Citation: *SJ v Minister of Employment and Social Development*, 2022 SST 1175

Social Security Tribunal of Canada
General Division – Income Security Section

Decision

Appellant:	S. J.
Representative:	Steven Yormak
Respondent:	Minister of Employment and Social Development
Decision under appeal:	Minister of Employment and Social Development reconsideration decision dated December 10, 2020 (issued by Service Canada)
Tribunal member:	Lianne Byrne
Type of hearing:	Teleconference
Hearing date:	May 17, 2022
Hearing participants:	Appellant Appellant's representative Respondent's representative
Decision date:	November 30, 2022
File number:	GP-21-136

Decision

[1] The appeal is dismissed.

[2] The Appellant, S. J., isn't eligible for a CPP disability benefit. This decision explains why I am dismissing the appeal.

Overview

[3] The Appellant has applied for *Canada Pension Plan* (CPP) disability benefits on four occasions. Her third application was in January 2008. This application was denied initially and upon reconsideration. The Appellant appealed this decision to the Office of the Commissioner of Review Tribunals (Review Tribunal). There was a Review Tribunal hearing in February 2010. The Review Tribunal dismissed the appeal by decision dated May 17, 2010. The Appellant did not request leave to appeal to the Pension Appeals Board.

[4] The Respondent received the Appellant's fourth application for a CPP disability pension on January 21, 2020. The Respondent denied the application initially and upon reconsideration on the basis that the issue of whether the Appellant is entitled to a disability pension has already been decided. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal).

[5] The Appellant says that I should use my discretion in this case not to apply the doctrine of *res judicata*. It would be unfair to apply the doctrine of *res judicata* because an egregious error was made in the Review Tribunal decision. The Review Tribunal fundamentally misunderstood chronic pain in that they were calling it a psychological disorder. This, in combination with the fact that she was unrepresented and did not seek leave to appeal to the Pension Appeals Board, resulted in an injustice.

[6] The Minister says that the doctrine of *res judicata* applies. Both parts of the test have been met. An injustice or issue of natural justice has not been raised nor is there one apparent with respect to this matter. Allowing the Appellant another chance to

meet her case, when her previous application was fairly considered and denied and she had various ways to contest that decision would not be in the interest of justice.

What the Appellant must prove

[7] *Res judicata* is the principle that once a dispute has been finally decided, it cannot be re-litigated. “When *res judicata* applies, a litigant is “estopped” by the previous proceeding”.[1] In the context of the CPP disability benefit, each application, once finally determined, is subject to *res judicata* and cannot be revived by a subsequent application.[2]

[8] In considering whether or not *res judicata* applies in this case, I must first consider three conditions to the operation of *res judicata:*

(a) That the same question has been decided;

(b) That the judicial decision which is said to create the estoppel was final; and

(c) That the parties to the judicial decision were the same as the parties to the proceedings in which the estoppel is raised.

[9] If these three conditions have been met, then I must consider whether *res judicata* should or should not be applied. This gives me the discretion not to apply *res judicata* if it would be unfair to do so. In considering whether to exercise this discretion, there is an overriding question of fairness involved to avoid potential injustice.[3]

Reasons for my decision

[10] With respect to the first part of the test for res judicata, the parties agree, and I find, that the three conditions to the operation of *res judicata* have been met. First, the issue has not changed. The Minimum Qualifying Period is the same as it was in the first appeal. The issue remains whether the Appellant had a severe and prolonged disability

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[1] *Belo-Alves* v. *Canada (Attorney General)*, 2014 FC 1100
[2] *LeBlanc* v. *MEI* (August 26, 1996), CP 3696 PAB
[3] *D.K.* v. *Minister of Employment and Social Development*, 2015 SSTAD 1068

by December 31, 2002. Therefore, it is the same question that has already been decided.

[11] The Review Tribunal decision was final. The Review Tribunal rendered its decision to dismiss the Appellant`s appeal on May 17, 2010. The Appellant did not seek leave to appeal to the Pension Appeals Board. The Review Tribunal`s decision is therefore final and binding.

[12] With respect to the third condition, the parties are the same, the Appellant and the Respondent. Therefore, the three conditions have been met.

