Citation: *SJ v Minister of Employment and Social Development*, 2023 SST 1802

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	S. J.
Representative:	Steven R. Yormak
Respondent:	Minister of Employment and Social Development
Representative:	

Decision under appeal:	General Division decision dated November 30, 2022 (GP-21-136)

Tribunal member:	Kate Sellar
Type of hearing:	Teleconference
Hearing date:	April 14, 2023
Hearing participants:	Appellant Appellant's representative Respondent's representative
Decision date:	**December 15, 2023**
File number:	AD-23-212

Decision

[1] I'm dismissing the appeal. I'm applying the rule against deciding something that has already been decided (*res judicata*). These are the reasons for my decision.

Overview

[2] S. J. (Claimant) has applied for *Canada Pension Plan* (CPP) disability pension four times. Her third application was in January 2008. The Minister of Employment and Social Development (Minister) denied the third application initially and on reconsideration. The Claimant appealed to the Office of the Commissioner of Review Tribunals (Review Tribunal). The Review Tribunal dismissed the appeal by decision dated May 17, 2010. The Claimant did not request permission to appeal to the Pension Appeals Board.

[3] The Minister received the Claimant's fourth application on January 21, 2020. The Minister refused the application initially and on reconsideration. The Minister decided that the issue of whether the Claimant is entitled to a disability pension had already been decided. The rule against deciding something that has already been decided is called *res judicata* (I'll just refer to it as the rule).

[4] The Claimant appealed to this Tribunal. At the General Division, the Claimant argued that it would be manifestly unjust to apply the rule because the Review Tribunal made an outstandingly bad (egregious) error in its decision. The Claimant says that the Review Tribunal fundamentally misunderstood chronic pain as a condition, referring to it as 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.

[5] The General Division dismissed the appeal. I gave the Claimant permission to appeal the General Division's decision. I found that it was arguable that the General Division made an error of law by failing to consider all the circumstances before concluding that it wasn't manifestly unjust to apply the rule.

[6] In this case, I'm deciding as a preliminary question, after an oral hearing, whether the appeal should be dismissed based on the rule.

[7] I've decided to apply the rule to the Claimant's appeal. The pre-conditions for the rule apply. Given all the circumstances, applying the rule doesn't result in manifest injustice.

Preliminary Issue

[8] At the hearing, I stated that I would allow the parties the chance to comment on the relevance of a decision from the General Division in which the decision maker did not apply the rule.[1]

[9] The Minister did provide (and I accepted) a brief written argument about that decision, stating that it was different from this appeal in several ways. I accepted that argument post-hearing. Accordingly, I accepted and considered that argument. However, in the end, that General Division decision did not factor into my reasons for my decision as outlined below.

Issue

[10] Should the Claimant's appeal to the Appeal Division be dismissed as *res judicata*? In other words, should I apply the rule?

Analysis

[11] In this decision, I will:

- Define and discuss the rule and its preconditions;

[1] The decision was *DS v Minister of Employment and Social Development*, 2021 SST 419.

- Explain how I have concluded that each of the rule's three preconditions are met;

- Explain that applying the rule is still a matter of discretion; and

- Explain why I'm exercising my discretion to apply the rule because the Review Tribunal procedure was not unfair;

- Explain that the Claimant did not satisfy me that substantive problems with a decision alone can justify exercising the discretion not to apply the rule.

– **The rule is fundamentally about balancing important interests. There are three pre-conditions for applying the rule.**

[12] In a case called Danyluk, the Supreme Court of Canada has been clear that the rule should not be mechanically applied: "[t]he underlying purpose of the rule is to balance the public interest in the finality of litigation with the public interest in ensuring that justice is done on the facts of a particular case."[2] The rule advances the interests of justice and prevents abuses of the decision-making process. It avoids repeat litigation, possible inconsistent results, and undue cost.[3]

[13] The Federal Court of Appeal found that the rule applies to decisions of the Review Tribunal and the Pension Appeals Board under the CPP.[4]

[14] Danyluk summarizes some of the history of the rule and describes the three preconditions to its operation:

- That the same question has been decided;

- That the judicial decision which is said to create the estoppel was final; and

---

[2] See paragraph 33 in *Danyluk v Ainsworth Technologies Inc.*, 2001 SCC 44 (Danyluk).
[3] See paragraphs 18 to 20 in Danyluk.
[4] The Review Tribunal and the Pension Appeals Board were decision makers under the CPP before this Tribunal began. See *Canada (Minister of Human Resources Development) v MacDonald* 2002 FCA 48; *Canada (Minister of Human Resources Development) v Fleming*, 2004 FCA 288; and *Vuong v Canada (Attorney General)*, 2007 FC 699.

