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

Citation: *A. H. v. Minister of Employment and Social Development,* 2017 SSTGDIS 52

Tribunal File Number: GP-16-2666

BETWEEN:

A. H.

Appellant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION

General Division – Income Security Section

DECISION BY: Pierre Vanderhout

DATE OF DECISION: May 9, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] The Appellant's most recent application for a *Canada Pension Plan* ("CPP") disability pension was date stamped by the Respondent on March 30, 2015. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal ("Tribunal").

[2] This appeal was decided on the basis of the documents and submissions filed for the following reasons:

a) The member has decided that a further hearing is not required.

b) The issues under appeal are not complex.

c) There are no gaps in the information in the file or need for clarification.

d) Credibility is not a prevailing issue.

e) 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.

THE LAW

[3] Paragraph 44(1)(b) of the CPP sets out the eligibility requirements for the 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").

[4] 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.

[5] 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.

ISSUE

[6] The Appellant first applied for CPP disability benefits on September 14, 2001 (the "First Application"). As with his subsequent applications, it was made from outside Canada. The Respondent denied the First Application initially and upon reconsideration. The Appellant then appealed to the Review Tribunal. The Review Tribunal dismissed the appeal on December 4, 2003. The Appellant then appealed further to the Pension Appeals Board. The Pension Appeals Board dismissed the Appellant's appeal on July 30, 2007. It does not appear that there was any judicial review of the Pension Appeals Board's decision.

[7] The Appellant applied for CPP disability benefits a second time on December 18, 2009 (the "Second Application"). The Respondent denied the Second Application on the basis of *res judicata*. The Appellant did not request a reconsideration of that decision, nor did it proceed to the Review Tribunal or the Pension Appeals Board.

[8] The Appellant applied for CPP disability benefits a third time on March 30, 2015 (the "Third Application"). The Tribunal must first decide the important question of the Appellant's MQP because the Respondent's denials of the most recent application have been based on the principle of *res judicata* and did not address the Appellant's medical condition. Once the MQP has been determined, the Tribunal must then decide if the principle of *res judicata* bars the Appellant's appeal. Finally, if the principle of *res judicata* does not bar the Appellant's appeal, then the Tribunal must decide if it is more likely than not that the Appellant had a severe and prolonged disability on or before MQP date.

EVIDENCE

[9] There is a considerable amount of documentary evidence in this matter, particularly as the Appellant made two prior applications for CPP disability benefits and appealed one of those applications to both the Review Tribunal and the Pension Appeals Board. While the Tribunal has reviewed all of the evidence, some of which appears multiple times, only the most relevant facts and evidence are specifically referenced here.

[10] The Appellant claims that he could no longer work because of his medical condition on March 3, 1999. In the Questionnaire dated March 12, 2015 that accompanied the Third Application, the Appellant described his illnesses as depression, being mentally upset, memory issues, fear, and having no source of income. He said that these prevented him from working because he had pain, headaches, and depression due to being forcibly deported from Canada. He also identified additional medical conditions of Hepatitis C and a weak eye.

Chronology of Events

[11] The Appellant is currently 47 years old. Although he was born in Pakistan, he later came to Canada and started working as a kitchen assistant at Swiss Chalet on March 29, 1995. He worked there until approximately December 22, 1998, at which time immigration authorities stopped him from working and commenced the process of deporting him to Pakistan. As a result of his employment, he made qualifying contributions to the Canada Pension Plan for the years 1995, 1996, 1997 and 1998. It appears that he was deported from Canada in January of 1999.

[12] The Respondent denied the First Application both initially and upon reconsideration on June 17, 2002. The Appellant then appealed to the Review Tribunal. It appears that the hearing before the Review Tribunal was adjourned from March 27, 2003 because the Appellant was unable to get a visa to travel to Canada for that date. The Appellant then advised the Review Tribunal prior to the new October 7, 2003 hearing date that he would also be unable to attend that hearing, as he was again unable to obtain a visa to enter Canada. The Review Tribunal found that the Appellant had an MQP date of December 31, 2000 and dismissed the appeal in its decision dated December 4, 2003. The Review Tribunal's decision was based on an analysis of the available medical evidence and the narrative letters provided by the Appellant.

