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

Citation: *MB v Minister of Employment and Social Development*, 2021 SST 580

Tribunal File Number: GP-20-1892

BETWEEN:

M. B.

Appellant (Claimant)

and

Minister of Employment and Social Development

Minister

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

Decision by: Nicole Zwiers

Videoconference hearing on: April 12, 2021

Date of decision: June 4, 2021

Canada

DECISION

[1] The Claimant is not entitled to a Canada Pension Plan (CPP) disability pension.

OVERVIEW

[2] The Claimant stopped working in September 2013 for non-medical reasons. The Claimant bases her CPP application on significant mental health condition, irritable bowel syndrome (IBS) and significant vascular disease. The Minister received the Claimant's application for the disability pension on March 5, 2019. The Minister denied the application initially and on reconsideration. The Claimant appealed the reconsideration decision to the Social Security Tribunal.

[3] To qualify for a CPP disability pension, the Claimant must meet the requirements that are set out in the CPP. More specifically, the Claimant must be found disabled as defined in the CPP on or before the end of the minimum qualifying period (MQP). The calculation of the MQP is based on the Claimant's contributions to the CPP. I find the Claimant's MQP to be December 31, 2015.

[4] The Claimant's husband, D. B., testified at the hearing.

[5] The Minister has raised the issue of *res judicata* and taken the position that the Claimant's matter has already been fully and finally decided by a member of the Tribunal, General Division in February 2017. The Claimant first applied for a CPP disability pension in August 2014.

[6] I have approached the matter before me by inviting the Claimant and her husband to provide any and all evidence about the Claimant's condition and the Claimant's submission that she had a severe and prolonged disability as of her MQP. In the event that I had decided that the matter is not *res judicata* or that I can make an exception to the application of *res judicata*, I would have the evidence before me to make a decision.

[7] The first part of my decision reflects the evidence provided to me by the Claimant and her husband. The second part is a consideration of the law I am bound to follow about *res judicata* and my ability to make an exception to its application here. For the reasons that follow,

I find that I must apply the doctrine of res judicata, not exercise discretion and dismiss the Claimant's appeal.

ISSUE(S)

[8] Is this matter *res judicata* (already decided) preventing me from making a decision on the application before me?

[9] If yes, in applying my discretion, can I consider the Claimant's second application and make a finding as to whether the Claimant has met the severe and prolonged test as of December 31, 2015 on her second application?

[10] If no to the first issue, did the Claimant's conditions result in the Claimant having a severe disability, meaning incapable regularly of pursuing any substantially gainful occupation by December 31, 2015?

[11] If so, was the Claimant's disability also long continued and of indefinite duration by December 31, 2015?

ANALYSIS

[12] Disability is defined as a physical or mental disability that is severe and prolonged[1]. A person is considered to have a severe disability if incapable regularly of pursuing any substantially gainful occupation. A disability is prolonged if it is likely to be long continued and of indefinite duration or is likely to result in death. A person must prove on a balance of probabilities their disability meets both parts of the test, which means if the Claimant meets only one part, the Claimant does not qualify for disability benefits.

Severe disability

[13] The Claimant testified that she stopped working in September 2013 when she was let go. The Claimant testified that she was terminated because she was having trouble doing her job as she was experiencing medical issues but did not understand what the cause was. The Claimant

[1] Paragraph 42(2)(a) *Canada Pension Plan*

experienced pain in her groin and her legs went numb, felt cold and were purple. The job the Claimant had been doing at that time was a full-time physical job. The Claimant was a material handler and forklift driver since 2007.[2]

[14] The Claimant testified that after she was terminated she tried to do a job through a temporary agency doing work that was less physically demanding where she could stay in one spot to work. Although this job was less physical than her previous work, she stopped working and has not looked for work since. The Claimant testified that she did not look for work because she knew she was unable to work. The Claimant reports that she uses a walker on a daily basis.[3]

[15] The Claimant testified that she sees her vascular surgeon every 3 months but there is nothing more that can be done to help her condition. Her veins are narrower than previously and she is in a lot of pain in her legs and feet. The Claimant testified that she takes medication to treat her condition.