- That the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[15] In my view, all the preconditions for applying the rule in this appeal are met.

– **The first precondition is met: the same question has already been decided by the Review Tribunal.**

[16] This precondition is met. The legal question that the Claimant wants the Tribunal to decide is whether she is eligible for the CPP disability pension. To decide whether a person is eligible for a disability pension, the Tribunal considers whether the Claimant:

- Has made contributions such that she has a coverage period (or minimum qualifying period) under the CPP; and

- Has shown, on a balance of probabilities, that she has a severe and prolonged disability that started on or before the end of the coverage period, and continuously after that.

[17] Since the Claimant does not have any more contributions to the CPP between the Review Tribunal's decision and the General Division decision, the question she asked the General Division to decide remained precisely the same: did the Claimant have a disability that became severe and prolonged within the meaning of the CPP on or before December 31, 2002 (the last day of her coverage period)?

– **The second precondition is met: the decision from the Review Tribunal was final.**

[18] This precondition is met. The Claimant was unrepresented, and she didn't appeal the Review Tribunal decision to the Pension Appeals Board. The Review Tribunal decision was a final, quasi-judicial decision.

[19] More specifically, the Review Tribunal was an institution capable of exercising adjudicative authority within the meaning of the Danyluk decision. As a matter of law, it had the jurisdiction to decide whether the Claimant was eligible for a disability pension

in a judicial manner. It made its decision based on findings of facts following a hearing about the Claimant's medical conditions, functional limitations, personal circumstances, and contributions to the CPP.

– **The third precondition is met: the parties to the decision were the same as the parties at the Appeal Division.**

[20] This precondition is met. The Claimant sought benefits under the CPP, and the Minister refused them initially and on reconsideration. The Minister and the Claimant were the parties at the Review Tribunal.

[21] The Claimant was unrepresented at the Review Tribunal and was well represented by counsel at this Tribunal. However, I cannot find that representation changes the **parties** to the proceeding, since acting as a legal representative is fundamentally different from being a party to a proceeding.

Applying the rule is an exercise of discretion

[22] Even when the pre-conditions are all met, Danyluk explains that applying the rule is not automatic. Applying the rule is an exercise of discretion (a choice) by the decision maker. The idea is to avoid an injustice that would be caused by applying the rule. More specifically, Danyluk stands for each of the following principles:

- The exercise of the discretion is case specific.
- The exercise of the discretion depends on all the circumstances.
- The list of factors to consider when deciding whether to exercise the discretion is open.
- In the administrative law setting, the decision whether to apply the rule must be approached in a flexible way.[5]

[5] See paragraph 62 in Danyluk.

– **None of the factors the Supreme Court considered in Danyluk lead me to conclude that I should refuse to apply the rule.**

[23] In deciding to exercise my discretion to apply the rule, I've considered all the factors in Danyluk:

- **The wording of the CPP**: the Review Tribunal had the exclusive jurisdiction, when it heard the Claimant's appeal, to decide whether the Claimant was eligible for the disability pension. There is no other avenue under the law for addressing the issue of eligibility for a disability pension that would cause me to consider refraining from exercising my discretion to apply the rule.

- **The purpose of the CPP**: it's clear that the issues were the same at the Review Tribunal. But also, the focus of the earlier process at the Review Tribunal is the same as the focus at this Tribunal. Both processes focus on providing a hearing for the Claimant to show that she is eligible for the disability pension. There's nothing about the Review Tribunal's process that was different from the process claimants receive at this Tribunal that would cause me to consider refraining from exercising the discretion to apply the rule.

- **The availability of an appeal**: If the Claimant wasn't satisfied with the Review Tribunal decision, the covering letter explains that she could appeal to the Pension Appeals Board.[6] There was no lack of appeal process for the Claimant that would cause me to consider refraining from exercising the discretion to apply the rule.

- **The procedural safeguards available and the expertise of the decision maker:** there are no facts or arguments before me about any differences in the procedure and the expertise of the decision makers at the Review Tribunal versus this Tribunal that would lead me to consider refraining from exercising my discretion to apply the rule. The Review Tribunal held a

[6] See GD3-17.

hearing, which included documentary evidence as well as oral testimony. The Claimant participated in the hearing.

- **The circumstances that gave rise to the prior proceeding**: the Claimant was not represented and isn't an expert in medical or legal issues, so in that way she was vulnerable. But she appealed to the Review Tribunal despite that vulnerability, and her appeal was within the Review Tribunal's exclusive jurisdiction to decide. The Review Tribunal's decision included information about her appeal rights. There aren't any circumstances that gave rise to the proceeding at the Review Tribunal that would lead me to consider refraining from exercising my discretion to apply the rule.

