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

Citation: *D. B. v Minister of Employment and Social Development*, 2020 SST 437

Tribunal File Number: GP-18-2512

BETWEEN:

D. B.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Pierre Vanderhout

Claimant represented by: Celeste Courville

Teleconference hearing on: February 5, 2020

Date of decision: April 7, 2020

Canada

DECISION

[1] The appeal is dismissed. I find that the doctrine of *res judicata* applies, and I will not exercise my discretion to refuse to apply *res judicata* in the circumstances of this case. This means the 1997 Review Tribunal decision that the Claimant was not entitled to a Canada Pension Plan ("CPP") disability pension is final and binding. This prevents the Claimant from litigating the issue of disability under the CPP again before the Social Security Tribunal.

OVERVIEW

[2] The Claimant has applied many times for a CPP disability pension. The Minister received his latest application on September 20, 2017. The Minister denied the application initially and on reconsideration. The Minister says the principle of *res judicata* prevents the Tribunal from considering the Claimant's latest application. The Minister says the Review Tribunal considered the same question in 1997 and the Claimant's Minimum Qualifying Period ("MQP") was the same as it is today. The Claimant appealed the reconsideration decision to the Social Security Tribunal. The Claimant argues that the Tribunal has the discretion not to apply *res judicata* to this appeal, based on a Supreme Court of Canada decision. In the alternative, relying on another Supreme Court decision, the Claimant submits that the 1997 Review Tribunal decision should be considered a nullity. That would also prevent the application of *res judicata*.

[3] To qualify for a CPP disability pension, the Claimant must meet the requirements set out in the CPP. In particular, he must be found disabled, as defined in the CPP, on or before the end of his MQP. The MQP calculation is based on his CPP contributions. I find that his MQP is December 31, 1993. However, I can only consider the disability issue if *res judicata* does not prevent me from doing so.

PRELIMINARY MATTER

[4] At the pre-hearing conference, the parties agreed on a two-stage process for this appeal. First, I would hold a hearing to determine if *res judicata* prevented the hearing of the appeal on the merits. If I found that *res judicata* applied, that would be the final decision in this matter and no further hearing or decision would be needed. However, if I found that *res judicata* did not

apply, I would deliver that finding in an interim decision. I would then hold a second hearing on the merits of the Claimant's appeal, followed by a final decision on the merits.

ISSUE

[5] Is the Claimant's appeal barred by the application of *res judicata*?

ANALYSIS

[6] This matter has a long and complicated history, with many proceedings at both the Tribunal and its predecessors. However, the issue is actually quite simple. Does the principle of *res judicata* apply?

Summary of events

[7] The Claimant first applied for CPP disability benefits in 1993. However, that application is not relevant to my decision. I am concerned with his second CPP disability application, which he made on January 31, 1996. The Minister denied it initially in June 1996. The Claimant asked for a reconsideration. On January 6, 1997, the Minister made a reconsideration decision that upheld the initial denial. The Claimant then appealed the reconsideration decision to the Review Tribunal (the predecessor of the Social Security Tribunal's General Division).

[8] The Review Tribunal (which I'll call the "1997 Review Tribunal") heard the appeal in June 1997. On September 9, 1997, the Review Tribunal issued its decision (the "1997 Review Tribunal Decision"), in which the Claimant's appeal was denied.[1] The 1997 Review Tribunal found that the Claimant did not have a severe and prolonged disability by the end of his MQP on December 31, 1993.

[9] The Claimant did not appeal the 1997 Review Tribunal Decision at the time. However, he filed another CPP disability application on January 6, 1998, and has pursued disability benefits from time to time since then. His MQP is still December 31, 1993, so the principle of *res judicata* appears to apply.

[1] GD2-1300 to GD2-1302

[10] The Minister denied the Claimant's latest application on June 15, 2018. On October 5, 2018, relying on *res judicata*, the Minister made a reconsideration decision that upheld the initial denial. The Claimant appealed that decision to the General Division of the Tribunal (which is the appeal I am currently deciding). However, it went into abeyance for a while because the Claimant also had an appeal at the Tribunal's Appeal Division.