[13] The Appellant then appealed further to the Pension Appeals Board (the "Board"). The Appellant was unable to attend the May 31, 2007 hearing but was represented by Mr. Banaras Khan Chouddary (also spelled as "Choudhary") as agent. Documents indicate that the hearing had been adjourned at the Appellant's request on two previous occasions: once because he had been unable to obtain a visa, and once because of severe depression. It does not appear that an interpreter was requested for the hearing. According to the July 30, 2007 decision of the Board, the Appellant was not present at the hearing as he had been denied entry into Canada by Canadian immigration authorities. However, Mr. Chouddary advised the Board that the Appellant still wished to proceed with his appeal despite his absence. Mr. Chouddary requested leave to act as both agent and as witness for the Appellant. The Respondent opposed Mr. Chouddary acting as both witness and agent.

[14] In its decision, the Board commented on the role of Mr. Chouddary at the hearing. It decided, in the circumstances and in the interests of justice, to allow Mr. Chouddary a certain amount of leeway and permit him to act for the Appellant, give evidence, and address the Board at the conclusion of the hearing. The Board permitted this because the Appellant had indicated by letter that he wishes to proceed with the appeal and Mr. Chouddary was ready to proceed with the appeal on his behalf. The Board added that it did this to be fair and to expedite matters, as there was no way of knowing if and when the Appellant would ever be allowed re-entry into Canada.

[15] The Board found that the Appellant had an MQP date of December 31, 2000. After considering the oral evidence from Mr. Chouddary, the documentary evidence, the oral evidence from Dr. Louise Pilon (for the Respondent), and the closing submissions of both Mr. Chouddary and the Respondent's counsel, the Board found that the Appellant had failed to establish, on a balance of probabilities, that on December 31, 2000, and continuing up to the time of its decision, he was disabled within the meaning of the Canada Pension Plan. As a result, the Board dismissed the Appellant's appeal. The Board consisted of a panel of three superior court judges.

[16] By letter dated August 1, 2007, the Board sent a letter to both the Appellant and Mr. Chouddary that enclosed a copy of the Board's decision dated July 30, 2007. The letter stated that, if the Appellant wished to dispute that decision, he could request judicial review under

section 28 of the *Federal Courts Act* within 30 days. It does not appear that the matter ever proceeded to judicial review.

[17] On March 26, 2010, the Respondent denied the Second Application on the basis of *res judicata*: the Respondent stated that it could not change a final and binding decision that had already been made by the Pension Appeals Board. Once again, this was based on a finding that the Appellant's MQP ended in December of 2000. The Appellant did not request a reconsideration of that decision, nor did the matter proceed to the Review Tribunal or the Pension Appeals Board.

[18] In the materials accompanying his Third Application, the Appellant indicated that he had lived in Norway from August of 2010 until May of 2013. He also indicated that he had been employed in Norway from June of 2011 until April of 2013. His jobs included positions as a pizza maker and a kitchen assistant. The Respondent investigated these earnings, as Canada had signed a social security agreement with Norway and the earnings in Norway might therefore have been relevant for the purposes of calculating the Appellant's MQP. Indeed, on February 1, 2016, the Respondent concluded that the Appellant's foreign social security contributions for the years 2011, 2012 and 2013 were valid for Canadian purposes. However, the Respondent also concluded that these did not change the expiry of the Appellant's MQP in December of 2000.

[19] On March 1, 2016, the Respondent denied the Appellant's Third Application, on the basis that his MQP still ended in December of 2000 and the Pension Appeals Board had previously considered the matter with an identical MQP date. The Respondent confirmed that the Appellant's contributions in Norway did not improve his MQP date.

[20] In a letter dated April 7, 2016, the Appellant alleged that the Board's 2007 decision was made against him "only on the basis of surmises, conjecture and assumptions". He said that, due to a language problem, Mr. Chouddary's statements were not properly recorded because no interpreter was provided to him. As a result, the Appellant claimed that the Board had misunderstood the Appellant's evidence. The Appellant added that Mr. Chouddary was "ready to record his statement once again before any competent authorities". The Appellant also stated that he was sick while in Norway but had worked there in order to provide for his family.

[21] On July 15, 2016, the Respondent issued a reconsideration decision that essentially repeated the reasoning of the initial decision on March 1, 2016 and did not address the medical evidence.

[22] The Appellant's Notice of Appeal was received by the Tribunal on August 4, 2016. The Appellant stated that he had been suffering a disease since March 3, 1999, had been under prolonged treatment since then, had not recovered despite his treatment, and was medically unfit to work. He noted that the Respondent had not changed its decision in spite of the medical evidence that had been accumulating since 1999.

