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

Citation: *P. H. v. Minister of Employment and Social Development,* 2017 SSTADIS 368

Tribunal File Number: AD-16-1194

BETWEEN:

P. H.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Meredith Porter

Date of Decision: July 26, 2017

Canada

REASONS AND DECISION

INTRODUCTION

[1] On September 7, 2016, the General Division of the Social Security Tribunal of Canada (Tribunal) dismissed the Applicant's appeal of a decision refusing her application for a disability pension under the *Canada Pension Plan* (CPP). The General Division dismissed the appeal on the basis that the issues therein were *res judicata* and, as a result, the appeal had no chance of success.

[2] The Applicant filed an application requesting leave to appeal with the Tribunal's Appeal Division on October 17, 2016.

THE LAW

[3] According to subsections 56(1) and 58(3) of the Department of Employment and Social Development Act (DESD Act), "An appeal to the Appeal Division may only be brought if leave to appeal is granted" and "The Appeal Division must either grant or refuse leave to appeal."

[4] Subsection 58(2) of the DESD Act provides that "[l]eave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success." A reasonable chance of success has been equated to "an arguable case." (*Fancy v. Canada (Attorney General)*, 2010 FCA 63)

[5] According to subsection 58(1) of the *Department of Employment and Social Development Act* (DESD Act), the only grounds of appeal are the following:

> (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.

[6] Before granting leave to appeal, I need to be satisfied that the reasons for appeal fall within the enumerated grounds of appeal under subsection 58(1) of the DESD Act, and that the appeal has a reasonable chance of success.

BACKGROUND

[7] The Applicant filed an application for a CPP disability pension on November 28, 2007. The Respondent refused her application initially and on reconsideration. The Applicant then appealed to the Office of the Commissioner of Review Tribunals (OCRT), which the Tribunal's General Division has since replaced. Her application was refused after being heard on April 22, 2009, as the OCRT did not find her disabled at her MQP date of December 31, 2008.

[8] The Applicant had the opportunity, following receipt of the OCRT decision, to request leave to appeal the OCRT decision to the Pension Appeals Board (PAB) pursuant to section 83 of the CPP prior to 2013, but she did not.

[9] The Applicant filed a second application for CPP disability pension on April 15, 2015. The Respondent refused her application, both initially and on reconsideration. The basis on which her second application was refused was that the issues were considered *res judicata*, because her MQP remained December 31, 2008. The Respondent considered all issues and determined that rights of appeal had been exhausted in 2009 when the OCRT had determined the issue, and the Applicant had not pursued an appeal to the PAB.

[10] The Applicant appealed the Respondent's decision and enlisted a representative's assistance in pursuing her appeal to the General Division. The Applicant and her representative were notified that the General Division intended to proceed with a decision on the record, and they were invited to submit additional documents or make additional submissions to the Tribunal before a decision would be made. No additional documentation was received.

[11] The General Division determined that it did not have jurisdiction to consider the Applicant's case, as the MQP had not changed, the OCRT had already determined the issue of whether the Applicant was disabled on or before December 31, 2008, and the issue was *res judicata*.

SUBMISSIONS

[12] The Applicant submits that she was unable to present her case fairly and fully when she first appeared before the OCRT, but she had enlisted a representative's assistance and would be in a better position to present evidence in a more fulsome manner. She asserts that, based on the principle of natural justice, the General Division ought to have considered this before determining that the issue was *res judicata*.

[13] Further, the Applicant asserts that the OCRT based its decision on mistaken facts. The OCRT considered the fact that the Applicant had received CPP earnings in 2005 as an indication that she had capacity to work. Her employer had actually paid these earnings in lieu of vacation, sick days, etc. after it had terminated her employment. Because of her deteriorating health condition, she did not appeal the OCRT decision to the PAB.