[11] The Claimant's 2018 appeal to the Tribunal's Appeal Division sought an extension of time to appeal the 1997 Review Tribunal Decision. On December 14, 2018, the Tribunal's Appeal Division ruled that the Claimant was too late to appeal the 1997 Review Tribunal Decision. As a result, the current appeal could finally proceed.

The Claimant's arguments

[12] While the Claimant acknowledges that the 1997 Review Tribunal Decision exists, he argues that the principle of *res judicata* should not apply to his appeal. He bases his arguments on two Supreme Court of Canada decisions: *Danyluk*[2] and *Chandler*[3].

[13] The *Danyluk* decision sets out a two-step test to determine whether *res judicata* ought to apply. The Claimant admits that the *Danyluk* decision is the leading case on *res judicata*.

[14] For the first step in the *Danyluk* test, the Claimant says the issue decided in the 1997 Review Tribunal Decision is different from the issue to be decided in this application. For the second step in the *Danyluk* test, the Claimant says the 1997 Review Tribunal Decision applied the wrong test for CPP disability benefits, by insisting on objective medical evidence of physical impairment. As a result, the Claimant submits that the principles of natural justice prevent the application of *res judicata*.

[15] The *Chandler* decision says that, in certain circumstances, a previous tribunal decision can be considered a nullity. The Claimant says the 1997 Review Tribunal Decision was a nullity because the panel was biased and did not weigh and consider all the medical evidence. If the

[2] *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44.
[3] *Chandler v. Alberta Association of Architects*, [1989] 2 SCR 848.

1997 Review Tribunal Decision is a nullity, then *res judicata* would not apply. I will consider the Claimant's arguments with respect to both the *Danyluk* and *Chandler* decisions.

Is the Claimant's appeal barred by the application of *res judicata*?

[16] For the reasons that follow, I find that res *judicata* applies to the Claimant's present appeal. This means his appeal cannot proceed to a hearing and decision on the merits.

[17] In *Danyluk*, the Supreme Court of Canada affirmed that *res judicata* applies when considering issues that the courts previously decided. When *res judicata* applies, the decision in the previous proceeding prevents the re-litigation of an issue. If *res judicata* applies to this case, then the 1997 Review Tribunal Decision would prevent the Claimant from relitigating the issue of disability under the CPP before the Tribunal.

[18] The *Danyluk* decision sets out a two-step test for the application of *res judicata*. The Claimant argues that neither of these steps is satisfied.

The first step of the Danyluk test

[19] For the reasons that follow, I find that the first step of the *Danyluk* test is met.

[20] Three conditions must be met in the first step of the *Danyluk* test:

(1) The issue must be the same as the one decided in the prior decision;
(2) The prior decision must have been a final decision; and
(3) The parties to both proceedings must be the same.

[21] The Claimant admits that the second and third conditions are met. However, he says that the 1997 Review Tribunal Decision did not decide the same issue.

(1) Was the same issue decided in the 1997 Review Tribunal Decision?

[22] The 1997 Review Tribunal Decision decided whether the Claimant was disabled as defined in the *Canada Pension Plan* on or before the end of his MQP on December 31, 1993.[4]

[4] GD2-1301

[23] In the current appeal, the question is whether the Claimant was disabled as defined under the *Canada Pension Plan* on or before his MQP of December 31, 1993. He admits that his MQP ended on December 31, 1993. The CPP definition of disability has not changed since the 1997 Review Tribunal Decision.

