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

Citation: *C. M. v Minister of Employment and Social Development*, 2020 SST 170

Tribunal File Number: GP-19-1150

BETWEEN:

C. M.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by:	Shannon Russell
Minister's representative:	Heather Carr
Teleconference hearing on:	December 5, 2019
Date of decision:	January 8, 2020

DECISION

[1] I cannot consider whether the Claimant is disabled because a Tribunal Member has already decided that she does not meet the eligibility requirements for *Canada Pension Plan* (CPP) disability benefits.

OVERVIEW

[2] The Claimant is a 51-year-old woman who applied for disability benefits in October 2017. In her application, she reported that she is unable to work because of PTSD, social phobia, obsessive-compulsive disorder, a thyroid condition, chronic polymyalgias with associated brain fog, and chronic pain. The Minister denied the application initially and on reconsideration. In its decision letters, the Minister explained that it was denying the Claimant's application because the Social Security Tribunal (SST) had previously determined that the Claimant was not disabled at the time she met the contributory requirements of the CPP.

[3] The Claimant appealed the reconsideration decision to the SST. In March 2019, a member of the SST General Division summarily dismissed the Claimant's appeal. That member decided that the Claimant's appeal did not have a reasonable chance of success because the SST Appeal Division (AD) had already decided in April 2014 that the Claimant was not disabled at the time she met the contributory requirements. In other words, the member decided that the principle of *res judicata* applied to the AD decision of 2014.

[4] The Claimant appealed the member's summary dismissal decision to the AD. The AD allowed the appeal because the General Division did not consider whether there were any special circumstances that would cause an injustice if *res judicata* was applied. The AD returned the matter back to the General Division for reconsideration and, in doing so, directed the General Division to give the Claimant an opportunity to provide evidence and make arguments about both parts of the test for *res judicata*.

PRELIMINARY MATTERS

[5] At the start of the hearing, the Claimant told me that she had hoped to have two people with her during the hearing. One was her daughter (K. G.) and one was her friend (S. B.). The

Claimant said that her daughter would be participating as a witness, and her friend would be providing moral support and helping her to understand things. The Claimant explained, however, that although her daughter was with her, S. B. was not. She believed S. B. was on her way, but she also explained that S. B. was in the process of moving. I asked the Claimant if she was comfortable with me starting the hearing despite the fact that her friend was not with her, and the Claimant said she was. Her daughter added that she could help the Claimant if needed. I therefore proceeded with the hearing and, in doing so, I ensured that the Claimant's daughter was not excluded (despite the fact that she intended to be a witness) so that she was available to help the Claimant if needed. After the hearing started and after I explained the issues, which included a detailed explanation of what *res judicata* means, I gave the Claimant an opportunity to let me know if she was having difficulty understanding the issues. The Claimant told me she was understanding my explanations.

The Claimant has a significant appeal history

[6] The Claimant has applied for CPP disability benefits four times. She first applied in October 2010[1]. The Minister denied that application at the initial and reconsideration levels of adjudication. The Claimant appealed the Minister's reconsideration decision to the Office of the Commissioner of Review Tribunals (OCRT)[2]. A Review Tribunal heard the Claimant's appeal on May 12, 2012. The Review Tribunal's decision states the issue as whether the Claimant had a severe and prolonged disability on or before December 31, 1990 or in 2009 but no later than April 30, 2009. After the hearing, the Review Tribunal determined that the Claimant's disability was not severe by April 30, 2009[3]. The decision explains that the Claimant acknowledged during her hearing that she was not disabled by December 1990[4]. The Claimant appealed the Review Tribunal's decision to the Pension Appeals Board (PAB). The PAB granted leave (permission) to appeal, but it was the SST AD, and not the PAB, that heard the Claimant's appeal. This is because the SST AD replaced the PAB in 2013. The AD heard the Claimant's appeal *de novo*[5] on April 29, 2014 and after that hearing decided that the Claimant's disability was not severe by

[1] Page GD2-313
[2] The OCRT was replaced by the SST in 2013.
[3] Pages GD2-253 to GD2-261
[4] Page GD2-256 at paragraph 12 and Page GD2-260 at paragraph 30
[5] The term "de novo" is a Latin phrase that means "starting from the beginning".