[16] The Claimant testified that her IBS is controlled by medication but she has had to stop taking the medication because she cannot afford it. The Claimant testified that she was diagnosed by a specialist after experiencing constant diarrhea.

[17] The Claimant testified that her anxiety and depression started after she stopped working and are the result of her limitations from her other conditions. She finds it embarrassing that she cannot climb stairs or go for a walk with her husband or have a bonfire with her grandchildren as she used to. The Claimant testified that she takes medication for both and she belongs to private support groups that she found.

[18] The Claimant testified that as of her MQP, December 31, 2015, she was up frequently during the night because of numbness and tingling in her legs and feet. The Claimant's medication allows her to sleep for 2 hours but then she has to get up. This continues into the daytime with the need to get up frequently. The Claimant tries to do some dishes, make tea or coffee and something to eat for herself. She has not done grocery shopping since before her

[2] GD2-58
[3] GD2-50

MQP because she is not able to. She tries to do light housekeeping but it takes her much longer to do tasks than it used to.

[19] The Claimant testified that she takes naps during the day for short periods because she then has to get up due to numbness and tingling in her feet. The Claimant testified that sometimes her pain is so great she feels as though she is going to be physically ill.

[20] The Claimant does have a valid driver's license but only drives short distances because the numbness and tingling in her feet prevent her from driving for longer periods.

[21] The Claimant's husband, D. B., testified at the hearing. D. B testified that the Claimant had a drastic change in her condition after her by-pass surgery in 2018. Although her condition was bad before, it worsened after and there was discussion about possibly amputating her foot.

[22] D. B. testified that the Claimant stopped working in September 2013 and was walking poorly at that time. In 2010 D. B. recalled that the Claimant's condition was relatively good. They walked for miles together. However, the Claimant's condition slowly worsened and stents were put in that also helped at that time. D. B. testified that when the Claimant was working she was much better. By the end of 2015 the Claimant could no longer walk any distance, did not do grocery shopping or cooking and they no longer shared the chores as they used to. D. B. testified that when the Claimant stopped working in 2013 he thought she might have been able to do something else but it became clear that she would not be able to.

[23] A letter from the Claimant's physician, Dr. Somoila, dated May 27, 2020 provides that the Claimant has a medical condition that is severe and prolonged. The prognosis is further confirmed by Dr. Somoila as one that will deteriorate.[4] Dr. Somoila answered that he recommended that the Claimant stop working in September 2014 and did not expect her to return to any type of work. Dr. Somoila wrote that the vascular disease is extensive and precludes any employment.[5]

[24] Dr. Somoila completed the Claimant's medical report on February 28, 2019 and answered that he has been treating her for the main medical condition since June 2014. He

[4] GD2-23
[5] GD2-26

diagnosed her with significant vascular disease since September 2013 with severe pain and decreased mobility. The Claimant was noted to be taking a number of prescription medications.[6]

[25] A letter from Dr. Pearce, Cardiovascular and Thoracic surgeon, dated February 20, 2019 confirms that the Claimant has neuropathic pain in her feet.[7] A diagnostic report dated February 7, 2019 shows a 50-59% stenosis in the right distal superficial femoral artery as well as occlusion on the left distal anterior tibial and dorsalis pedis arteries.[8]

The Matter is Res Judicata:

[26] The Minister has taken the position that the Claimant's current application is *res judicata*. This is a Latin legal term that means the matter at issue has already been finally decided and cannot be decided again. In essence, the Minister takes the position that the Claimant's current and second application is not validly before me. In this case the Minister refers to the Claimant's first CPP disability benefits application dated August 22, 2014 that was heard by a Tribunal member of the Social Security Tribunal, General Division in February 2017. Following the hearing the Tribunal determined that the Claimant did not meet the severe and prolonged test for CPP disability benefits and the Claimant's appeal was dismissed. The Tribunal wrote a decision to this effect.