[24] The Claimant suggests that the same issue was not decided, as the 1997 Review Tribunal Decision denied his appeal because no objective medical evidence supported a finding that he was disabled.[5] He submits that the 1997 Review Tribunal applied the wrong test, and therefore did not decide the same issue that is currently before this Tribunal. He said he gave persuasive oral evidence at the hearing. He submitted that objective evidence is not required: the relevant CPP provisions focus on whether an applicant can work.[6] He also cited a 1993 Pension Appeals Board decision called *Bennett* that relied on the applicant's convincing and credible evidence. However, I note the *Bennett* decision considered objective medical evidence as well.[7]

[25] In my view, the Claimant argues that the 1997 Review Tribunal made an error in law by applying the wrong CPP disability test when it relied on objective evidence. This is not the same as dealing with a different issue. I am not persuaded, for example, that the 1997 Review Tribunal lacked the jurisdiction to make the decision it made. I find that the 1997 Review Tribunal did in fact decide the same issue. It assessed whether the Claimant was disabled under s. 42(2) of the *Canada Pension Plan*. This is exactly what the Claimant seeks in his latest application. When he applied for disability benefits in 1996, he said his impairments were chronic back pain from damaged vertebrae and pain on the right side of the body and chest.[8] Later that year, Dr. Lax (Family Physician) said the disability was based on three significant back injuries that left the Claimant physically disabled and unable to do physically demanding work. The Claimant's intellectual limitations prevented other kinds of work. In May 1997, right before the hearing, Dr. Lax again stressed the Claimant's chronic low back pain.[9] If the current appeal were to proceed to a hearing on the merits, the Claimant would rely on these and other examples of objective evidence.

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[5] GD2-1302
[6] Paragraph 42(2)(a) of the *Canada Pension Plan*.
[7] *Bennett v. MNHW*, (1993) CP 2549.
[8] GD2-785
[9] GD2-759 and GD2-682

[26] The Claimant's current appeal concerns the same issue in the 1997 Review Tribunal Decision: his eligibility for a CPP disability pension. As a result, the first condition is met.

(2) Was the 1997 Review Tribunal Decision final?

[27] The Claimant admits that the 1997 Review Tribunal Decision was final. A letter accompanying the decision set out the appeal procedure. It said that a party who is not satisfied with the decision could apply to the Pension Appeal Board (the "Board") for leave to appeal, within 90 days after receiving the decision. The letter gave the Board's address, and invited the parties to contact the Review Tribunal if they had any questions.[10] I see no evidence that the Claimant appealed to the Board within 90 days of receiving the 1997 Review Tribunal Decision.

[28] As the 1997 Review Tribunal Decision was not appealed in time, it is a final decision. The second condition is therefore met.

(3) Are the parties to the 1997 Review Tribunal Decision and the current proceeding the same?

[29] The 1997 Review Tribunal is very similar to the General Division of the Social Security Tribunal. They are both adjudicative fact-finding tribunals that apply an objective legal standard to those facts. They both allow hearings. They both allow applicants to call new evidence, respond to the Minister's evidence, make submissions, and receive written reasons for decisions.

[30] The 1997 Review Tribunal Decision arose from the Claimant's appeal against the Minister of Human Resources Development's reconsideration decision. The current appeal arises from the Claimant's appeal against the Minister of Employment and Social Development's reconsideration decision. The responsible minister's name is the only thing that has changed. The Minister of Employment and Social Development now administers the Canada Pension Plan. The Claimant admits this. In each case, the minister represents the federal government. The parties are therefore the same, and the third condition of the first step in *Danyluk* is met.

The second step of the Danyluk test

[31] For the reasons that follow, I find that the second step of the *Danyluk* test is met.

[32] The second step of the *Danyluk* is deciding whether *res judicata* should not be applied as a matter of discretion. When making this decision, the following factors should be considered:

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[10] GD2-1300

(1) The wording of the statute from which the power to issue the administrative order derives;
(2) The purpose of the legislation;
(3) The availability of an appeal;
(4) The safeguards available to the parties in the administrative procedure;
(5) The expertise of the administrative decision maker;
(6) The circumstances giving rise to the prior administrative proceedings; and
(7) The potential injustice.

