Citation: *RM v Minister of Employment and Social Development*, 2023 SST 858

Social Security Tribunal of Canada
General Division – Income Security Section

Decision

Appellant:	R. M.
Respondent:	Minister of Employment and Social Development
Decision under appeal:	Minister of Employment and Social Development reconsideration decision dated June 15, 2022 (issued by Service Canada)

Tribunal member:	Antoinette Cardillo
Type of hearing:	Case conference held / Decision in writing
Decision date:	March 16, 2023
File number:	GP-22-1335

Decision

[1] The appeal is dismissed.

[2] The Appellant`s eligibility for a Canada Pension Plan (CPP) disability pension has already been decided by the Pension Appeals Board (PAB)[1] on June 9, 2004[2]. This decision explains why I am dismissing the appeal.

Overview

[3] The Appellant applied for a CPP disability pension five times.

[4] On December 10, 2001[3], the Appellant submitted his first CPP disability application. The Appellant was 34 years old. He worked as a welder. He stated that he was unable to work since September 2001 because of back pain from a work-related injury.

[5] For the Appellant to succeed, he had to prove that it was more likely than not that he had a disability that was severe and prolonged by December 31, 2003. This date was based on his contributions to the CPP.[4]

[6] The CPP defines “severe” and “prolonged”. A disability is severe if it makes a person incapable regularly of pursuing any substantially gainful occupation.[5] It is prolonged if it is likely to be long continued and of indefinite duration.[6]

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[1] The PAB was replaced by the Appeal Division of the Social Security Tribunal in April 2013.
[2] See PAB decision dated June 9, 2004 at GD2-257.
[3] See 1st application at GD2-386.
[4] Service Canada uses a person’s years of CPP contributions to calculate their coverage period, or “minimum qualifying period” (MQP). The end of the coverage period is called the MQP date. See subsection 44(2) of the CPP. The Appellant’s CPP contributions are at GD2-1879 and GD5-14.

[5] Paragraph 42(2)(a) of the *Canada Pension Plan* gives this definition of severe disability.
[6] Paragraph 42(2)(a) of the *Canada Pension Plan* gives this definition of prolonged disability.

[7] The Minister of Employment and Social Development (Minister)[7] denied the Appellant's first application. The Appellant appealed the Minister's decision to the Review Tribunal (RT).[8] After holding a hearing, the RT dismissed the Appellant`s appeal on April 2, 2003. The Appellant then appealed that decision to the PAB. The PAB also dismissed the Appellant`s appeal on June 9, 2004 after holding a hearing.

[8] The Appellant submitted a new facts application to the PAB and requested that the June 9, 2004 decision be reopened. In a decision letter dated October 1, 2004, the PAB dismissed the application.[9]

[9] The Appellant submitted his second CPP disability application on March 17, 2006. The RT dismissed the application on the basis that the PAB's decision of June 9, 2004 was final.[10]

[10] The Appellant then submitted a second new facts application to the PAB in November 2008, again requesting that the June 9, 2004 decision be reopened. In a decision dated May 7, 2009, the PAB dismissed the application.[11]

[11] In August 2009, the Appellant submitted a third new facts application asking that his PAB appeal be reopened. The PAB dismissed his application on May 21, 2010.[12]

[12] On August 28, 2017, the Appellant submitted an application to the Appeal Division (AD) of the Tribunal asking to rescind and amend the PAB decision of June 9,

[7] Minister of Social Development as it was then called.
[8] The RT was replaced by the Income Security General Division of the Social Security Tribunal in April 2013.
[9] See decision at GD2-201 and GD2-195.
[10] See decision at GD2-1586.
[11] See decision at GD2-202.
[12] See decision at GD2-126.

2004.[13] The AD refused the Appellant's application. The Appellant appealed the AD's decision to the Federal Court of Appeal, which dismissed the appeal.[14]

[13] The Appellant submitted a fourth CPP disability application on January 21, 2021[15], which was dismissed by the Minister based on the fact that the PAB rendered a decision that was final and binding in June 2004.[16] The Appellant did not appeal that decision.

[14] The Appellant submitted a fifth CPP disability application on September 28, 2021.[17] The Minister also dismissed that application based on the fact that the PAB rendered a decision that was final and binding in June 2004. The Appellant appealed that decision to the Tribunal. This appeal is about this fifth application.

[15] The Appellant's MQP is December 31, 2003. His MQP has not changed since his first application of December 10, 2001.

[16] The Minister submits that I must dismiss the appeal because the Tribunal does not have the jurisdiction to consider whether the Appellant's disability was severe and prolonged by December 31, 2003. The PAB held a hearing and rendered a decision on June 9, 2004, which is a final decision[18].

Matters I must consider first

- **Form of hearing**

[13] See application at GD2-79. An application to rescind and amend (reopen) a decision is possible in limited circumstances. In order to succeed, a claimant must establish that they have presented a "new fact." A "new fact," is usually a medical condition (or information) that was in existence at the time of the original hearing but could not have been discovered with the exercise of reasonable diligence. The new fact or information must also be material. This means that it could reasonably be expected to have affected the outcome of the initial hearing, if the decision-maker had known about it at the time.
[14] *Maclean v. Canada (Attorney General)*, 2019 FCA 277.
[15] See fourth application at GD2-59.
[16] See reconsideration letter at GD2-20.
[17] See fifth application at GD2-29.
[18] See Minister's submissions at GD5-11 paragraph 32.

