Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *B. B. v. Minister of Employment and Social Development*, 2018 SST 387

Tribunal File Number: AD-18-68

BETWEEN:

**B. B.**

Applicant

and

**Minister of Employment and Social Development**

Respondent

# SOCIAL SECURITY TRIBUNAL DECISION
## Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: April 6, 2018

Canada

## DECISION AND REASONS

### DECISION

Leave to appeal is refused.

### INTRODUCTION

[1] The Applicant, B. B., who is now 58 years old, was born in India and has the equivalent of a Grade 10 education. After immigrating to Canada in 1980, she held a series of low-skilled retail and factory jobs. She was most recently employed as a packer for Payless Shoes, a position that she left in April 2009 because of heart problems and depression, among other medical conditions.

[2] The Applicant first applied for Canada Pension Plan (CPP) disability benefits on July 5, 2010. The Respondent, the Minister of Employment and Social Development (Minister), denied the application initially and upon reconsideration. The Applicant then appealed to the now-defunct CPP Review Tribunal (RT). In a decision dated September 10, 2012, the RT dismissed the appeal because it found that the Applicant's disability was not severe, as defined by the *Canada Pension Plan* (CPP), as of the minimum qualifying period (MQP), which ended on December 31, 2011. There is no record that the Applicant ever applied for leave to appeal to the Pension Appeals Board (PAB).

[3] The Applicant applied for CPP disability benefits for a second time on August 21, 2015. The MQP remained December 31, 2011. The Minister denied this application on the basis that the matter had already been conclusively decided by the RT. The Applicant appealed this determination to the RT's successor, the General Division of the Social Security Tribunal. The General Division conducted a hearing on the basis of the existing documentary record and, in a decision dated May 9, 2017, dismissed the appeal, finding that the principle of *res judicata* was applicable. In doing so, the General Division analyzed the factors set out in *Danyluk v.*

*Ainsworth Technologies Inc.*[1] and concluded that there was no reason to exercise its discretion to waive *res judicata* and consider the Applicant's disability claim on its merits.

[4] On January 23, 2018, the Applicant's representative requested leave to appeal to the Appeal Division, alleging that the General Division erred as follows:

- The General Division failed to take into consideration the totality of the evidence before it when it decided that the Applicant was not entitled to a disability pension. She suffers from a severe and prolonged disability within the meaning of s. 42(2)(*a*) of the CPP.
- The General Division failed to adequately consider numerous medical reports indicating that the Applicant was disabled from work as of her MQP.
- The General Division failed to apply the principles of *Villani v. Canada*,[2] which required it to consider factors such as age, level of education, language proficiency and past work and life experience. The Applicant was 56 years old when she applied for the CPP disability pension and has limited education and English language skills. In a "real world" context, she has no prospect of returning to any occupation compatible with her impairments.
- The General Division failed to consider the Applicant's attempt to appeal the RT decision to the PAB, which was thwarted by her inability to retain competent representation.

## ISSUES

[5] According to s. 58(1) of the *Department of Employment and Social Development Act* (DESDA), there are only three grounds of appeal to the Appeal Division: The General Division (i) failed to observe a principle of natural justice; (ii) erred in law or (iii) based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it. An appeal may be brought only if the Appeal Division first grants leave to

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[1] *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44.
[2] *Villani v. Canada (Attorney General)*, 2001 FCA 248.

appeal,[3] but the Appeal Division must first be satisfied that it has a reasonable chance of success.[4] The Federal Court of Appeal has held that a reasonable chance of success is akin to an arguable case at law.[5]

[6] My task is to determine whether any of the grounds that the Applicant has put forward fall into the categories specified in s. 58(1) of the DESDA and whether any of them raise an arguable case.

**ANALYSIS**

[7] Having carefully examined the Applicant's submissions against the record in the context of the applicable law, I am unable to identify an arguable case under any of the grounds set out in s. 58(1) of the DESDA.

[8] The Applicant suggests that the General Division dismissed her appeal despite medical evidence indicating that her condition was "severe and prolonged" according to the criteria governing CPP disability.

[9] However, outside of this broad allegation, the Applicant has not identified how, in coming to its decision, the General Division failed to observe a principle of natural justice, erred in law or based its decision on an erroneous finding of fact. The decision indicates that the General Division reviewed the Applicant's submissions and determined that the doctrine of *res judicata* prevented consideration of her application for CPP disability benefits. The General Division concluded—properly, in my view—that the issue of whether the Applicant was disabled as of her MQP ending December 31, 2011, had already been adjudicated by the RT in September 2012 and therefore could not be revisited.

[10] I see no error of law in the General Division's analysis of *res judicata* and its applicability to the Applicant's fact situation, nor do I see anything problematic in its application of the *Danyluk* criteria. In that case, the Supreme Court of Canada held that there were sound public policy reasons underpinning the doctrine of *res judicata*:

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[3] DESDA at ss. 56(1) and 58(3).
[4] *Ibid*. at s. 58(1).
[5] *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

> [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.

[11] While applicants are not required to prove the grounds of appeal at the leave to appeal stage, they must put forward some rational basis for their submissions that fall within the enumerated grounds of appeal. It is not sufficient for an applicant to merely state their disagreement with the General Division decision, nor is it sufficient for an applicant to express their continued conviction that their health conditions render them disabled within the meaning of the CPP.

[12] The General Division considered the September 2012, RT decision only to confirm that (i) it dealt with the same issues as the current appeal; (ii) the prior decision was final and (iii) the parties to the two proceedings were the same. Having found that *res judicata* prohibited it from considering the Applicant's disability as of December 31, 2011, the General Division saw no need to conduct a review of the medical record or assess the Applicant's employability in light of the *Villani* factors. It correctly found that any documentary evidence, whether generated before or after the September 2012 RT decision, was out of bounds if it pertained to the medical conditions that were the basis of the Applicant's first application for CPP disability benefits.

[13] Just as the General Division was barred from reassessing the substance of the Applicant's disability claim by virtue of *res judicata*, so is the Appeal Division, which has no mandate to consider evidence of disability on its merits. My authority permits me to determine only whether any of the Applicant's reasons for appealing fall within the precise and narrow grounds of s. 58(1) and whether any of them raises an arguable case.

[14] The Applicant may regard this result as unjust, but I see no recourse available to her. The General Division was bound to follow the law, and so am I. It remains a fact that her impairments prior to 2012 were conclusively adjudicated by the RT, and its successor was therefore barred from hearing what amounted to the same case. The Applicant pleads that she did her best, despite challenging circumstances, to bring an appeal to the PAB, but whether or not

she had succeeded, it would have had no bearing on this proceeding, which originates from her second application for CPP disability benefits.

[15] Under s. 58 of the DESDA, I lack the discretionary authority to simply order what I may think is fair. This reality is reflected in cases such as *Canada v. Tucker*,[6] which held that an administrative tribunal is not a court but a statutory decision-maker and therefore not empowered to provide any form of equitable relief.

**CONCLUSION**

[16] The Applicant has not identified any grounds of appeal under s. 58(1) that would have a reasonable chance of success on appeal. Thus, the application for leave to appeal is refused.

Member, Appeal Division

| REPRESENTATIVE: | J. J., for the Applicant |
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[6] *Canada (Minister of Human Resources Development) v. Tucker*, 2003 FCA 278.