April 30, 2009[6].

[7] The Claimant applied again for disability benefits in April 2015[7] (the second application) and January 2016[8] (the third application). The Minister denied each application at the initial level of adjudication, and the Claimant did not ask the Minister to reconsider either decision.

[8] The Claimant's fourth application was made in October 2017[9], and this is the application that is before me.

Why the Claimant's appeal history is important

[9] The Claimant's appeal history is important because of a legal principle known as *res judicata*. Generally speaking, *res judicata* means that once a dispute has been finally decided, it cannot be litigated again. The doctrine is motivated in part by public policy concerns and it is intended to advance the interests of justice by basically preventing a decision from being made again on the same issue. In a case called *Danyluk*, the Supreme Court of Canada explained the public policy concerns this way[10]:

> The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry…An 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.

ISSUES

[10] Given that the AD previously considered the Claimant's eligibility for CPP disability benefits in 2014, I must decide whether the principle of *res judicata* applies to that decision.

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[6] Pages GD2-208 to GD2-218
[7] Page GD2-116
[8] Page GD2-36
[9] Page GD2-16
[10] *Danyluk* v. *Ainsworth Technologies Inc*., 2001 SCC 44 at paragraph 18

[11] If the principle of *res judicata* applies, then I must dismiss the appeal without considering whether the Claimant is disabled.

[12] If the principle of *res judicata* does not apply, then I must decide whether the Claimant's disability was severe and prolonged by December 31, 1990 or whether it became severe and prolonged between January 1, 2009 and April 30, 2009.

ANALYSIS

When *res judicata* applies

[13] The principle of *res judicata* applies to administrative tribunals, like the SST[11]. For the principle to apply, three preconditions must be must:

a) the issue in the two proceedings must be the same;

b) the decision which is said to give rise to *res judicata* must be a final decision; and

c) the parties in the two proceedings must be the same.

The three preconditions of *res judicata* are met in this case

[14] The Minister submits that the three preconditions of *res judicata* are met. The Claimant does not dispute the Minister's assertion and in fact she said she acknowledges that the three preconditions are met. I agree with the parties.

(a) The issue in the two proceedings is the same

[15] The issue in the two proceedings is the same. The issue before the AD in April 2014 was whether the Claimant's disability was severe and prolonged by December 31, 1990 or whether it became severe and prolonged between January 1, 2009 and April 30, 2009. That is the same question that has been raised in this appeal.

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[11] *Danyluk, supra* and *Belo-Alves* v. *Canada (Attorney General)*, 2014 FC 1100

[16] I have noticed that the AD framed the issue more broadly than how I have stated the issue[12]. The AD said, for example, that the sole issue was whether the Claimant had a severe and prolonged disability on or before April 30, 2009[13]. The AD did not specifically mention the MQP of December 31, 1990 and did not explain that the prorated MQP of April 30, 2009 could only be used if the Claimant became disabled in 2009 (but before the end of April).

[17] Despite the way the AD framed the issue, I am nonetheless satisfied that the issue in the two proceedings is the same.

[18] The AD was clearly aware that the Claimant's MQP was not *just* April 30, 2009. I say this because when the AD summarized the Claimant's reasons for appeal, it explained that the Claimant was relying on an assessment that identified mental health issues predating "both MQP dates"[14].