[17] On his notice of appeal dated July 26, 2022, the Appellant did not indicate what kind of hearing he preferred. He left the section blank.

[18] I decided to hold a case conference to explain the law to the Appellant. The Appellant's behaviour was such that I had to end the case conference[19]. For this reason, I did not have an opportunity to ask whether he agreed to a decision without a hearing. However, during the case conference, the Appellant repeated several times that he wanted a decision in writing. Therefore, I decided to render a decision without holding a hearing.

What the law says

- **The Canada Pension Plan**

[19] Pursuant to the CPP[20], a decision of the PAB is final and binding except as provided in the CPP.

- **The *res judicata* rule**

[20] There is a legal rule called *res judicata* (the matter has been decided). The rule applies when issues have previously been decided by courts, administrative officers and tribunals.[21] More precisely, the rule says that when a person appeals more than once, the Tribunal can't decide an issue that has already been decided.

[21] There is a two-step analysis involved in determining whether it is appropriate to apply the *res judicata rule*.

[22] First step, 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;

[19] Case conference held on December 16, 2022.
[20] Subsection 84(1) of the CPP, as it read prior to April 1, 2013.
[21] *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44.

b) The **parties** are the same in both appeals;

c) The decision on the earlier appeal was **final**.

[23] Second step, even if the three requirements are met, the Supreme Court of Canada has held that the court or tribunal must still determine whether as a matter of discretion, the *res judicata* rule ought to be applied.[22]

[24] While a discretion exists, I cannot exercise that discretion randomly. In other words, I cannot decide for just any reason that the *res judicata* rule should not apply. My objective must be to ensure the application of the *res judicata* rule promotes the orderly administration of justice, but not at the cost of real injustice.[23]

[25] The Supreme Court of Canada set out a list of factors to consider about the previous appeal when addressing the question of discretion.

[26] The list of factors include, but are not limited to:

a) the purpose of the legislation;

b) the availability of an appeal;

c) the safeguards available to the parties in the administrative procedure;

d) the expertise of the initial decision-maker;

e) the circumstances giving rise to the first proceedings; and

f) any potential injustice.

[27] This list of factors is not exhaustive and the factors may not be relevant in every case. These factors are not meant to be a checklist. I must address the factors for and against the exercise of discretion. Of all the factors to consider, the potential injustice

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[22] *Danyluk*, supra.
[23] *Danyluk*, supra at paragraph 67.

factor is the most important. I have to consider whether it would be unjust not to hear the current appeal.

Reasons for my decision

[28] 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 the appeal. I will now explain why.

- **First step – Requirements - *Res judicata rule***

[29] The rule applies because the three requirements for *res judicata* are met, and the appeal can't go ahead. The issue in this appeal has already been decided by the PAB on June 9, 2004.

[30] 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, 2003. That is when his MQP ended. After the PAB's decision, the Appellant did not contribute to the CPP, and therefore his MQP did not change. This means that this appeal is still about whether he had a severe and prolonged disability by December 31, 2003, just as in the appeal before the PAB.

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

[32] Third, the PAB's decision was **final**. The Appellant had 90 days to appeal the decision at the Federal Court of Appeal. Because the Appellant did not exercise his right to appeal, the PAB decision is therefore final.

[33] Since the *res judicata* rule applies, I now have to decide whether I should hear the Appellant's appeal anyway.

- **Second step - It isn't unjust to decide not to hear the Appellant's appeal**

[34] I reviewed the file material and I have considered the factors listed by the Supreme Court of Canada.[24]

[35] I find there are no circumstances that would cause an injustice if I apply the *res judicata* rule to this appeal, for the following reasons:

- The purpose of the legislation is the same as in the previous appeal;
- The Appellant attended in person and gave evidence under oath at prior proceedings;
- He filed medical documents and was given the opportunity to make submissions;
- He had the opportunity to appeal the previous decision. Although, he did not exercise his right to appeal the June 9, 2004 PAB decision, he did however use other legal recourse. The Appellant`s case was reviewed on three occasions by the PAB for new facts. The PAB dismissed all the applications stating that the documents and reports that the Appellant submitted were either discoverable at the time of his hearing in 2004 or would not have changed the outcome. The evidence that the Appellant resubmitted for this appeal and claiming in his notice of appeal that it was not taken into account, has already been considered by the PAB on more than one occasion;[25]
- Both the RT and the PAB were applying their home statute in an area where they had expertise; and
- There is no evidence of any deficiencies in the procedure leading up to the June 9, 2004 PAB decision.

[36] What the Appellant is really asking me to do is re-hear his claim for CPP disability because he disagrees with the previous decision. But the principle of *res*

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[24] *Danyluk*, supra.
[25] MRI Lumbar spine MRI dated November 1st, 2003 at GD1-17 was considered by the PAB, see GD2-223 and again in 2010, see GD2-1788. The Functional Capacity Evaluation of November 7/8, 2007 at GD1-18 was submitted in 2008 to Service Canada, see GD2-2464.

judicata prevents the rehearing or re-litigation of matters that have already been decided.

Conclusion

[37] The Appellant's appeal can't go ahead. The PAB has already decided that he didn't have a severe and prolonged disability by December 31, 2003. The *res judicata* rule applies. It is also not unjust not to hear the appeal.

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

[39] This means the appeal is dismissed.

Antoinette Cardillo
Member, General Division – Income Security Section