Citation: *LB v Minister of Employment and Social Development*, 2023 SST 1718

Social Security Tribunal of Canada
General Division – Income Security Section

Decision

Appellant:	L. B.
Respondent:	Minister of Employment and Social Development
Decision under appeal:	Minister of Employment and Social Development reconsideration decision dated May 5, 2023 (issued by Service Canada)

Tribunal member:	Carol Wilton
Type of hearing:	Videoconference
Hearing date:	November 16, 2023
Hearing participant:	Appellant
Decision date:	November 28, 2023
File number:	GP-23-967

Decision

[1] The appeal is dismissed.

The Appellant, L. B., isn't eligible for Canada Pension Plan (CPP) disability benefits. This decision explains why I am dismissing the appeal.

Overview

[2] The Appellant was 31 years old in July 2005, when she applied for CPP disability benefits. She had worked as a health care aide. She stated that she had been unable to work since 2005 after two workplace accidents the year before. In one, a patient punched her in the back. In the other, she injured herself while attempting to transfer a patient by herself. As a result, she had pain in her right shoulder and in her back.[1]

[3] The Minister denied the Appellant's application. She appealed to the Review Tribunal (predecessor of the General Division of this tribunal). The Review Tribunal held a hearing on April 15, 2008.

[4] In a decision dated June 2, 2008, the Review Tribunal denied the Appellant's appeal. It stated that the evidence did not show she had a severe and prolonged disability by the date she last qualified for CPP disability.

[5] The Appellant did not appeal the Review Tribunal's decision.

[6] In April 2022, the Appellant again applied for CPP disability benefits. She said she had been unable to work since 2005 because of her disability. The Minister denied her application.

[7] The Minister said that the decision the Review Tribunal made in June 2008 was a final decision about the Appellant's eligibility for CPP disability benefits. The Appellant appealed to this Tribunal.

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[1] GD02-25

[8] The Appellant says that she disagrees with the Review Tribunal's 2008 decision because since 2004, the entire right side of her body has been damaged and painful.

What the law says

[9] The Supreme Court of Canada has stated that "the law rightly seeks a finality to litigation…. A litigant … is only entitled to one bite at the cherry."[2]

[10] There is a legal rule called *res judicata*. *Res judicata* is Latin for "the thing is decided."

[11] 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:

- The issue in the current appeal is the same as the issue in an earlier appeal.
- The parties are the same in both appeals.
- The decision on the earlier appeal was final.[3]

[12] 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
- where there is a significant difference between the purposes, processes, or stakes involved in the two appeals

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

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[2] See *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44
[3] See *Danyluk v Ainsworth Technologies Inc.,* 2001 SCC 44

[14] 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.[4]

[15] I explained this in a letter to the Appellant on July 31, 2023. I told her that her hearing would be her chance to tell me:

- why the *res judicata* rule doesn't apply to her appeal
- why I should hear her appeal even if the *res judicata* rule does apply.[5]

Reasons for my decision

[16] I have decided that the *res judicata* rule applies to the Appellant's appeal. I have also decided that my decision about *res judicata* doesn't result in an injustice. 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, 2007.

[19] That is when her coverage period, or "minimum qualifying period" (MQP), ended. A person's MQP is based on their contributions to the CPP.[6] This means that this appeal is still about whether she had a severe and prolonged disability by December 31, 2007.

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

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[4] 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.
[5] GD03
[6] The Appellant's Record of Contributions is at page GD02-6.

[21] Third, the decision of the 2008 Review Tribunal was **final**. The Appellant could only appeal it to the Penson Appeals Board (PAB) (predecessor of the present Appeal Division). She had 90 days to do that,[7] but she didn't.

[22] 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 her appeal.

- It isn't unjust to decide against hearing the Appellant's appeal

[23] I find that my decision about *res judicata* doesn't result in an injustice. I explain my reasons below.

[24] While a discretion exists, I cannot exercise that discretion randomly. In other words, I cannot decide for just any reason that *res judicata* should not apply. My objective is to ensure that the operation of *res judicata* "promotes the orderly administration of justice, but not at the cost of real injustice."[8]

- The 2008 hearing was procedurally fair

[25] From a procedural point of view, I find that the 2008 hearing was fair. The Appellant cited no evidence of any procedural deficiencies before the 2008 hearing. She attended that hearing in person. She gave evidence under oath. Two witnesses spoke on her behalf. She filed medical documents and was given the opportunity to make submissions. She had appeal rights from the 2008 decision but chose not to appeal.

- The Appellant states that there was an injustice in the 2008 hearing

[26] The Appellant submitted that in the 2008 hearing, her medical issues were ignored.

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[7] See GD02-22 and 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.
[8] See *Danyluk v Ainsworth Technologies Inc*, 2001 SCC 44.

[27] I don't agree. The Review Tribunal had before it both imaging and specialist reports. Its decision considered all the evidence before it.

[28] The Appellant also testified that later evidence showed that in December 2007, she was suffering from fractures of her shoulder and back. These, she testified, had never healed. They had caused her terrible pain ever since. However, I find that evidence from 2021 and 2023 is not relevant to the matter before me.

[29] In August 2021, an imaging report showed the formation of new bone tissue (ossification) that might be based on a remote avulsion fracture (breaking off of a bone fragment).[9] Nothing in the imaging report suggests that the fracture hadn't healed or that it had occurred by the end of 2007. In fact, a November 2005 ultrasound of the Appellant's right shoulder showed only a small tear in one tendon.[10]

[30] In August 2023, an MRI showed osteoarthritis in the joints of the Appellant's mid-back. The reports said that this was possibly secondary to "chronic right-sided rib fracture."[11] Nothing in this report shows that the Appellant had fractured ribs in 2007. Nor did the MRIs of her mid-back in 2004 and 2005.[12]

[31] The Appellant testified that the 2008 hearing didn't matter to her at the time, and she didn't pay much attention. She was more focused on her anger with the Workplace Safety and Insurance Board (WSIB), which was denying her claims. The Appellant's alleged indifference to the outcome of the hearing doesn't make it unfair.

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

[32] It is not unfair to use the Review Tribunal's 2008 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 her earlier appeal.[13]

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[9] GD02-187
[10] GD02-180. In an undated report some time after April 2018, a WSIB adjudicator found that the Appellant's shoulder injury had resolved by February 2005: GD02-206.
[11] GD06-2
[12] GD02-183, 186
[13] See *Penner v Niagara (Regional Police Services Board)*, 2013 SCC 19.

[33] The **purpose** of this appeal is to decide whether the Appellant had a severe and prolonged disability by December 31, 2007. That was the purpose of the earlier appeal too.

[34] 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.

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

- Applying *res judicata* will not promote injustice

[36] The Appellant has not raised any credible allegations of injustice that would justify my setting aside the principle of *res judicata*. This case cries out for finality.

[37] What the Appellant is really asking me to do is re-hear her claim for CPP disability because she disagrees with the previous decision. But the principle of *res judicata* prevents the rehearing or re-litigation of matters that have already been decided.

[38] I find that there are no special circumstances that would bring the appeal within the exception to the doctrine of *res judicata*.

Conclusion

[39] The Appellant's appeal can't go ahead. The 2008 Review Tribunal decided that she didn't have a severe and prolonged disability by December 31, 2007. The *res judicata* rule applies. There is no injustice in deciding not to hear her appeal.

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

[41] This means the appeal is dismissed.

Carol Wilton

Member, General Division – Income Security Section