[19] As for the proration and the fact that the AD did not explain what it means, I do not see this as a basis to find that the issue in the two proceedings is different. First, the AD had the Minister's submissions of December 2012 and those submissions clearly explained that the Claimant could only prorate her earnings in 2009 if she became disabled between January 1, 2009 and April 30, 2009[15]. If the AD disagreed with how the Minister explained proration, then presumably the AD would have said so in its decision. It did not. The absence of any discussion on this point tells me that the AD likely accepted the Minister's submissions on this point. Second, even if the AD considered whether the Claimant became disabled *at any point* before April 30, 2009, I am still left with no new issue to decide. If the Claimant did not become disabled *at any point* before April 30, 2009, it follows that she did not become disabled between January 1, 2009 and April 30, 2009.

[12] Neither party raised this as an issue. However, I have turned my mind to it because it is something that was apparent to me from the record and because the Claimant was unrepresented.
[13] Page GD2-210 at paragraph 10
[14] Page GD2-210 at paragraph 6
[15] Page GD2-232 at paragraph 21

[20] The Claimant's MQP did not change after her AD hearing in 2014. This is despite the fact that in 2016 the Claimant successfully applied for a division of unadjusted pensionable earnings (DUPE or credit split)[16].

[21] With the credit split, the Claimant has more years of pension credits than she had at the time of her AD hearing in 2014. If the Claimant is able to use the extra years of pension credits, she would have a new Minimum Qualifying Period (MQP)[17] of December 31, 2013.

[22] The Minister submits that the Claimant, as a late applicant,[18] is not able to use the extra years of pension credits to extend her MQP. The Minister's argument is not explained well in the file, but the Minister's representative confirmed at the hearing that the position is based on the findings of a Federal Court of Appeal decision called *Woodcock*[19].

[23] In the *Woodcock* decision, the Court held that late applicants can only use the pension credits obtained through a credit split to extend or establish an MQP for disability benefit purposes if the following circumstances exist:

- The late applicant provision applies;
- The facts of the case make it reasonable to presume that the application for disability benefits and the application for the credit split would have been submitted at or about the same time; and
- Where it is reasonable to conclude that the credit split application would have been accepted if it had been made at that time.

[24] The Minister submits that, although the Claimant is a late applicant, she is unable to meet all three of the *Woodcock* conditions. Specifically, it would not be reasonable to presume that the Claimant would have applied for disability benefits and the credit split in December 2013 (the

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[16] A DUPE or credit split occurs when a couple divorces or separates. The pension credits of both partners are added together for each year they lived together, and then they are divided equally between the partners.
[17] An MQP is the date a person meets the contributory requirements of the CPP.
[18] The late applicant provision is set out in subparagraph 44(1)(b)(ii) of the CPP. The provision protects individuals who apply late (more than 15 months after their MQP) for disability benefits by requiring the Minister to determine whether the applicant would have qualified for disability benefits if the application had been submitted earlier than it was.
[19] *Canada (Minister of Human Resources Development)* v. *Woodcock*, 2002 FCA 296

date of her MQP with the pension credits) because the Claimant was still in a relationship with her husband. She did not separate from her husband until one year later, in December 2014. It would also not be reasonable to conclude that the credit split application would have been accepted if it had been made in 2013 because again the Claimant was not yet separated from her husband[20].

[25] I asked the Claimant if there was anything she wanted to say in response to the Minister's argument about the pension credits not being helpful to her in this appeal, and the Claimant said she had nothing to say on this point.

[26] I find that the Minister's argument is consistent with the *Woodcock* decision. I am aware that there is another Federal Court of Appeal decision (the *Ash* decision[21]) on this issue. In the *Ash* decision, the court appears to have come to a different conclusion than it did in *Woodcock*. However, I have chosen to follow the *Woodcock* decision rather than the *Ash* decision. This is because I am unable to understand how the court arrived at its decision in *Ash*. On the one hand, the court in *Ash* said that *Woodcock* was "dispositive" (determinative) of the issue relating to the interpretation of the late applicant provision and yet, on the other hand, the court reached a conclusion that appears to be inconsistent with what *Woodcock* says.

