



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *K. S. v Minister of Employment and Social Development*, 2019 SST 1404

Tribunal File Number: AD-19-820

BETWEEN:

K. S.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Kate Sellar

Date of Decision: December 12, 2019

DECISION AND REASONS

DECISION

[1] The application for leave to appeal is refused.

OVERVIEW

[2] K. S. (Claimant) has post-traumatic stress disorder, obsessive compulsive disorder, and major depression and anxiety (including panic). She has survived domestic violence. She has the Disability Tax Credit and receives Ontario Disability Support Program (ODSP) benefits. She applied for a disability pension under the *Canada Pension Plan* (CPP). She was one of a large group of people whose personal information was on a USB key that a government employee misplaced. This was a very upsetting situation.

[3] The Claimant applied for a disability pension in May, 2011. The Minister denied the application initially and again on reconsideration. The Claimant appealed to this Tribunal. The General Division dismissed the appeal after a written hearing of questions and answers in 2011. The Appeal Division refused to give the Claimant permission (leave) to appeal the General Division decision.

[4] The Claimant applied for a disability pension again in March, 2016. The Minister denied the application initially and on reconsideration, finding that the case had already been decided and could not be decided again. This rule against deciding something that was already decided is called *res judicata*.

[5] The Claimant filed another disability application in April 2018. The Minister denied the application initially and on reconsideration. The Claimant appealed to this Tribunal. The General Division dismissed the appeal on November 18, 2019. The Claimant is asking the Appeal Division for permission (leave) to appeal that General Division decision.

[6] I must decide whether there is an arguable case that the General Division made an error under the *Department of Employment and Social Development Act* (DESDA) that would justify granting the Claimant permission (leave) to appeal.

[7] In my view, the Claimant has no arguable case for an error. The application for leave to appeal is dismissed.

ISSUE

[8] Is there an arguable case that the Appeal Division made an error by dismissing the Claimant's appeal?

ANALYSIS

Reviewing General Division Decisions

[9] The Appeal Division does not give people a chance to re-argue their case in full at a new hearing. Instead, the Appeal Division reviews the General Division's decision to decide whether there is an error. The Appeal Division's review is based on the wording of the DESDA, which sets out the reasons that form the basis for any appeal.¹ Basically, the Appeal Division can remedy (fix) General Division decisions when the General Division fails to provide a fair process, or when the General Division has made an error of fact, or when the General Division has made an error of law.²

[10] At the leave to appeal stage, a claimant must show that the appeal has a reasonable chance of success.³ To meet this requirement, the claimant needs to show only that there is some arguable ground on which the appeal might succeed.⁴ That is a low test to meet.

The Rule Against Deciding Something That Was Already Decided

[11] The Tribunal follows a legal rule against deciding things that have already been decided (*res judicata*). 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.⁵ However, applying the rule is still a choice – also called a matter of discretion. The purpose of the rule is to promote

¹ DESDA, s 58(1).

² DESDA, s 58(1) (a) to (c).

³ DESDA, s 58(2).

⁴ The Federal Court explained this in a case called *Fancy v Canada (Attorney General)*, 2010 FCA 63.

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

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.⁶

Is there an arguable case that the General Division made an error?

[12] There is no arguable case that the General Division made an error.

[13] To have a disability pension, claimants must show that they have a severe and prolonged disability on or before the end of their minimum qualifying period (MQP).⁷ The Minister calculates the MQP based on claimants' contributions to the Canada Pension Plan. In this case, the Claimant's MQP ended on December 31, 2001.

[14] The Claimant made some contributions to the Canada Pension Plan in 2003 (but those contributions were not high enough to meet a certain level set by the law⁸), so she can also have the pension if she can show that she was disabled in 2003, between January 1, 2003 and August 31, 2003. That period of time in 2003 is called the period of proration. The Claimant's MQP and period of proration has never changed.⁹

⁶ *Danyluk v Ainsworth Technologies Inc.*, 2001 SCC 44.

⁷ *Canada Pension Plan*, s 42(2).

⁸ That level is called the year's basic exemption.

⁹ The General Division explained the Claimant's MQP and period of proration at paras 3 and 4.

[15] The Claimant argues that she has lots of evidence that she has had a disability since 2001. She argues that the prognosis is not good for people with complex PTSD. She reminds the Appeal Division that many domestic violence victims have permanent injuries.¹⁰

[16] In my view, this appeal does not raise an arguable case. The General Division decided that the case could not go forward because of the rule against deciding things that have already been decided. The General Division followed the legal steps to apply this rule. The General Division decided that the issues and parties were the same as they were the last time the case was at the General Division. The same Claimant was asking the General Division to decide whether she was entitled to a disability pension again, even though the tribunal's prior decision was final.¹¹ The Claimant's MQP and period of proration had not changed.

[17] The General Division also considered whether applying the rule would result in an injustice. Using the criteria from the Supreme Court of Canada, the General Division decided that there were no special circumstances that would justify refusing to apply the rule against deciding something that has already been decided.¹² There is no arguable case that the General Division failed to apply the correct legal tests.

[18] There is no arguable case that the General Division got any of the facts about the Claimant's prior applications and appeals wrong. There is no arguable case that the General Division got the facts wrong about the period of time the Claimant had to show that she was disabled.

[19] The Claimant has not raised any specific problem with the fairness of the General Division's process.

[20] The Claimant, understandably, wants the result to be different. She seems to have struggled to understand whether she should actually continue to try to receive a disability pension under the CPP. She receives benefits from the ODSP. She keeps trying to access the

¹⁰ AD1.

¹¹ General Division decision, para 12.

¹² General Division decision, paras 13 and 14.

disability pension under the CPP, possibly because a medical doctor has advised her that CPP disability pension would be better for her.

The Claimant has already been turned down for a disability pension from the Minister more than once. She appealed to this tribunal and she was not successful. She applied again and appealed to the General Division again, and she was turned down again. The General Division applies a legal rule against deciding things that have already been decided. The General Division has already issued a final decision about whether the Claimant is entitled to a disability pension based on the contributions she made to the Canada Pension Plan up to 2013.

CONCLUSION

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

Kate Sellar
Member, Appeal Division

REPRESENTATIVE:	K. S., self-represented
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