[23] In correspondence received by the Tribunal on November 29, 2016, the Appellant indicated that his deportation was caused by an inadvertent failure to report to immigration authorities on December 15, 1998. He claimed that he was seriously ill on that date and did not report until a week later. However, this prompted the initiation of deportation proceedings and he was ultimately deported to Pakistan on January 8, 1999. He indicated that he suffered badly during his detention period: his eyes were affected and he was depressed due to mental torture by the police and others. He said that his condition worsened after arrival in Pakistan.

[24] Since the filing of his appeal on August 4, 2016, the Appellant has been in frequent written, e-mail and telephone contact with the Tribunal. There was still concern about being able to obtain the necessary visa to attend a hearing in Canada. In a letter dated February 2, 2017, for example, he said that he needed to have a hearing date before applying for a visa. In the event that he could not attend due to visa issues or his health, he would appoint a representative to represent him at the hearing.

[25] In addition to various medical documents, the Appellant also filed numerous documents concerning his financial circumstances. The Appellant`s appeal was accordingly processed by the Tribunal on an expedited basis.

[26] On April 24, 2017, the Appellant stated that the Tribunal (the Appellant appears to be referring to the Respondent here) had not considered the medical issues and had simply maintained that the Pension Appeals Board decision was final and binding. He stated that, in fact, judicial review in his case had been sought at the Federal Court. He also suggested that it

was up to the Tribunal to forward the case to the Federal Court of Appeal. There is no documentation in the file from either the Federal Court or the Federal Court of Appeal.

SUBMISSIONS

[27] The Appellant has made extensive submissions to both the Respondent and the Tribunal over the years on why he qualifies for a disability pension. However, the most relevant submissions may be summarized as follows:

a) He has had a prolonged and severe disability since March 3, 1999 and this disability was triggered by the manner in which he was deported from Canada;

b) The Respondent has ignored the medical evidence and has instead denied his application on the basis of the July 30, 2007 Pension Appeals Board decision; and

c) His representative's evidence was not properly recorded at the Pension Appeal Board because no interpreter was provided to him.

[28] The Respondent submitted that the Appellant does not qualify for a disability pension because:

a) The principle of *res judicata* applies because the Pension Appeals Board has already decided the issue of the Appellant`s disability by his MQP of December 31, 2000; and

b) This is not an appropriate case to employ residual discretion in order to justify an exception to the principle of *res judicata.*

ANALYSIS

[29] Given the potential issue of *res judicata*, it is first necessary for the Tribunal to make a finding on the Appellant`s MQP date.

MQP Determination

[30] Subsection 44(1) of the *Canada Pension Plan* confirms that eligibility for CPP disability benefits is premised on making a certain number of qualifying CPP contributions within a

defined period of time. In some ways, it is like an insurance policy: coverage only exists if premiums (contributions) are paid. Similarly, coverage eventually terminates if premiums (contributions) do not continue.

[31] For persons such as the Appellant who have qualifying CPP contributions in fewer than 25 years, who have at least 6 years in their contributory period, and who were not previously in receipt of CPP disability benefits, eligibility for CPP disability benefits is established by having 4 years of qualifying CPP contributions within the past 6 calendar years. This is set out in s. 44(2) of the *Canada Pension Plan*. Alternatively, a person can establish eligibility as a "late applicant" if they made 4 years of qualifying contributions in a previous 6 calendar year period. The corresponding MQP for such "late applicants" would be in the past.

[32] In this case, the Appellant has exactly 4 years (1995, 1996, 1997, and 1998) of qualifying CPP contributions in Canada, disregarding for now the potential effect of his later social security contributions in Norway. The 4 years of contributions in Canada were also the only contributions on record when the First Application and the Second Application were made. Based on those dates, the Appellant's MQP would be December 31, 2000, as the Appellant no longer satisfied the '4 out of 6' rule by 2001.

[33] While the Appellant did not make any qualifying CPP contributions after his deportation from Canada, he did ultimately earn significant income during his residency in Norway. Because of the social security agreement in place between Canada and Norway, his years of social security contributions in Norway can also count as qualifying contributions in Canada. For that reason, the Appellant is deemed to have made qualifying CPP contributions in 1995, 1996, 1997, 1998, 2011, 2012, and 2013.

[34] However, the Norway contributions do not actually assist the Appellant in establishing a new MQP date. At no point after 2000 did the Appellant have 4 qualifying CPP contributions in 6 consecutive calendar years. The Tribunal accordingly finds that the Appellant's MQP date remains December 31, 2000, the same as it has been for his previous applications.