(b) The Decision of the AD is final

[27] The 2014 decision of the AD is final. The finality of that decision is confirmed by the legislation that creates the SST[22], and by the fact that the Claimant did not apply to have the AD decision of 2014 judicially reviewed.

(c) The parties in the two proceedings are the same

[28] The parties in the two proceedings are the same. The parties in the AD proceeding of 2014 were the Claimant and the Minister. These are the same two parties in this proceeding.

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[20] Page IS1-22
[21] *Canada (Minister of Human Resources)* v. *Ash*, 2002 FCA 462
[22] The legislation that creates the SST is the *Department of Employment and Social Development Act*. Section 68 of that Act states that the decision of the Tribunal on any application made under the Act is final and, except for judicial review under the *Federal Courts Act*, is not subject to appeal or review by any court.

Applying *res judicata* involves some discretion

[29] Even when the three preconditions of *res judicata* are met, I can still decide not to apply *res judicata*. This is because *res judicata* involves an element of discretion. While discretion exists, I cannot exercise that discretion randomly. In other words, I cannot decide for just *any* reason that *res judicata* should not apply. My objective is to ensure that the operation of *res judicata* promotes the orderly administration of justice, but not at the cost of real injustice[23].

[30] The Supreme Court of Canada has set out a list of factors to consider when exercising discretion. The factors 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 proceeding; and (g) any potential injustice[24].

[31] There are three important comments to make about these factors.

[32] First, this list of factors is open. This means that all of these factors may not be relevant in every case. It also means that these factors may not be the only factors to consider. Indeed, the Court acknowledged that there may well be other factors to consider such as a change in the law after the first proceeding or where further relevant material becomes available after the first decision was made[25].

[33] Second, these factors are not meant to be a checklist, and they are not an invitation to engage in a mechanical analysis[26]. However, decision makers are required to address the factors for and against the exercise of discretion[27].

[34] Third, of all the factors to consider, the one that is said to be the most important is the potential injustice factor[28]. This factor requires me to stand back and ask myself whether, given

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[23] *Danyluk, supra*, at paragraph 67
[24] *Danyluk, supra*
[25] *Danyluk, supra*, at paragraph 67 where the court cited with approval the factors considered in *Minott* v. *O'Shanter Development Company Ltd*., 1999 CanLII 3686 (ON CA)
[26] *Penner* v. *Niagara (Regional Police Services Board)*, 2013 SCC 19 at paragraph 38
[27] *Danyluk, supra*, at paragraphs 65 and 66
[28] *Danyluk, supra*, at paragraph 80

the entirety of the circumstances, the application of *res judicata* in this particular case would work an injustice[29].

[35] To help me understand the types of circumstances that might cause an injustice, I have looked at cases decided by other decision makers. Some of the circumstances where other decision makers have used their discretion to find that *res judicata* should not apply include situations where:

- the prior decision resulted from a process where the claimant had not received notice of the other party's allegations or been given a chance to respond to them[30].
- the prior decision was "unintelligible" (it could not be understood) and where the claimant did not pursue her appeal rights of that decision because she instead followed the direction of the decision maker to undergo treatment for depression[31].
- the prior decision was rendered without jurisdiction. (The claimant had withdrawn his appeal before his Tribunal hearing but the Tribunal nonetheless conducted a hearing in the claimant's absence, and dismissed the appeal)[32].
- The claimant invoked the procedure at a time of personal vulnerability (she was on maternity leave), was self-represented in the context of a case with a complex procedural history, and was faced with the unusual situation of having two regulatory bodies refuse to take jurisdiction over her claim[33].
- There was a significant difference between the purpose, process and stakes involved in the two proceedings[34].

