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

Citation: *D. M. v. Minister of Employment and Social Development,* 2016 SSTADIS 450

Tribunal File Number: AD-16-361

BETWEEN:

D. 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: November 22, 2016

Canada

REASONS AND DECISION

OVERVIEW

[1] At its core, this appeal is about whether the General Division erred in determining that the issue as to whether the Appellant was disabled on or before November 23, 1999 was *res judicata* and whether it failed to consider subsection 81(3) of the *Canada Pension Plan.*

[2] 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

[3] The issues before me are as follows:

1. Did the General Division err in determining that the issue as to whether the Appellant could be found disabled on or before November 23, 1999 was *res judicata,* and that she therefore could only be entitled to a disability pension if she became disabled between November 23[1], 1999 and December 31, 1999?

2. Did the General Division fail to consider subsection 81(3) of the *Canada Pension Plan* which permits the Respondent to reconsider a decision based on new facts?

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

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[1] Properly the General Division should have determined whether the Applicant became severely disabled between November 24, 1999 and December 31, 1999 but, for the purposes of this appeal, I will refer to the commencement date as November 23, 1999.

4. What is the appropriate disposition of this matter?

HISTORY OF PROCEEDINGS

[4] The relevant history is as follows:

- The Appellant applied for a Canada Pension Plan disability pension in November 1998 (GD3-123 to GD3-126). The Appellant's minimum qualifying period ended on December 31, 1999. The Respondent denied her application initially and upon reconsideration. She appealed the reconsideration decision to a Review Tribunal. On November 23, 1999, a Review Tribunal heard the matter and in a decision dated February 7, 2000, dismissed her appeal, as it found that her disability was not severe (GD3- 135 to GD3-136). The Appellant did not seek leave to appeal the decision to the Pension Appeals Board.

- The Appellant applied for a Canada Pension Plan disability pension a second time, on April 5, 2013 (GD3-33 to GD3-36). The minimum qualifying period remained unchanged. The Respondent denied her second application. The Appellant appealed the decision to the General Division, which summarily dismissed her appeal on November 27, 2015. The General Division determined that the appeal before it was largely *res judicata* and also determined that the Appellant's condition had otherwise not become severe between November 23, 1999 and December 31, 1999.

- The Appellant filed an appeal of the decision of the General Division on February 26, 2016 (the "Notice of Appeal"). On March 1, 2016, the Social Security Tribunal notified the parties that they had until April 12, 2016 to file any submissions.

- The Respondent filed submissions on April 8, 2016, arguing that this appeal should be dismissed because the Appellant had failed to raise any grounds of appeal under subsection 58(1) of the DESDA. The Respondent further argued

that there was no basis for the General Division to consider any "new facts" as the Appellant had not raised any, and as there was no legal authority under subsection 81(3) of the *Canada Pension Plan* to rescind or amend a reconsideration decision of the Respondent. The Respondent further argues that the decision of the Review Tribunal was final and binding, and that the General Division could only review the period from November 23, 1999 until the end of her minimum qualifying period on December 31, 1999. The Respondent argues that, in any event, the Appellant has not adduced any medical evidence to support a finding that her disability had become severe between November 23, 1999 and December 31, 1999.

- On April 12, 2016, the Appellant made a request for an extension to file submissions. The Appellant's counsel advised that he was in the process of obtaining new information regarding the Appellant's condition and ability to work. This would include additional medical information and a vocational rehabilitation assessment, which he argued would establish that the Appellant's disability was severe on or before the end of her minimum qualifying period on December 31, 1999. He anticipated that an extension of two to three months would be appropriate for the parties to review and make submissions in respect of this additional information. Otherwise, the Appellant's counsel requested a one-week extension to address the issue of *res judicata*.

- No additional submissions or further requests for an extension of time have been received from the parties, despite enquiries from the Social Security Tribunal to the Appellant's counsel.

GROUNDS OF APPEAL

[5] 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: *RES JUDICATA*

[6] If a matter is *res judicata*, it may preclude the rehearing or re-litigation of matters that have been previously determined.

[7] In following *Danlyuk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, the General Division determined that where the same issue had been decided by a previous tribunal, the parties to both proceedings were the same, and the decision was final, that that decision of the previous tribunal was final and binding, under the doctrine of *res judicata.* The General Division determined that the doctrine applied to the decision of the Review Tribunal and that its decision (that the Appellant's disability was not severe as of the date of hearing on November 23, 1999) was final and binding.