[13] I must now consider the second part of the test for *res judicata*, which is to decide whether or not *res judicata* should be applied. The relevant factors to consider in determining whether or not to apply *res judicata* include the following:

- The wording of the statute from which the power to issue the administrative order derives
- 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
- The potential injustice.[4]

[14] In this case, the Appellant submits that *res judicata* should not be applied because it would result in an injustice. The Appellant submits that there was an

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egregious error made in the Review Tribunal decision. This, along with the fact that she was unrepresented, results in an injustice.

[15] With respect to the Review Tribunal hearing itself, I do not agree that there was any unfairness to the Appellant. She knew the case she had to meet before the Review Tribunal hearing. For example, there are numerous documents on file setting out her Minimum Qualifying Period and the issue under appeal.

[16] She did not have a representative at the hearing. She explained that she could not afford anyone to represent her. She represented herself. She was given an opportunity to testify at the hearing. She was asked questions by the Review Tribunal.

[17] She knew in advance of the hearing that she could bring witnesses to testify on her behalf. She did bring three witnesses and each witness provided testimony and was questioned by the Review Tribunal.

[18] She says she and her witnesses were at the hearing for a “while”, but she could not remember how long. She confirmed that the Review Tribunal members asked her and her witnesses a fair bit of questions. She thinks most of the questions were about her pain, mobility and how she was managing. They also asked about her psychological state. It is evident in the Review Tribunal decision that their testimony was considered.

[19] The Appellant found the hearing overwhelming because she did not know what questions would be asked. She says that she told the Review Tribunal members that she was not prepared, but she does not remember their response. She did not ask for a break or an adjournment.

[20] She thinks she should have submitted additional documents in support of her appeal. However, she did not request to submit additional documents at the hearing. She was also given an opportunity to submit documents before the hearing.

[21] The Appellant was aware of the case she had to meet. She was given a reasonable opportunity to meet it. The process was a fair one and it cannot be said that any injustice would result if I applied to doctrine of *res judicata*.

[22] The Appellant acknowledges receiving the Review Tribunal decision. She says that she did not attempt to appeal because she thought that was the end of it. She thinks she may have received a letter explaining her appeal rights, but does not think she would have known what to do with it. She did not have the finances to hire anyone to help her.

[23] Although the Appellant could not remember if she received a letter explaining her appeal rights, this letter is evident in the hearing file.[5] It very clearly explains that any party who is not satisfied with the decision of the Review Tribunal may apply to the Pension Appeals Board for leave to appeal. It went on to explain that leave to appeal had to be requested within 90 days of the date she received the decision. There was also a telephone number provided in case she had any questions about how to request leave to appeal.

[24] The Appellant's appeal rights were explained to her in the letter. If she had questions, she could have called the number provided in the letter. She was given an opportunity to request leave to appeal, but she did not. She did not need a representative to do this. I note that she had previously appealed the Minister's decision to the Review Tribunal despite not having a representative. She could have done the same if she wanted to request leave to appeal to the Pension Appeals Board.

[25] The Appellant submits that, even if the procedure at the hearing was fair, the decision was unfair because it contained an egregious error. The error, it is submitted, occurs at paragraph 36 of the decision, which reads as follows:

> "There is no doubt that chronic pain can be disabling in some individuals, even though it has a significant psychological component. However, S. J. presented almost no evidence of depression or anxiety and has apparently never received,

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or been referred to, active psychological counselling, nor has she been prescribed antidepressant medications."

[26] It is submitted that chronic pain disorder is a pain condition. If a psychological condition is lacking, that does not mean that a disability is lacking. It is pointed out that the Review Tribunal mentioned that she was not receiving psychological counselling or antidepressant medication. The Review Tribunal should have based its decision on her pain condition rather than a psychological condition.

[27] The Appellant submits that she was unrepresented and that the Review Tribunal decision is not supportable. These two factors together make it unfair to apply *res judicata* in this case.

[28] However, I do not have the authority to determine whether or not an error was made by the Review Tribunal in its decision. If an error had been made, this would have been for the Pension Appeals Board to determine. Since I do not have the authority to determine if an error was made by the Review Tribunal, it would not be appropriate for me to use this as a factor to determine whether or not to apply *res judicata*.

[29] For these reasons, I find that I should apply the doctrine of *res judicata* in this case. I therefore agree with the Respondent that I do not have the jurisdiction to consider the issue of disability.

Conclusion

[30] This means the appeal is dismissed.

Lianne Byrne

Member, General Division – Income Security Section