[27] The Minister has referred to case law that I must follow if I find that it is applicable. The decision of *Danyluk v. Ainsworth Technologies Inc* has a legal test that sets out the means to determine if a matter is *res judicata*.[9] In that decision the first of the two-step analysis to determine whether the legal principle of *res judicata* applies is that: (a) the issue must be the same as the one decided in the prior decision; the prior decision must have been final; and the parties to both proceedings must be the same.

[28] I find that *Danyluk* does apply to this matter. I further find that all three elements of the first part of the test are met. The issue of severe and prolonged is the same as it was in the prior decision. The decision of the General Division was final and the Claimant's leave application to

---

[6] GD2-25
[7] GD2-106
[8] GD2-108
[9] *Danyluk v. Ainsworth Technologies Inc*., 2001 SCC 44, [2001] 2 S.C.R. 460

appeal the General Division decision to the Appeal Division was denied. The parties are the same to both proceedings.

[29] I appreciate that the Claimant has made a second application for CPP disability benefits and she has enclosed new medical documents that are more recent and were not available at her first hearing given the dates on the documents. However, these new documents include documentation from the same treating physician as when the Claimant was before the General Division on her first application. In addition, the documents still refer to the same time period that was considered at the first General Division hearing and it is not clear why the same information was not conveyed at the first hearing. Either the information contained in these documents is new or it's the same as was already considered by the General Division in the first hearing. If it's the case that the new documentation reflects a change in the Claimant's prognosis since her first hearing, the documentation is irrelevant because it is many years after the Claimant's MQP. If it is a duplication of the information that was before the General Division at the original hearing, the Claimant has not provided any new information from that considered at her first hearing.

[30] There is nothing to suggest that the Claimant did not have every opportunity to put any documents she felt were appropriate before the General Division in 2017 and a final binding decision was already made by this Tribunal on the same issue. The Claimant's hearing before the General Division on her first application was over a year after her MQP so any documents provided to the General Division would show the Claimant's conditions as of her MQP.

[31] The Minister has also referred to a second part of the test in *Danyluk* that allows a decision maker to exercise some discretion whether to apply the doctrine of *res judicata,* even where all of the elements of the first part of the test are met. Essentially, this discretion could allow me to make an exception in applying the doctrine of *res judicata* in this circumstance.

[32] In exercising my discretion regarding *res judicata*, I am to consider six factors: the wording of the statute; the purpose of the legislation; the availability of an appeal; the safeguards available to the parties in the administrative procedure; the expertise of the administrative decision maker; the circumstances giving rise to the prior administrative proceeding; and the potential injustice.

[33] I have considered these factors and note, in particular, that the CPP legislation is benevolent. That means that the purpose of the legislation is to help people in need, many of whom are not represented by legal counsel as is the case in this matter. However, I have also considered that the Claimant's hearing before the General Division was over a year after her MQP and, for that reason, I find that the Claimant had every opportunity to provide any documentation she felt was relevant up to the date of her MQP and after. I have no reason to find that the General Division did not have sufficient evidence before it to make a fair and final decision or that the Claimant did not have every opportunity to present her case. The Claimant had access to an appeal of the first decision and her leave to appeal was denied. The Claimant also has an opportunity to appeal my decision if she seeks leave to appeal.

[34] In terms of potential injustice, I do not see any. I appreciate that the Claimant would, of course, prefer to have a finding in her favour but that does not mean that applying *res judicata* creates an injustice. I find that the Claimant had a fair opportunity to present her case and did so. The Claimant appeared before me on her second application and her husband testified as well. There was no information or evidence before me that suggests that there was an injustice or that there will be an injustice if the original decision of the General Division is maintained. In my view, the interests of justice require that I apply the doctrine or *res judicata*.

[35] For all of these reasons I find that the matter is *res judicata* having already been fully and finally decided. Further, I do not find that this is a matter that requires an exercise of my discretion to make an exception to the application of *res judicata*.

CONCLUSION

[36] The appeal is dismissed.

Nicole Zwiers
Member, General Division - Income Security