- **Potential injustice**: this is the factor that the Claimant argues should lead to the conclusion that I shouldn't apply the rule. I'll consider this factor in detail next.

Considering the cumulative effect of the factors, applying the rule to the Claimant's appeal will not result in injustice.

– The approach to deciding whether the result might be an injustice

[24] The Claimant argues that I need to stand back and consider, taking everything into account, whether applying the rule would work an injustice here. The Claimant argued that when approaching the question of whether to apply to rule, I should also consider the Federal Court's decision in a case I'll refer to as Belo-Alves.[7] In that case, the Claimant argues that the Federal Court considered whether applying the rule would result in an injustice.

[25] The situation at the Federal Court in Belo-Alves is somewhat different from my role in this appeal. In Belo-Alves, the Federal Court was considering whether an Appeal Division decision on permission to appeal (leave) was reasonable. It was a judicial review. The Federal Court decided that the Appeal Division made an error of law by applying the wrong legal test when deciding to grant the claimant in that case

[7] *Belo-Alves v Canada (Attorney General)*, 2014 FC 1100.

permission to appeal. The Appeal Division referenced the idea of legitimate expectations as providing a reason for applying an older test rather than a new one. To address the Appeal Division's error about the application of legitimate expectations, the Federal Court declined to return the matter to the Appeal Division for reconsideration because the Appeal Division would apply the correct test and still dismiss the appeal – the result would remain the same.

[26] In my view, the Federal Court here was not taking a step back to consider whether there would be an injustice in applying the rule against deciding something that has already been decided. It was exercising its discretion on judicial review to substitute its decision rather than return a matter for reconsideration.

[27] The Claimant argues that if, like in Belo-Alves, I consider all the circumstances before deciding whether to apply the rule, I will ask myself whether there is injustice between the parties if I dismiss the appeal based on the rule. If the result is bound to be the same and the Claimant will still fail to be eligible for disability pension, then it's not manifestly unjust to dismiss based on the rule.

[28] I'm wary of this argument for a few reasons.

[29] First, the Claimant had no case law to suggest that a decision maker has exercised discretion to avoid applying the rule because of an injustice that would arise from the substance of a decision.

[30] Second, the other factors in Danyluk all seem to be about natural justice, process, and procedure. The example of potential injustice the Supreme Court describes in Danyluk is actually an example about a failure of natural justice by the initial decision maker (a lack of notice).

[31] Third, the Minister argues that the approach the Claimant argues for amounts to a request for me to review the Review Tribunal decision in terms of the way it weighed the evidence, which is a collateral attack on the Review Tribunal's decision. In my view, this is a valid concern.

[32] Accordingly, I have no strong basis for concluding that a final decision could be so faulty in terms of law or factual findings that it is manifestly unjust to apply the rule. It seems to me that asking whether it will work injustice to apply the rule given all the circumstances (the Danyluk approach) is different from merely asking myself whether the result on the merits is bound to be the same, and if the answer is no, I should apply the rule.

[33] I cannot simply review decisions from the Review Tribunal to see whether I would come to the same result, and then if I would come to a different result, withhold applying the rule. That is not, in my view, the kind of review that Danyluk anticipates.

– **I cannot conclude that the Review Tribunal proceeding was procedurally unfair such that applying the rule would be unjust.**

[34] The Claimant argues that she didn't have any degree of medical or medical/legal knowledge, let alone any expertise. She was unable to afford a representative.[8]

[35] I cannot conclude that the Claimant's lack of knowledge or expertise, coupled with the fact that she was unrepresented, means that the Review Tribunal's proceeding was procedurally unfair such that I need to refrain from applying the rule to avoid an injustice.[9]

[36] The Claimant didn't point to any case law that suggests unrepresented litigants, simply because they are unrepresented, have experienced the kind of unfairness that would mean they shouldn't be subjected to the rule.

[37] What fairness requires will depend on all the circumstances.[10] I cannot conclude that being an unrepresented litigant without legal or medical knowledge at the Review Tribunal renders that process so unfair that the Claimant's appeal on the same issue should proceed here.

---

[8] The Claimant points to paragraphs 16 and 22 in the General Division decision.
[9] I've discussed the fairness of the process at the Review Tribunal in more detail at paragraph 23 in this decision.
[10] See *Baker v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 699 (SCC).

[38] Accordingly, I've decided that:

- The preconditions for applying the rule are met;
- None of the factors in Danyluk lead me to conclude that it would be unjust to apply the rule, including the last factor which focuses specifically on avoiding injustice.
- I'm applying the rule against deciding something that's already been decided. This appeal will not go ahead to the next step.

Conclusion

[39] I've dismissed the Claimant's appeal. The appeal cannot move forward because I'm applying the rule against deciding something that has already been decided.

Kate Sellar
Member, Appeal Division