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[29] *Danyluk, supra,* at paragraph 80
[30] *Danyluk, supra*
[31] *M.L.* v. *Minister of Employment and Social Development*, 2018 SST 861
[32] *A.H.* v. *Minister of Employment and Social Development*, 2018 SST 1015
[33] *Tempest Global Telecom Inc*. v. *Kelly Maddison*, 2016 CanLII 17188 (ON LRB)
[34] *Id* v. *Adan*, 2019 ONSC 1070

This is not a case where I should use my discretion to not apply *res judicata*

[36] Keeping in mind that the factors mentioned in *Danyluk* are not meant to be a checklist or mechanically applied, and knowing that the AD has not (in other appeals involving *res judicata)* required a checklist-type approach to the *Danyluk* factors[35], there is no value in me scrutinizing each of the factors mentioned in *Danyluk*. Instead, I will focus on the factors that are relevant to what the Claimant told me and what is apparent to me from the record.

[37] The Claimant did not have a lot to say about why *res judicata* should not apply to the AD decision of 2014. However, when I asked the Claimant if there was anything that happened at her AD hearing that seemed unusual or unfair, she said that obesity was the focus of the AD's attention and that this "mortified" her because the word was used so many times. She remembered crying the whole way home from the hearing.

[38] I acknowledge that obesity can be a sensitive subject. I also appreciate that it must be very difficult for any claimant to speak openly in a judicial-type setting about something as personal as their medical conditions. However, these are not reasons for me to find that the proceeding was unfair. They are also not reasons for me to find that there would be an injustice if I were to apply *res judicata*.

[39] First, I asked the Claimant if she was given a chance to speak at the hearing and provide evidence, and she acknowledged that she was given that opportunity. She did not say that the AD member's references to obesity caused her to shut down or otherwise prevented her from giving evidence or stating her case.

[40] Second, the decision of the AD indicates that the Claimant participated in the hearing. The Claimant attended the AD hearing in person, she gave an opening statement, she provided oral testimony, and she had a witness (her then husband) testify on her behalf.

[41] Third, if the Claimant felt in any way disadvantaged by something that happened at the AD hearing in 2014 or even if she disagreed with the AD's decision, it was open to her to apply

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[35] See, for example, *B.S.* v. *Minister of Employment and Social Development*, 2017 SSTADIS 696 and *P.H.* v. *Minister of Employment and Social Development*, 2018 SST 5.

to the Federal Court of Appeal to have that decision judicially reviewed[36]. I asked the Claimant if she pursued that option and she said she did not. When I asked her to explain why she did not pursue that option, she said she could not remember. The Claimant's decision to not pursue an application for judicial review and the absence of a compelling reason explaining that decision, are not favourable to a discretionary decision to not apply *res judicata.*

[42] I asked the Claimant if there was anything else about the hearing or any special circumstances that she wanted to bring to my attention, and she said she had nothing further to add.

[43] I have looked at the record as a whole and there is nothing that stands out to me as a reason for why I should find that *res judicata* does not apply. There is no hint, for example, of any deficiencies in the procedure leading up to the AD's decision. There is also no concern about the AD's decision being based on considerations that were foreign to the member or beyond the member's expertise. The AD's decision involved the member's "home" statute (the law that the member is deemed to have expertise about).

[44] What the Claimant is really asking me to do is re-hear her case because she disagrees with the AD's decision. She wants another chance to prove her case. While I am sympathetic to the Claimant's position, I cannot do what she is asking.

[45] The CPP is not a social welfare scheme. It is a program that provides social insurance to eligible Canadians who lose earnings due to such things as disability[37]. The AD held in 2014 that the Claimant is not eligible for the disability pension.

[46] The circumstances in this appeal are not such that there would be an injustice in finding that *res judicata* applies to the AD decision of 2014.

[47] Because *res judicata* applies to the AD decision of 2014, I cannot consider whether the Claimant has a disability that was severe and prolonged at the time she met the contributory requirements.

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[36] Section 68 of the DESD Act and paragraph 28(1)(g) of the *Federal Courts Act*
[37] *Belo-Alves, supra* at paragraph 98

CONCLUSION

[48] The appeal is dismissed.

Shannon Russell
Member, General Division - Income Security