Does *Res Judicata* Apply?

[35] The Respondent submits that the principle of *res judicata* applies to this appeal. If *res judicata* does apply, the Appellant's appeal must be dismissed unless the Tribunal exercises its residual discretion and declines to apply it. For the purposes of determining the applicability of *res judicata*, the Tribunal shall only be considering the proceedings during the First Application. While the Second Application was denied on the basis of *res judicata*, the Appellant did not appeal the initial denial of that application to the Tribunal or its predecessor Review Tribunal. If *res judicata* applies to the current appeal, it can only be in connection with the First Application.

[36] The principles of *res judicata* were most notably set out by the Supreme Court of Canada's decision in *Danyluk* v. *Ainsworth Technologies Inc*., 2001 SCC 44 ("*Danyluk*"). The doctrine of *res judicata* essentially means that, once a dispute has been finally decided, it cannot be litigated again. The doctrine is partly motivated by public policy concerns and is intended to advance the interests of justice. In *Danyluk*, the Supreme Court stated at paragraph 18 that "[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."

[37] *Danyluk* and subsequent decisions such as *Canada (Minister of Human Resources Development)* v. *Macdonald*, 2002 FCA 48, and *Belo-Alves* v. *Canada (A.G.)*, 2014 FC 1100, have confirmed that the *res judicata* doctrine can apply to administrative tribunals generally and to decisions of the Review Tribunal and the Board in particular.

[38] In order for the doctrine of *res judicata* to apply, the following three conditions 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.

[39] The Tribunal finds that these three conditions have been met on the facts of this case.

[40] Firstly, the issue before the Board in the First Application was whether the Appellant suffered from a severe and prolonged mental or physical disability on December 31, 2000. That is the exact same issue raised by this appeal. The Appellant's MQP has not changed since the First Application was adjudicated by the Board. Subsequent to the First Application, the Appellant has not made sufficient deemed or actual CPP contributions that would extend his MQP and provide a different time period for which his claim could be adjudicated.

[41] Secondly, the decision made by the Board was final. Section 84 of the *Canada Pension Plan*, at the time of the Board's decision on July 30, 2007, stated that a decision of the Pension Appeals Board (except one that had proceeded to judicial review under the *Federal Courts Act*) was final and binding for all purposes of the *Canada Pension Pla*n. The Appellant had the option of seeking judicial review and the evidence discloses that both he and his representative were advised of this possibility. Although the Appellant suggested on April 24, 2017 that judicial review in his case had been sought at the Federal Court and that it was up to the Tribunal to forward the case to the Federal Court of Appeal, there is no persuasive evidence that judicial review actually occurred. Accordingly, s. 84 of the *Canada Pension Plan* (as it read at the time) affirms that the Board's July 30, 2007 decision was in fact final.

[42] Thirdly, the parties to both the First Application and this appeal are the same. The Appellant in this appeal is clearly the same person who brought the First Application before the Board. While the Respondent in the Third Application is the "Minister of Employment and Social Development", and the Respondent in the First Application was the "Minister of Social Development", this slight difference merely reflects a renaming of the federal authority responsible for administering the disability benefits program of the *Canada Pension Plan*.

[43] The three initial conditions for the application of the doctrine of *res judicata* appear to have been met. However, in the *Danyluk* decision, the Supreme Court of Canada recognized that a rigid application of the doctrine could potentially result in an injustice and decision makers therefore retained a residual discretion to decline the application of *res judicata*. The Tribunal will now consider whether such discretion ought to be applied in this particular case.

Should the Tribunal use its residual discretion to decline the application of *res judicata*?

[44] In *Danyluk*, the Supreme Court provided a non-exhaustive list of seven factors that could be considered when deciding whether to apply *res judicata*. The seven factors are:

1. The wording of the statute pursuant to which the first decision was made;

2. The purpose of the legislation;

3. The availability of an appeal;

4. The safeguards available to the parties in the administrative proceeding;

5. The expertise of the administrative decision-maker;

6. The circumstances giving rise to the prior administrative proceeding; and

7. Potential injustice.

[45] The Tribunal does not find the first six factors from *Danyluk*, which are relatively mechanical, to be supportive of the Appellant's position in this particular case. The Appellant's current appeal is under the same legislative framework as the First Application. The nature of the claim and the remedy sought is the same in each case. An appeal was available from the Board's decision in the First Application by way of an application for judicial review.