ANALYSIS

[14] The Applicant has not made submissions on the issue of *res judicata*. However, the General Division's analysis in its decision was short and, in applying the doctrine of *res judicata*, this was the only basis on which the General Division dismissed the Applicant's appeal. I have considered the Applicant's submissions as set out above, in addition to reviewing the underlying record. However, I am granting leave to appeal on the basis that the General Division, in applying the principle of *res judicata* to the Applicant's appeal, failed to properly apply the Supreme Court's direction found in *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 SCR 460, 2001 SCC 44, with respect to the proper approach to applying the doctrine of *res judicata*. This raises questions of whether the General Division erred in law.

<u>Did the General Division err in determining that the matter was *res judicata*?</u>

[15] The principle of *res judicata* was established with the intention of preventing abuse of the decision-making process. Parties were estopped from seeking to have a case retried on the belief that "[t]he idea that a dispute once judged with finality is not subject to relitigation" (*Danyluk*,at para. 20). In the context of administrative tribunals, the court in *Danyluk* confirmed "[…] the more specific objective is to balance fairness to the parties with the protection of the administrative decision-making process, whose integrity would be undermined by too readily

permitting collateral attack or relitigation of issues once decided" (at para. 21). The appropriate conditions for determining whether the doctrine of *res judicata* applies includes the following factors:

a) The issue to be determined is the same as the one decided in a prior decision;

b) The prior decision is final;

c) The parties to the proceeding are the same.

[16] Applying the above factors to the matter at hand:

(i) I note that the facts and issues put forward in the first application and the second application that the Applicant filed remain the same: had she been disabled within the meaning of the CPP on or before her MQP date of December 31, 2008? Other than obtaining a representative's help, nothing material has changed since the OCRT refused her first application in 2009.

(ii) The Applicant and the Respondent as parties remain the same.

(iii) The OCRT decision is final and binding, as the Applicant was not found to be disabled at her MQP date, and that date has not changed. The opportunity to appeal to the PAB was never pursued.

[17] Based on the foregoing, I find that the principle of *res judicata* applies to this case.

[18] On review of the underlying record, however, I note that there is an issue of natural justice stemming from my finding that *res judicata* applies. Specifically, the Supreme Court in *Danyluk* set out the abovementioned three factors to determine when *res judicata* applies. However, the court recognized in *Danyluk* that a rigid application of the doctrine could result in a potential injustice. Discretion should be exercised, as set out by the Supreme Court in paragraph 33, with the recognition that "[t]he 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." Decision-makers retain a residual discretion to determine whether *res judicata* should be applied on the facts of any given case. The Supreme Court, however, 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:

i. The wording of the statute from which the power to issue the administrative order derives;

ii. The purpose of the legislation;

iii. The availability of an appeal;

iv. The safeguards available to the parties in the administrative procedure;

v. The expertise of the administrative decision maker;

vi. The circumstances giving rise to the prior administrative proceedings; and

[19] Although the Applicant has not made submissions relating to the issue of *res judicata*, on my review of the underlying record, I find that the General Division failed to consider the second step of the two-step test: whether *res judicata* ought to be applied in this case. There is no indication that the General Division considered any of the seven factors as set out above. I find that this may be an error of law, which has a reasonable chance of success. Pursuant to paragraph 58(1)(*b*) of the DESD Act, errors of law, whether or not they appear on the face of the record, are a ground of appeal for which leave to appeal may be granted. As a result, I am granting leave to appeal on this ground.

[20] The Federal Court of Appeal in *Mette v. Canada (Attorney General)*, 2016 FCA 276, stated that it is unnecessary for the Appeal Division to address all the grounds of appeal that an Applicant raises. In *Mette*, Dawson J.A. stated that section 58 of the DESD Act "does not require that individual grounds of appeal be dismissed […] individual grounds may be so inter-related that it is impracticable to parse the grounds so that an arguable ground of appeal may suffice to justify granting leave." (para. 15) The other grounds of appeal that the Applicant has submitted are inter-related to the analysis of whether her health condition is severe and prolonged. As a result, I am not required to address the other grounds submitted in the application for leave to appeal that the Applicant has filed.

CONCLUSION

[21] The application for leave to appeal is granted.

[22] This decision granting leave to appeal does not, in any way, prejudge the result of the appeal on the merits of the case.

Meredith Porter
Member, Appeal Division