



Citation: *DP v Minister of Employment and Social Development*, 2022 SST 1779

Social Security Tribunal of Canada General Division – Income Security Section

Decision

Appellant: D. P.
Representative: S. T.

Respondent: Minister of Employment and Social Development

Decision under appeal: Minister of Employment and Social Development reconsideration decision dated January 22, 2021 (issued by Service Canada)

Tribunal member: James Beaton

Type of hearing: Teleconference

Hearing date: August 22, 2022

Hearing participants: Appellant
Appellant's representative

Decision date: September 13, 2022

File number: GP-21-1409

Decision

[1] The appeal is dismissed.

[2] The Appellant, D. P., isn't eligible for a Canada Pension Plan (CPP) disability pension. This decision explains why I am dismissing the appeal.

Overview

[3] The Appellant has applied for a CPP disability pension four times. This appeal is about the Appellant's third application.

[4] On April 20, 2015, the Appellant submitted his **first application**.¹ The Minister of Employment and Social Development (Minister) refused it. The Appellant appealed the Minister's decision to the Social Security Tribunal's General Division. The Tribunal held a hearing on February 15, 2018. On March 19, 2018, it decided to dismiss the appeal.²

[5] Before the Appellant got that decision, he submitted his **second application** on September 24, 2015.³ When the Tribunal decided his first application, it considered the evidence in his second application because it was relevant.⁴ After the Tribunal decided his first application, the Minister refused his second application.⁵

[6] On September 8, 2020, the Appellant submitted his **third application**.⁶ The Minister refused it. The Appellant asked the Minister to reconsider. On January 22, 2021, it refused his application again.⁷ He appealed to the Tribunal.

¹ The first application is at GD2R-200 to GD2R-204.

² The Tribunal's 2018 decision is at GD2R-52 to GD2R-75.

³ The second application is at GD2R-44 to GD2R-48.

⁴ See paragraph 7 of the Tribunal's 2018 decision at GD2R-54.

⁵ See GD2R-39 to GD2R-41.

⁶ The third application is at GD2R-20 to GD2R-37.

⁷ See GD2R-11 to GD2R-13.

[7] On December 24, 2021, the Appellant submitted his **fourth application**.⁸ The Minister will decide it now that the Tribunal has decided this appeal, which involves the third application.⁹

[8] The Minister argues that I have to dismiss the appeal because the Tribunal has already decided that the Appellant isn't eligible for a disability pension. The Minister says the Tribunal's decision was final.¹⁰

What the law says

[9] There is a legal rule called *res judicata*. *Res judicata* is Latin for "thing decided." The rule says that, when a person appeals more than once, the Tribunal can't decide an issue that has already been decided. The rule applies when these three requirements are met:

- a) The issue in the current appeal is the same as the issue in an earlier appeal.
- b) The parties are the same in both appeals.
- c) The decision on the earlier appeal was final.

[10] Even if this rule applies, the Tribunal can still hear the current appeal, but **only** if it would be **unjust** not to. For example, it could be unjust not to hear the appeal:

- if the earlier appeal hearing wasn't fair
- if the purpose, process or stakes involved in this appeal are different than in the earlier appeal

[11] In these situations, the Tribunal could decide to hear the appeal, even though the *res judicata* rule applies.

⁸ The fourth application is at GD6-1 to GD6-18.

⁹ See GD8.

¹⁰ The Minister's arguments are at GD3.

[12] Those are only two examples. There isn't a set list of factors I have to consider when I decide whether it would be unjust not to hear the current appeal.¹¹

[13] I explained this in a letter to the Appellant on July 14, 2022. I told him that his hearing would be his chance to tell me:

- why the *res judicata* rule doesn't apply to his appeal
- why I should hear his appeal even if the *res judicata* rule does apply

[14] I also told him that I would schedule another hearing if I decided that his appeal could go ahead.¹²

[15] Since I have decided that his appeal can't go ahead, there won't be another hearing. This is the end of the Appellant's appeal.

Reasons for my decision

[16] I have decided that the *res judicata* rule applies to the Appellant's appeal. I have also decided that it isn't unjust to decide not to hear it anyway. I will now explain why.

The issue in this appeal has already been decided

[17] The issue in this appeal has already been decided. This means the *res judicata* rule applies, and the appeal can't go ahead. The rule applies because the three requirements for *res judicata* are met.

[18] First, the **issues** in both appeals are the same. The earlier appeal was about whether the Appellant had a severe and prolonged disability by December 31, 2015.¹³ That is when his coverage period, or "minimum qualifying period" (MQP), ended. A person's MQP is based on their contributions to the CPP. After the Tribunal's 2018 decision, the Appellant contributed to the CPP in 2019. But those contributions weren't

¹¹ See *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44; *Penner v Niagara (Regional Police Services Board)*, 2013 SCC 19; and *Belo-Alves v Canada (Attorney General)*, 2014 FC 1100.

