



Social Security  
Tribunal of Canada

Tribunal de la sécurité  
sociale du Canada

Citation: *C. M. v Minister of Employment and Social Development*, 2019 SST 629

Tribunal File Number: AD-19-198

BETWEEN:

**C. M.**

Appellant

and

**Minister of Employment and Social Development**

Respondent

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**SOCIAL SECURITY TRIBUNAL DECISION**  
**Appeal Division**

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DECISION BY: Kate Sellar

DATE OF DECISION: July 8, 2019

## DECISION AND REASONS

### DECISION

[1] The appeal is allowed.

### OVERVIEW

[2] C. M. (Claimant) explains that she has multiple conditions that have continued to get worse over the past 10 years. She has fibromyalgia and post-traumatic stress disorder. There are days when she cannot get out of bed.

[3] The history of the process in this case is important. The Claimant has applied for a disability pension under the *Canada Pension Plan* (CPP) four times.

[4] The Minister denied the first application. In May 2012, the Review Tribunal found that the Claimant was not entitled to a CPP disability pension. The Claimant requested and received leave to appeal that decision from the Pension Appeals Board (PAB). The Appeal Division of this tribunal held a new hearing. The Appeal Division dismissed the appeal. The Claimant did not appeal any further.

[5] The Claimant made a second application for the disability pension in April 2015. The Minister denied the application, stating that the issue had already been decided so it could not be decided again.<sup>1</sup> The Claimant did not ask the Minister to reconsider that decision.

[6] The Claimant made a third application for the disability pension in January 2016. The Minister denied the application, for the same reason as it denied the April 2015 application. Again, the Claimant did not ask the Minister to reconsider that decision.

[7] The Claimant made a fourth application for the disability pension in October 2017. The Minister denied the application. In the reconsideration letter, the Minister stated again that the matter had already been decided and could not be decided again. The Claimant appealed to the General Division of this Tribunal.

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<sup>1</sup> The legal term for that is *res judicata*. One form of *res judicata* is called issue estoppel.

[8] The General Division decided, on March 6, 2019, to summarily dismiss the appeal because it had no reasonable chance of success. The Claimant appealed that decision to the Appeal Division.

[9] I must decide whether the General Division made an error under the *Department of Employment and Social Development Act* (DESDA) that would justify allowing the appeal.

[10] In my view, it is more likely than not that the General Division made an error under the DESDA. The appeal is allowed.

## ISSUE

[11] Did the General Division member make an error under the DESDA when they summarily dismissed the Claimant's appeal?

## ANALYSIS

### **Appeal Division Reviews of General Division Decisions**

[12] The Appeal Division does not provide an opportunity for the parties to re-argue their case in full. Instead, the Appeal Division reviews the General Division's decision to decide whether there are errors. That review is based on the wording of the DESDA, which sets out the grounds of appeal for cases at the Appeal Division.

[13] The DESDA allows for appeals where the General Division has made an error of law.

### **Summary Dismissal**

[14] The General Division member must summarily dismiss an appeal if they are satisfied that the appeal has no reasonable chance of success.<sup>2</sup> The question that the Tribunal must answer is whether it is plain and obvious on the record that the appeal is bound to fail. The question is **not** whether the Tribunal must dismiss the appeal after considering the facts, the case law, and all the

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<sup>2</sup> DESDA, s 53(1); *Miter v Canada (Attorney General)*, 2017 FC 262.

arguments from both sides. Rather, the question is whether the appeal is bound to fail regardless of the evidence or arguments that the Claimant might bring at a hearing.<sup>3</sup>

### **Disability Pension**

[15] To get a disability pension from CPP, a claimant must have a severe disability. That means that a claimant must be “incapable regularly of pursuing any substantially gainful occupation.”<sup>4</sup> The disability must be severe on or before the end of the minimum qualifying period (MQP). The Minister calculates the MQP based on the Claimant’s contributions to the Canada Pension Plan.

### **The Rule Against Deciding Something that was Already Decided**

[16] The Tribunal follows a legal rule against deciding things that have already been decided. The Tribunal cannot consider applying that legal rule unless the issue and the parties are the same as the prior decision, and the prior decision was final.<sup>5</sup> However, applying the rule is still a choice – also called a matter of discretion. The purpose of the rule is to promote the orderly administration of justice, but not at the cost of real injustice in the particular case. Before applying the rule, the decision maker needs to consider whether it might cause injustice. The factors to consider include:

- a) the wording of the statute (where the power to give the decision comes from);
- b) the purpose of the legislation;
- c) the availability of an appeal;
- d) the safeguards available to the parties in the procedure;
- e) the expertise of the prior decision-maker;
- f) the circumstances giving rise to the first proceedings; and
- g) any potential injustice.<sup>6</sup>

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<sup>3</sup> This is described in a case called *A.Z. v Minister of Employment and Social Development*, 2018 SST 298.

