) of the *Canada Pension Plan*, otherwise it would result in a breach of natural justice.

[18] There is no indication in the jurisprudence that the presiding member is required to convert an appeal into a new facts application, although in *Kent v. Canada (Attorney General)*, 2004 FCA 420, Sharlow J.A. suggested that it would be unreasonable to deprive an applicant of her entitlement to a disability pension on the rather technical ground that the Review Tribunal should not have admitted the new facts that, in the result, established her entitlement.

[19] The legislative backdrop has however changed since *Kent*, as the legislation now imposes limitations on the number of "new facts" applications which can be made, and when such applications must be made. Consequently, if an applicant is statute-barred or has made a previous application to rescind or amend, he or she will be precluded from making future or subsequent applications to rescind or amend. An applicant cannot now rely on *Kent* to overcome what might have been considered "technical ground[s]", where he or she otherwise might have been found disabled.

[20] I query also whether the General Division (or, for that matter, the Appeal Division) now has the jurisdiction to convert an appeal to an application to rescind or amend, given the language of section 66 of the DESDA. Unlike the former subsection 84(2) of the *Canada Pension Plan*, which did not refer to applications, section 66 of the DESDA now refers to applications. I need not resolve this question for the purposes of this appeal.

[21] The Appellant indicates that notice of the application to rescind or amend was given on October 23, 2015. However, the General Division by then had rendered its decision, on October 5, 2015. Furthermore, that application had been directed to the Appeal Division, as it was described by the Appellant as an "Appeal to Appeal Division of the Social Security Tribunal".

[22] The Appellant argues that the General Division member misdirected himself, but as notice had not been given, the member could not have been aware that the appeal (of May 6, 2013) had been intended to be an application to rescind or amend.

[23] As the Appellant did not give notice of an application to rescind or amend until more than a year had elapsed after April 1, 2013, I find the application to be statute- barred under subsection 66 of the DESDA. The notice should have been provided within a year after section 66 of the DESDA came into force and effect on April 1, 2013.

ISSUE 2: *RES JUDICATA*

[24] Notwithstanding the fact that I have determined that the Appellant was out of time in making an application to rescind or amend, I must still determine the appropriateness of the summary dismissal procedure. The General Division relied on the doctrine of *res judicata* to summarily dismiss the appeal.

[25] The General Division determined that the doctrine of *res judicata* applies if the following three conditions 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 must be the same.

[26] If a matter is *res judicata,* it precludes the rehearing or re-litigation of matters that have been previously determined. Having found that these three conditions had been met, the General Division member determined that the principle of *res judicata* applies.

[27] I reviewed the issue of whether a matter can properly be determined to be *res judicata* in *D.K. v. Minister of Employment and Social Development,* 2015 SSTAD 1068 and noted there that in fact *Danlyuk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460 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.

[28] 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.

[29] 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 relitigating an issue". There is an overriding question of fairness involved, to avoid a potential injustice.

[30] The General Division did not undertake this second step analysis.

[31] The Appellant suggests that the doctrine of *res judicata* should not apply, as her medical condition has changed since her initial application. She had filed supporting medical records with the General Division, which she claims constitute "new facts", as follows:

(a) report dated February 4, 2004 of Dr. Martin Willans, consulting rheumatologist (GD4-753 and at GD4-516) – the Appellant submits that this report establishes that she had been seeing Dr. Willans for the past six to seven years. The report does not in fact state that. Dr. Willans reviewed her medications and treatment plan;

(b) report dated May 30, 2004 of Dr. Willans (GD4-517 to GD4-519 / GD4- 729 to GD4-731) – this report suggests that he first examined the Appellant on April 29, 2003;

(c) report dated April 29, 2003 of Dr. Willans, in which he diagnosed the Appellant with fibromyalgia and recommended Gabapentin 300 mg (GD4-52);

(d) report dated June 15, 2006 of Dr. James Seligman, orthopaedic surgeon, who diagnosed the Appellant with progressive neck and lower back pain for the past 10 years and a history of fibromyalgia (GD4-46 / GD4-305 / GD4-415);

(e) report dated September 15, 2006 of Dr. M. Batorowicz, anaesthesiologist, who supported the diagnosis of chronic degenerative arthritis of the spine with pain and fibromyalgia aggravated by depression (GD4-48 to GD4-49 / GD4-312 to GD4-313);

(f) report dated May 30, 2006 of Dr. Chandrasena, psychiatrist, who diagnosed the Appellant with a major depressive disorder, general anxiety disorder, panic attacks, substance ,and a GAF score of 50 (GD4-412 to GD4-413);

(g) report dated July 18, 2006 of Dr. MacPherson, who indicated that the Appellant had been admitted to the hospital's psychiatric unit, having had severe bouts of depression (GD4-416 to GD4-417); and

(h) report dated May 11, 2011 of the Appellant's family physician, who was of the opinion that the extent of the Appellant's medical disability only became apparent after the end of her minimum qualifying period, because the Appellant was unprepared to fully discuss her mental health issues, even at the hearing before the Review Tribunal, as it aggravated her post- traumatic stress disorder, depression, mood swings and other associated behaviours.

[32] The 2003 and 2004 reports were before the Review Tribunal. The 2006 and 2011 reports did not become available until after the hearing before the Review Tribunal.

[33] A review of the decision of the Review Tribunal indicates that it was aware of the Appellant's mental health issues. Indeed, the Review Tribunal acknowledged that depression had been a problem for the Appellant and that she was to see a psychiatrist in the near future.

[34] The Review Tribunal noted that the Appellant had seen Dr. Cooper on March 23, 2004. The Review Tribunal wrote that Dr. Cooper (whose report is at GD4-509 to GD4-510) was of the opinion that:

> The Appellant had a drug and alcohol dependency and has had three rehabilitation programs and had display mental instability. She has not been treated by a psychiatrist for seven years. She now displays no evidence of depressive disorder. (GD4-458)

[35] The Review Tribunal also noted that the Appellant had seen Dr. Russell on January 20, 2005. The Review Tribunal noted that Dr. Russell was of the opinion that there was no anxiety or depression and that he had concluded that there were no psychological limitations to returning to work (GD4-459). (Dr. Russell's report is at GD4-611 to GD4-619.)

[36] 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.

[37] 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 Review Tribunal in June 2005, the Appellant was aware of the case she had to meet, she had a reasonable opportunity to meet it and she was provided with an opportunity to state her own case. I find also that, while the Appellant sought to appeal the decision of the Review Tribunal to the Pension Appeals Board, she was unsuccessful in obtaining an extension of time to file her appeal, nor did she try to previously re-open the decision of the Review Tribunal on the basis of the 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.

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

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

ISSUE 3: SUMMARY DISMISSAL

[40] 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.

[41] There are no exceptions to and no basis to overcome the deeming provisions under paragraph 42(2)(b) of the *Canada Pension Plan* (short of establishing incapacity, which is not the case here), and the Appellant accordingly could not have been deemed disabled earlier than the 15-month maximum retroactivity before her application for a disability pension. On the facts of this case, there was no reasonable chance of success and the General Division appropriately summarily dismissed the matter.

DISPOSITION

[42] The appeal is dismissed.

Janet Lew
Member, Appeal Division