¹² See GD11.

¹³ See paragraphs 2 and 62 to 64 of the Tribunal's 2018 decision (GD2R-53, GD2R-68, and GD2R-69).

enough to change his MQP.¹⁴ This means that this appeal is still about whether he had a severe and prolonged disability by December 31, 2015.

[19] Second, the **parties** are the same. They are still the Appellant and the Minister.

[20] Third, the Tribunal's 2018 decision was **final**. The Appellant could only appeal it to the Tribunal's Appeal Division. He had 90 days to do that,¹⁵ but he didn't.

[21] Since the *res judicata* rule applies, I now have to decide whether I should hear the Appellant's appeal anyway. I can do this only if it would be unjust not to hear his appeal.

It isn't unjust to decide not to hear the Appellant's appeal

[22] I find that it isn't unjust to decide not to hear the Appellant's appeal. I explain my reasons below.

– The 2018 hearing was fair

[23] The 2018 hearing was fair. Even if it hadn't been fair, this is only one factor for me to consider. I would also have to consider that the Appellant chose not to appeal to the Appeal Division. The Appeal Division can review a General Division decision to see whether the hearing was fair.¹⁶

[24] The Appellant's spouse argues that the 2018 hearing wasn't fair because:

- she wasn't allowed to testify
- she wasn't allowed in the hearing room to help the Appellant answer questions

¹⁴ See section 44(2) of the *Canada Pension Plan*. The Appellant's contributions to the CPP are explained at GD4.

¹⁵ See section 57(1)(b) of the *Department of Employment and Social Development Act* (DESD Act). This 90-day rule hasn't changed since the earlier appeal.

¹⁶ See section 58(1) of the DESD Act.

- the Appellant's lawyer had issues connecting to the hearing¹⁷

[25] First, the Appellant's spouse did testify.¹⁸ The Tribunal member referred to the spouse's testimony in her decision.¹⁹

[26] Second, it is true that the Appellant's spouse was excluded from the hearing room while he testified. The Tribunal member and the Appellant's lawyer had agreed to this.²⁰ Tribunal members often have witnesses testify individually, without hearing what the appellant or other witnesses have said. This keeps one person's testimony from influencing another person's testimony.

[27] In this case, the Tribunal member asked whether the Appellant needed his spouse present for "moral support."²¹ He said he didn't. His lawyer and the Tribunal member then asked him questions, which he answered.

[28] There is no evidence that the Appellant had trouble understanding questions. Although he might have had trouble remembering details, it was still important for him to testify apart from his spouse. If the Appellant could not remember something, his lawyer could have asked the Appellant's spouse to provide more details when she testified (she testified after the Appellant).

[29] Third, the hearing recording shows that there were technical issues about five minutes into the hearing. However, they were resolved. The Tribunal member repeated what the lawyer had missed, and the hearing continued.²² The evidence doesn't show that technical issues resulted in an unfair hearing.

¹⁷ The 2018 hearing was a three-way video call from three different locations. The Tribunal member was in one location. The Appellant and his spouse were in a second location (a Service Canada office). And the Appellant's lawyer was in a third location.

¹⁸ See the 2018 hearing recording at 1:20:00 to 1:36:00.

¹⁹ See, for example, GD2R-53 and GD2R-64 to GD2R-66.

²⁰ See the 2018 hearing recording at 0:01:20 to 0:02:40 and 0:16:00 to 0:16:30.

²¹ See the 2018 hearing recording at 0:01:20 to 0:02:40.

²² See the 2018 hearing recording at 0:05:20 to 0:11:30.

– **The purpose, process, and stakes in both appeals are the same**

[30] It is fair to use the Tribunal's 2018 decision to keep the Appellant from appealing now. This is because the purpose, process, and stakes involved in this appeal are the same as in his earlier appeal.²³

[31] The **purpose** of this appeal is to decide whether the Appellant had a severe and prolonged disability by December 31, 2015. That was the purpose of the earlier appeal too.

[32] The **process** in both appeals is the same. If I had decided that the current appeal could go ahead, there would have been another hearing—just like there was a hearing for the earlier appeal.

[33] The **stakes** involved in the current appeal are the Appellant's eligibility for a CPP disability pension. The stakes were the same in the earlier appeal.

Conclusion

[34] The Appellant's appeal can't go ahead. The Tribunal has already decided that he didn't have a severe and prolonged disability by December 31, 2015. The *res judicata* rule applies. It isn't unjust to decide not to hear his appeal.

[35] As a result, the Appellant isn't eligible for a CPP disability pension.

[36] This means the appeal is dismissed.

James Beaton
Member, General Division – Income Security Section

²³ See *Penner v Niagara (Regional Police Services Board)*, 2013 SCC 19.