[8] 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* 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 but did not undertake the second-step analysis.

[9] 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 several 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.

[10] 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.

[11] The Appellant suggests that the doctrine of *res judicata* should not apply because subsection 81(1) of the *Canada Pension Plan* should apply. She alleges the subsection permits the Respondent to reconsider a decision based on "new facts". Yet, the Appellant did not file any "new facts" or documents in support of a "new facts" application or an application to rescind or amend as she instead now proposes to file additional medical information, including a vocational rehabilitation assessment.

[12] In considering whether the General Division should have exercised its discretion in applying the doctrine of *res judicata*, and as stated in *Minott*, in trying to achieve a "certain balance between the needs for fairness, efficiency and predictability of outcome," one

should look to see whether, in the proceedings before the Review Tribunal in November 1999, the Appellant was aware of the case she had to meet, had a reasonable opportunity to meet it and was provided with an opportunity to state her own case.

[13] There is no indication here before me that the Appellant had been unaware of the case she had to meet, or that she did not have a reasonable opportunity to or had been denied an opportunity to state her case. The Appellant also did not appeal the decision of the Review Tribunal to the Pension Appeals Board, nor did she endeavour to re-open the decision of the Review Tribunal under the former subsection 84(2) of the *Canada Pension Plan*. As such, I find that the Appellant has not been deprived of the opportunity to have her claim to a disability pension properly assessed and adjudicated, for the period up to and including November 23, 1999.

[14] The Appellant's second application for a disability pension, where it pertains to the timeframe up to and including November 23, 1999, 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 set out in *Danlyuk*, 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.

[15] The decision of the Review Tribunal was final and conclusive. The very issues that the Appellant raised in her appeal to the General Division were decided previously by the Review Tribunal, where it pertained to the timeframe up to and including November 23, 1999. The appeal to the General Division, where it pertained to this timeframe, amounted to a collateral attack on the decision of the Review Tribunal.

[16] Given the applicability of the doctrine, the General Division was well within its jurisdiction in deciding that the Appellant could only be entitled to a disability pension if she became disabled for the purposes of the *Canada Pension Plan* within the window of time between November 23, 1999 and December 31, 1999.

[17] This same determination was made by the Federal Court of Appeal in *Minister of Human Resources Development v. Hogervorst*, 2007 FCA 41. There, a Review Tribunal dismissed Ms. Hogervorst's appeal on November 4, 1997, informing her that she could appeal its decision to the Pension Appeals Board within 90 days or such longer period as the Chairman or Vice-Chairman of the Board might allow. Ms. Hogervorst did not appeal the decision of the Review Tribunal, which became final and binding under subsection 84(1) of the *Canada Pension Plan.*

[18] Ms. Hogervorst made a second application for disability benefits in January 2000. The minimum qualifying period in her case ended on December 31, 1997. The Federal Court of Appeal determined that as the November 4, 1997 decision of the Review Tribunal was final and binding, Ms. Hogervorst, through her second application, could be entitled to disability benefits only if she established that she became disabled between November 5 and December 31, 1997, the day she last satisfied the contributory requirements. This second application was denied initially and upon reconsideration by the Minister. Ms. Hogervorst appealed the reconsideration decision to a Review Tribunal, which dismissed the appeal as it did not find any new facts with respect to the first decision and as it had not been satisfied that she did not develop a severe and prolonged disability between November 5 and December 31, 1997.

[19] There is no suggestion in the proceedings before me that the Appellant argued that there were "new facts" or had in fact presented any "new facts" before the General Division, as that term is defined under subsection 66(1) of the DESDA, for the period prior to November 23, 1999. Consequently, short of establishing "new facts" with respect to the decision of the Review Tribunal, the General Division was left to determining whether the Appellant had developed a severe and prolonged disability between November 23, 1999 and December 31, 1999.

ISSUE 2: "NEW FACTS"

[20] The Appellant claims that the General Division failed to consider subsection 81(3) of the *Canada Pension Plan* which permits the Respondent to reconsider its decision based on new facts.

[21] Subsection 81(3) of the *Canada Pension Plan* reads

> **Rescission or amendment of decision**
>
> **(3)** The Minister may, on new facts, rescind or amend a decision made by him or her under this Act.