[33] The Claimant submits that the 1997 Review Tribunal Decision applied the incorrect test for CPP disability benefits, by insisting on objective medical evidence of physical impairment. As a result, he submits that the principles of natural justice (in other words, the potential injustice) prevent the application of *res judicata*.

[34] Although prior Tribunal decisions (even those from the Tribunal's Appeal Division) are not binding on me, they can be persuasive. In a 2015 decision, the Appeal Division said these factors may not merit equal consideration, and there may even be other factors.[11] There is an overriding question of fairness involved, to avoid a potential injustice. There must also be a balance between the needs for fairness, efficiency, and predictability of outcome.[12] The question I have to answer is whether, standing back and looking at all of the circumstances, applying *res judicata* would cause an injustice.

[35] I will first consider the procedural aspects of the 1997 Review Tribunal matter.

The Claimant received procedural fairness from the 1997 Review Tribunal

[36] I find that the Claimant knew the case he had to meet before the 1997 Review Tribunal. His written submissions to the 1997 Review Tribunal specifically address the need to have a "severe" and "prolonged" disability.[13] He had a reasonable opportunity to meet the test and state his case in support of it.

[37] After the Claimant filed his Notice of Appeal, the Review Tribunal advised him to decide if he wanted to obtain any new information or evidence to support his appeal. The Review Tribunal also told him to decide if he would have a representative or witnesses to support him at

[11] *D. K. v. Minister of Employment and Social Development*, 2015 SSTAD 1068.
[12] *Minott v. O'Shanter Development Co.*, (1999) 42 O.R. (3d) 321 (Ont. C. A.).
[13] GD2-684 to GD2-685

the hearing. The Review Tribunal gave him contact details, if he needed any other information about the hearing.[14] The Review Tribunal then sent a Notice of Hearing four weeks before the hearing date. That Notice affirmed his right to be heard, his right to testify and call witnesses, his right to submit evidence, and the possibility of having a representative help him at the hearing. The Review Tribunal again gave contact information for any questions that he might have.[15]

[38] The Claimant filed a detailed psycho-educational report before the 1997 Review Tribunal hearing.[16] The Claimant's family doctor also gave an updated report shortly before the hearing. This report addressed the Claimant's ability to work and summarized his medical conditions.[17]

[39] I am satisfied that the Claimant had the chance to make his case at the hearing itself, as the 1997 Review Tribunal Decision says that it "heard the parties and considered the evidence".[18] At the proceeding before me, the Claimant's Representative said she did not take issue with the conduct of the hearing at the 1997 Review Tribunal.

[40] The Claimant did not pursue an appeal of the 1997 Review Tribunal Decision to the Pension Appeals Board, although the law at the time allowed him to do that.[19] However, the Review Tribunal told him about this option on several occasions. This was set out in the May 1997 Notice of Hearing and the 1997 Review Tribunal Decision. The 1997 Review Tribunal Decision gave the Board's address, and set out the 90-day deadline to apply for leave to appeal. The Claimant also knew he could contact the Review Tribunal with any questions.[20]

[41] Considering all of the above, I do not see any evidence of a procedural injustice at the 1997 Review Tribunal. I will now consider the Claimant's argument that there was an injustice because the 1997 Review Tribunal Decision applied the incorrect test for CPP disability benefits.

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[14] GD2-728 to GD2-729
[15] GD2-712 to GD2-713
[16] GD2-684 to GD2-685, and GD2-721 to GD2-727
[17] GD2-682
[18] GD2-1301
[19] Section 83 of the *Canada Pension Plan*, RSC 1985, c C-8, s 82.
[20] GD2-712 and GD2-1300

Did the 1997 Review Tribunal apply the incorrect test?

[42] The Claimant says the 1997 Review Tribunal wrongly insisted on objective medical evidence of physical impairment. As a result, the Claimant submits that the principles of natural justice prevent the application of *res judicata*.