<sup>4</sup> *Canada Pension Plan*, s 42(2)(a).

<sup>5</sup> The Supreme Court of Canada explained the test in a case called *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44.

<sup>6</sup> *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44.

**Did the General Division member make an error when they summarily dismissed the Claimant's appeal?**

[17] The General Division member made an error of law when they summarily dismissed the Claimant's appeal.

[18] The General Division member decided that the Claimant's appeal had no reasonable chance of success. The General Division member found that they would apply the rule against deciding something that was already decided:

The Tribunal finds that *res judicata* does apply in this case. The Appellant's MQP has not changed from the time of her first application for CPP disability benefits. The parties and issues have also remained unchanged and the previous decision made by the SST—Appeal Division in November 2014 was final<sup>1</sup>. As a result, the Appellant is prevented from re-litigating the issue already decided in a previous hearing<sup>2</sup>. The Tribunal simply does not have the authority consider once again the issue of disability.<sup>7</sup>

[19] The Claimant does not have a lawyer. The Claimant says that the General Division made an error of law. The Claimant seems actually to be arguing that the General Division made an error of fact by finding that nothing had changed with her disability, when in fact her condition had become worse. She says that in fact her mobility has become much more limited than when she first applied. She explains that she can barely walk.<sup>8</sup> The Minister did not provide submissions to the General Division, and the time for doing that has now passed.

[20] I am allowing the appeal. The General Division made a different error of law than the one the Claimant raised.

[21] The General Division made an error of law by summarily dismissing the appeal. To summarily dismiss an appeal, it must be plain and obvious that the appeal is bound to fail. The General Division summarily dismissed the case by applying the rule against deciding something that has already been decided. However, if the General Division is going to apply that rule, there are two steps to follow. First, the General Division must satisfy itself that the issues and the

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<sup>7</sup> General Division decision, para 13.

<sup>8</sup> The Claimant made this argument in her appeal, at AD1-3.

parties are the same as the prior decision, and that the prior decision was final. Second, the General Division has to consider whether it should choose to apply the rule, based on a series of factors. One of those factors is whether there any potential injustice might result from applying the rule.

[22] The General Division only completed the first step. The Claimant's MQP never changed throughout her applications, so the General Division decided that the issue remained the same. The parties were the same (the Claimant and the Minister), and the General Division found that the prior decision was final.

[23] However, the General Division member did not consider the factors about whether the rule against deciding something that was already decided should actually be applied in this case. Even when the issues are the same, the parties are the same, and the first decision was final, it is possible that the General Division should choose not to apply the rule. Failing to consider the factors about whether to apply the rule is an error of law.

[24] The General Division did not gather the information from the Claimant it needed to decide whether to apply the rule. The General Division sent a notice to the Claimant that it might summarily dismiss the appeal because "the principle of *res judicata* applies in this case."<sup>9</sup> The notice to the Claimant did not explain what *res judicata*, as a rule, actually is. The notice stated that the parties and issues were the same and that there was a final decision. The notice asked the Claimant to explain in writing why the appeal has a reasonable chance of success. However, it did not describe the kinds of things the General Division would have to consider before choosing to apply the rule against the Claimant. For example, the Claimant might have information about the circumstances that gave rise to the first proceeding, or any potential injustice that might result from applying the rule.

[25] By summarily dismissing the case, the Claimant missed the chance to explain whether there were any special circumstances that meant that the General Division should not have applied the rule against deciding something that was already decided. Without trying to collect

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<sup>9</sup> The notice is in the record at GD0-1.

that kind of information from the Claimant, the General Division could not properly conclude that it was plain and obvious that the appeal was bound to fail.

**CONCLUSION**

[26] The appeal is allowed. The matter is returned to the General Division for reconsideration. The General Division will give the Claimant an opportunity to give evidence and make arguments about both parts of the test for applying the rule against deciding something that was already decided.

Kate Sellar  
Member, Appeal Division

METHOD OF PROCEEDING:	On the Record
REPRESENTATIVE:	C. M., self-represented