[22] The subsection does not involve the possibility of rescinding or amending decisions of a Review Tribunal or, for that matter, the General Division. Instead, the subsection involves the possibility of rescinding or amending decisions made by the Respondent, based on new facts.

[23] Put another way, the subsection does not confer any jurisdiction or authority on the General Division to rescind or amend any reconsideration decisions of the Respondent. Thus, there was no error or failure on the part of the General Division when it did not consider subsection 81(3) of the *Canada Pension Plan*.

[24] The Appellant suggests that there were "new facts" accompanying her appeal to the General Division. The "new" records in the appeal before the General Division consists of the records at pages GD3-10, 11, 14, 15, 66 to 67, 69 to 73, and 73 to 89, 91 to 94, 95, 96 and 97. As I have indicated above, the Appellant did not argue nor present these as "new facts" in the appeal before the General Division.

[25] A review of the jurisprudence suggests that, prior to April 1, 2013, the Review Tribunal and the Pension Appeals Board could take the initiative and convert an appeal into a new facts application, provided that the presiding member advised the parties prior to the hearing or determination of the matter that the appeal had been converted to a new facts application and invited submissions from the parties as to the appropriateness of proceeding in that manner.

[26] 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 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*.

[27] 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.

[28] There is no indication in the jurisprudence that a Review Tribunal or the Pension Appeals Board was 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.

[29] Subsection 84(2) of the *Canada Pension Plan* is no longer available to applicants who wish to re-open a decision on the basis of new facts. Rather, since April 1, 2013, applicants are now left with section 66 of the DESDA, which imposes strict limits with respect to the number of applications (to rescind or amend) which may be made, and when an application may be made. Section 66 of the DESDA, on its own, suggests that the General Division (or, for that matter, the Appeal Division) could, of its own accord, convert an appeal to an application to rescind or amend, given that the language of the section stipulates that the Tribunal may rescind or amend a decision given by it upon the occurrence of a triggering event, namely, when an application has been made. However, when read with sections 45 to 48 of the *Regulations*, it is apparent that an application to rescind or amend must be brought by filing an application and that it be the form set out by the Tribunal.

[30] Notwithstanding these provisions, even had there been an application to rescind or amend the decision of the Review Tribunal before it, the General Division nonetheless

would need to be satisfied that any new material fact could not have been discovered at the time of the hearing before the Review Tribunal with the exercise of reasonable diligence. This would involve determining whether:

(a) there was a new material fact, i.e. the evidence must reasonably be expected to affect the result of the prior hearing (the "materiality" test); and

(b) the new fact could not have been discovered at the time of the original hearing with the exercise of due diligence (the "discoverability" test).

[31] At no time has the Appellant ever offered how any of the "new facts" in the way of new records meet either the materiality or discoverability tests. Given that the medical opinions before the General Division remained largely unchanged from those before the Review Tribunal, it cannot be said that the discoverability or materiality test would have been met. Indeed, the Appellant seems to acknowledge as much by suggesting that a vocational assessment and additional medical records are required for any application based on "new facts".

[32] The Appellant suggests that she will obtain additional medical information, including a vocational rehabilitation assessment. If the Appellant's representative intends to file additional medical records in an effort to rescind or amend the decision of the Review Tribunal or of the General Division (the latter with respect to the timeframe after November 23, 1999 and up December 31, 1999), the Applicant must comply with the requirements set out in sections 45 and 46 of the *Social Security Tribunal Regulations*, and must also file an application for rescission or amendment. There are strict deadlines and requirements under section 66 of the DESDA for rescinding or amending decisions. Subsection 66(2) of the DESDA, for instance, requires an application to rescind or amend a decision to have been made within one year after the day on which a decision is communicated to a party, while paragraph 66(1)(b) of the DESDA requires an applicant to demonstrate that the new facts are material and could not have been discovered at the time of the hearing with the exercise of reasonable diligence.