[43] This is very similar to the Claimant's argument for the first step of the *Danyluk* test. As set out above, he cited legislative authority for his position that objective medical evidence is not required. He cited a non-binding Board decision affirming that the 1997 Review Tribunal could rely on an applicant's testimonial evidence.

[44] To begin, I see no injustice in the 1997 Review Tribunal relying on the evidence of Drs. Jimenez, Kay, and Chung. A tribunal may prefer objective medical evidence to subjective evidence from one of the parties.

[45] I turn now to whether the 1997 Review Tribunal wrongly insisted on objective medical evidence. I agree that the 1997 Review Tribunal Decision identified the lack of objective medical evidence in its decision. However, the CPP Regulations mention the requirement of objective medical evidence.[21] Is the 1997 Review Tribunal Decision still an injustice that requires me to use my discretion and refuse to apply *res judicata*?

[46] In *Danyluk*, the Supreme Court said *res judicata* (issue estoppel) is closely related to abuse of process. I must ask if something in the circumstances of this case would make the application of *res judicata* an injustice.[22] In *Danyluk*, the Supreme Court also drew a distinction between applying the discretionary factors and simply substituting a new opinion for that of the previous decision maker.[23]

[47] In *Danyluk*, there was an injustice because the appellant was not told of the respondent's allegation and had no opportunity to respond.[24] This is much different from the Claimant's case.

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[21] Section 68 of the *Canada Pension Plan Regulations*.
[22] *Danyluk*, at paragraph 63.
[23] *Danyluk*, at paragraph 66.
[24] *Danyluk*, at paragraph 80.

[48] The Claimant asks me to find the 1997 Review Tribunal Decision inherently unjust. Alas, after reviewing *Danyluk*, I am unable to do so. This does not mean that I would render the same decision as the 1997 Review Tribunal, if I were to look at the merits of the case today. However, it is also irrelevant whether I would make the same decision. In deciding whether I should use my discretion not to apply *res judicata*, I cannot reweigh the evidence. That would only be appropriate after deciding that *res judicata* should not apply.

[49] In my view, an unjust decision would arise if the decision were based on inherently flawed proceedings. As noted, I see nothing materially wrong with the procedures leading up to the 1997 Review Tribunal Decision. The Claimant had a full opportunity to be heard, file evidence, and make submissions. The purposes, processes, and stakes of the current appeal and the 1997 Review Tribunal matter are virtually identical.[25]

[50] An injustice might arise if the Claimant had been prevented from appealing an error by the 1997 Review Tribunal. However, I see no evidence to suggest that this happened. The Claimant could have appealed the 1997 Review Tribunal Decision. He chose not to appeal, and instead chose to pursue a new application for CPP disability benefits. Failing to exercise the option to appeal is not an injustice. It is a choice that he made himself.

[51] The Claimant was not deprived of the opportunity to have his claim to a CPP disability pension properly assessed and judged.[26] Based on the binding decision in *Danyluk*, I am not satisfied that I ought to exercise my discretion and refuse to apply the doctrine of *res judicata*. I will now decide if the *Chandler* decision helps the Claimant avoid *res judicata*.

The Chandler Decision

[52] For the following reasons, I find that the *Chandler* decision does not help the Claimant avoid *res judicata*. As the *Chandler* decision is complicated, I will summarize it first.

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[25] *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19, at paragraphs 42-48.
[26] *D. K. v. Minister of Employment and Social Development*, 2015 SSTAD 1068.

Summary of the Chandler decision

[53] The *Chandler* decision followed a decision of the Practice Review Board (the "Review Board") of the Alberta Association of Architects (the "Association"). While the hearing was supposed to be a practice review of an architectural firm that went bankrupt, the Review Board made 21 findings of unprofessional conduct against the firm and its architects. The Review Board also levied fines, imposed suspensions, and ordered the architects to pay the hearing costs. The Court of Queen's Bench overturned the Review Board's decision. The Court of Appeal then upheld the Court of Queen's Bench's decision. The applicable legislation said that the Board was only responsible for reporting to the Association's Council (the "Council") and making appropriate recommendations, not for imposing discipline.