[46] The proceedings before the Board in the First Application do not appear to have been lacking in procedural safeguards: the Appellant was permitted to adjourn the proceedings twice and the Appellant ultimately instructed his representative that he still wished to proceed with the eventual hearing his appeal even though he was unable to attend personally. The Board also granted the Appellant a considerable amount of leeway by permitting his representative to act as agent, give evidence, and make submissions at the conclusion of the hearing.

[47] The Board's expertise is not in question: in fact, the Board rendering the July 30, 2007 decision consisted of a panel of three superior court judges. Finally, the circumstances giving rise to the proceeding before the Board in the First Application are not inherently problematic: the Appellant requested and obtained adjournments on two occasions and had more than 6 years after the expiry of his MQP to obtain and submit relevant evidence. As noted above, he also provided instructions that the hearing could proceed in his absence.

[48] The Tribunal will set out its analysis of the seventh *Danyluk* factor in more detail, as it is more relevant in this case and it was also identified by the Supreme Court of Canada as the most important *Danyluk* factor.

The 7th *Danyluk* Factor: Potential Injustice?

[49] According to the Supreme Court of Canada in *Danyluk*, the decision maker must stand back and, taking into account the entirety of the circumstances, consider whether applying *res judicata* in this particular case would work an injustice. The Tribunal will first consider the sufficiency of evidence and the non-attendance of the Appellant at the hearing before the Board.

[50] During the course of the First Application, the Appellant had an extended period of time to both arrange for his attendance in Canada and to introduce the necessary evidence. The hearing before the Board finally took place on May 31, 2007 and was an appeal from the Review Tribunal's decision on December 4, 2003. Those proceedings followed from an application received on September 14, 2001. This is an exceptionally long period of time and the Tribunal is unable to find that the Appellant did not have an opportunity to file sufficient documentary evidence.

[51] Similarly, the Appellant was unable to attend hearings in front of both the Review Tribunal and the Board, with visa issues playing a significant role. While it is easy to see how a single visa attempt could be unsuccessful, the Appellant has been repeatedly unable to secure one to return to Canada. The Appellant is still unsure that he would be able to gain entry into Canada and is still willing to send a representative in his place for a hearing in the present matter. It is possible that the Appellant will never be able to attend a hearing. Indeed, the Board itself stated that there was no way of knowing if and when the Appellant would be allowed to return to Canada. The Tribunal does not find that an injustice occurred in connection with his non-attendance in front of the Board.

[52] The Appellant submitted that his representative`s evidence was not properly recorded at the Board hearing because no interpreter was provided to him. There is no evidence suggesting that the Appellant or the Representative requested an interpreter at the hearing. There is no indication in the Board's decision that there were any difficulties in understanding the

Appellant's representative at the hearing. As discussed above, the Board also specifically described the leeway it granted to the multi-faceted role played by the Appellant's representative at the hearing, over the objections of the Respondent. The interpreter issue also appears to have been raised for the first time in a letter dated April 7, 2016: nearly 9 years after the Board hearing took place. In the circumstances, the Tribunal cannot find that this approaches an injustice.

[53] Based on the above analysis, the Tribunal is satisfied and finds that no injustice would result from the application of *res judicata* in this case. As with the non-binding decision of the Tribunal's Appeal Division in *D.K.* v. *Minister of Employment and Social Development*, 2015 SSTAD 1068, it cannot be said that the Appellant has been deprived of the opportunity to have his claim to a CPP disability pension properly assessed and adjudicated.

[54] The Tribunal also notes that the social security contributions made by the Appellant in Norway over three calendar years resulted from his full-time employment during those years. Had this matter proceeded to an oral hearing, it would have been very challenging for the Appellant to prove that a severe disability continued during a period in which he relocated to a third country and proceeded to work gainfully over three calendar years. While this information is not necessary to make a decision on the final *Danyluk* factor, it nonetheless supports that this is not a case in which injustice will result from the application of *res judicata*.

Analysis of "Severe and Prolonged" Not Required

[55] The Tribunal found that *res judicata* applies in this case. The preconditions outlined in *Danyluk* are met and the Tribunal is satisfied that this is not an appropriate case to exercise its residual discretion to not apply *res judicata*. Accordingly, it is not necessary for the Tribunal to consider whether the Appellant, on a balance of probabilities, had a severe and prolonged disability commencing on or before December 31, 2000 and continuing through the present.

CONCLUSION

[56] The appeal is dismissed.

Pierre Vanderhout
Member, General Division - Income Security