[33] Finally, on this issue, I am mindful that sections of the General Division hearing file were redacted, presumably by or on behalf of the Respondent (GD3-31). Document disclosure is not predicated on which party bears the onus of proof. The parties and the Tribunal rely upon full document disclosure and production by each of the parties to the proceedings. Full document disclosure and production is vital, subject to proper claims of privilege, to ensure that the administration of justice does not fall into disrepute. It undermines confidence in the administrative tribunal process and undermines the integrity of the decision-making processes if documents, possibly of a relevant and material nature, are withheld. There can be no confidence in the administrative tribunal process if the parties are unable to properly prepare their cases; similarly, confidence in the decision-making process is undermined if a decision-maker has been deprived of any relevant and material documents, as he or she cannot then make a fully informed decision.

[34] No claim of privilege has been asserted over those documents which have been redacted. Nonetheless, even had privilege been claimed, as my colleague aptly pointed out in *Canada Employment Insurance Commission v. D.I. Inc.* (November 4, 2016), SSTAD-15-898 and SSTAD-15-899 (currently unreported):

> [35] . . . it is not appropriate for the Commission, a party to the appeal, to be determining whether or not evidence is relevant and should or should not be redacted. That is the role of the Tribunal member as established in the DESDA, the *Social Security Tribunal Regulations*, and the general powers of all administrative tribunals to manage their own proceedings.

[36] Indeed, upon his review of documents over which the Canada Employment Insurance Commission had claimed privilege, my colleague determined that the claims of privilege were misplaced and that the documents were indeed relevant.

[37] Ordinarily I would order that documents which have been redacted be produced, but in the circumstances of this case, if the Appellant is arguing “new facts”, surely there must be a basis or foundation upon which that claim is being advanced, and it is not reliant on speculation as to what may or may not be contained in the documents of the Respondent.

ISSUE 3: APPROPRIATENESS OF SUMMARY DISMISSAL

[38] A summary dismissal is appropriate when there are no triable issues, when there is no merit to the claim, or as subsection 53(1) of the DESDA 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.

[39] The issue of whether the Appellant could be found disabled on or before November 23, 1999 was *res judicata*. Had that issue alone been the only matter before the General Division, the appeal clearly would have been appropriately summarily dismissed. However, the issue of whether the Appellant could be found disabled for the purposes of the *Canada Pension Plan* between November 23, 1999 and December 31, 1999 was also before the General Division.

[40] The Respondent argues that the Appellant did not furnish any medical evidence to support a finding that her disability had become severe between November 23, 1999 and December 31, 1999. If the Appellant had failed to adduce any evidence that addressed this window of time, then the matter clearly would have been appropriately summarily dismissed.

[41] However, if the Appellant adduced any evidence which required the General Division to assess for the purposes of determining whether the Appellant could be found severely disabled, then it would not have been appropriate for the General Division to rely on the summary dismissal procedure.

[42] The Appellant provided additional medical records with her second application of April 5, 2013 but, for the most part, they did not address the issue of the Appellant's medical condition between November 23, 1999 and December 31, 1999.

[43] The closest that any of the medical records come to addressing this window of time after November 23, 1999 up to December 31, 1999 is the medical letter dated June 7, 2013, prepared by Dr. Rudolf Arts, neurologist and clinical neurophysiologist (GD3-66 to GD3-

67). He responded to an enquiry from the Respondent regarding the Appellant's medical status for the period from November 24 to December 31, 1999. Dr. Arts indicated however that the Appellant's last visit in 1999 was on August 9, 1999. Her next visit thereafter was in August 2000. Dr. Arts was unable to address the window after November 23, 1999 up to December 31, 1999, and the Appellant did not otherwise adduce any evidence which specifically addressed this timeframe.

[44] The General Division conducted this very same analysis. At paragraphs 16 and 17, the member wrote:

> [16] The issue that remains is whether the Appellant's condition deteriorated sufficiently between November 23, 1999 and December 31, 1999, a period of just five weeks, to be considered severe and prolonged by the end of her MQP.
>
> [17] There has been no new medical or other evidence submitted surrounding this time period to suggest that was the case. In fact, it appears that the Appellant's long time neurologist felt that the Appellant's condition did not change between August 1999 and August 2000 and that he felt she was capable of work.

[45] The General Division determined that there was no evidence before it in respect of this timeframe. On that basis, the matter was appropriately summarily dismissed.

DISPOSITION

[46] On the facts of this case, there was no reasonable chance of success and the General Division appropriately summarily dismissed the matter. Accordingly, the appeal is dismissed.

Janet Lew
Member, Appeal Division