[54] After losing at the Court of Appeal, the Review Board wanted to reconvene the hearing so that it could report to the Council. The architects opposed this and succeeded at the Court of Queen's Bench, which found the Review Board was "*functus officio*" (in other words, they had already finished their work and could not reconvene). However, the Review Board succeeded at the Court of Appeal. The Court of Appeal found that the Review Board had not considered whether to make recommendations to the Council, and therefore had not finished its work.

[55] The Supreme Court of Canada sided with the Court of Appeal, saying that the Review Board did not dispose of the matter in a way permitted by the legislation. The Review Board's disciplinary findings and orders were outside its jurisdiction. The Review Board wrongly thought it had the powers of the Complaint Review Committee and proceeded accordingly. It did not consider making recommendations, as required by the applicable regulations. This meant the Review Board's previous ruling (including the fines and suspensions) was a legal nullity and amounted to no disposition at all. This allowed the Review Board to continue the original proceedings.

The Claimant's Chandler argument

[56] According to the Claimant, the *Chandler* decision supports finding that the 1997 Review Tribunal Decision was a nullity. He says that decision should be a nullity because the 1997

Review Tribunal panel was biased and did not weigh and consider all the medical documents. If the 1997 Review Tribunal Decision is a nullity, then *res judicata* would not apply.

Applying Chandler to the 1997 Review Tribunal Decision

[57] I see no evidence that the 1997 Review Tribunal was biased. The Claimant appears to infer that the 1997 Review Tribunal was biased, based on the text of the decision and the outcome. However, a finding against the Claimant does not mean that the 1997 Review Tribunal was biased against him. Judicial impartiality is presumed, and there is a high burden of proof on the party alleging bias. I do not see the "reasonable apprehension of bias" that the Supreme Court of Canada has recently endorsed.[27] Nothing in the decision suggests that the 1997 Review Tribunal made up its mind before the hearing, refused to consider his evidence, or otherwise had an unfair hearing. In fact, the 1997 Review Tribunal Decision begins by saying the Claimant has a severe learning disability and may be illiterate.[28]

[58] Even more important, however, is the fact that the 1997 Review Tribunal acted entirely within its jurisdiction. It was entitled to make a finding on whether the Claimant met the CPP disability criteria. This is exactly what the 1997 Review Tribunal did.

[59] The Claimant's reliance on the *Chandler* case is similar to his argument that the first step of the *Danyluk* test (specifically, whether the same issue was decided) was not satisfied. The Claimant clearly does not approve of the 1997 Review Tribunal Decision or the reasons for that decision. He identified evidence that could support a finding of disability under the *Canada Pension Plan*, rather than the finding made by the 1997 Review Tribunal. However, cases frequently have evidence that can fairly support either of the two possible outcomes. In this case, there is also evidence to support the 1997 Review Tribunal Decision. Disagreeing with the 1997 Review Tribunal Decision, without persuasive proof that it was outside the 1997 Review Tribunal's authority, is not enough to make it a nullity. The Claimant could also have asked the Pension Appeals Board for leave to appeal in 1997, if he had been unhappy with the 1997 Review Tribunal's process and findings. He chose not to do that.

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[27] *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25.
[28] GD2-1301

[60] I conclude that the 1997 Review Tribunal acted within its jurisdiction when it made the 1997 Review Tribunal Decision. This means the 1997 Review Tribunal Decision is not a nullity. This means that the Claimant cannot use the *Chandler* decision to avoid the application of *res judicata* in this case.

CONCLUSION

[61] Both steps in the *Danyluk* decision are satisfied in this case. The *Chandler* decision does not assist the Claimant. This means the principle of *res judicata* applies to his appeal. As a result, the appeal is dismissed and no further hearing or decision is needed.

Pierre Vanderhout
Member, General Division - Income Security