Citation: *RE v Minister of Employment and Social Development*, 2024 SST 136

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	R. E.
Representative:	Roderick Lesperance
Respondent:	Minister of Employment and Social Development
Representative:	Joshua Toews

Decision under appeal:	General Division decision dated March 29, 2023 (GP-21-1622)

Tribunal member:	Neil Nawaz
Type of hearing:	Teleconference
Hearing date:	February 2, 2024
Hearing participants:	Appellant Appellant's representative Respondent's representative
Decision date:	February 13, 2024
File number:	AD-23-664

Decision

[1] I am dismissing this appeal. The Appellant is not entitled to a Canada Pension Plan (CPP) disability pension.

Overview

[2] The Appellant is a 65-year-old former forklift operator. In 1983, he injured his back in a workplace accident that left him with ongoing pain. He left his job in March 1990 and hasn't worked since.

[3] The Appellant first applied for a CPP disability pension in September 1994. The Minister refused the application after finding that the Appellant did not become disabled during his minimum qualifying period (MQP), which at that time ended on December 31, 1995. The CPP Review Tribunal (RT) upheld the Minister's refusal in May 1997, and the Pension Appeals Board (PAB) confirmed the RT's refusal in August 2000.[1]

[4] The Appellant applied for a CPP disability pension again in January 2002. By that time, the Appellant's MQP had been extended to December 31, 1997. The Minister refused that application too, and the Appellant appealed the refusal to the RT. In June 2004, the RT dismissed the appeal after finding that, because of the prior PAB decision, it didn't have jurisdiction to hear the appeal. This time, the Appellant did not appeal the RT's decision to the PAB.

[5] This appeal concerns the Appellant's third application for the CPP disability pension, which he submitted in May 2020. Once again, the Minister refused the application and, once again, the General Division dismissed the appeal. The General Division found that, because of a legal principle known as *res judicata*, it was barred from deciding issues — such as whether the Appellant became disabled before December 31, 1995 — that the PAB had already decided in its August 2000 decision. However, the General Division also found that neither the RT nor the PAB had ever considered whether the Appellant might have become disabled after December 31,

[1] The RT and the PAB were the predecessors of the Tribunal's General Division and Appeal Division, respectively.

1995, but before December 31, 1997. The General Division then decided that the Appellant had not become disabled during that two-year period.

[6] The Appellant applied for permission to appeal to the Appeal Division. Last year, one of my colleagues on the Appeal Division granted the Appellant permission to appeal. Earlier this month, I held a hearing to discuss his disability claim in full.

Issues

[7] In this appeal, I had to answer three questions:

- Does *res judicata* prevent me from considering the Appellant's condition before December 31, 1995?
- If *res judicata* does apply, is there a period of coverage in which the Appellant can show that he became disabled?
- If the Appellant has such a period of coverage, did he develop a severe and prolonged disability during that period?

Analysis

[8] Having considered submissions from both parties, I have concluded that the Appellant is not entitled to a CPP disability pension. Like the General Division, I found that I was restricted to considering the Appellant's condition for the period between December 31, 1995 and December 31, 1997. Like the General Division, I found that, while the Appellant might be disabled now, he did not become disabled during the two-year period in question.

I can't consider the Appellant's condition before December 31, 1995

[9] A well-established legal principle called *res judicata* prevents me from considering cases that have already been decided. The Federal Court has stated that *res judicata* specifically applies to decisions of the Social Security Tribunal.[2] The Court

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

has also found that Parliament intended this Tribunal's General and Appeal Divisions to be the RT and PAB's successors and replacements.[3]

[10] In a case called *Danyluk*, the Supreme Court of Canada held that there are sound public policy reasons for *res judicata*:

> An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided.[4]

[11] There are exceptions to the principle, but the Appellant does not fall under any of them.

– Matters can't be heard again unless they substantially differ from what came before

[12] *Danlyluk* set out a two-step analysis for applying *res judicata*.[5] First, the following conditions must be met:

- The prior proceeding involved the same parties as the current one;
- It addressed the same issues; and
- It led to a final decision.

[13] Second, even if these three conditions are met, *Danyluk* permits decision-makers some discretion in whether to apply *res judicata*. However, that discretion must be exercised by keeping in mind factors such as

- the circumstances that led to the prior proceeding;
- the wording of the statute;
- the purpose of the legislation;
- the availability of appeal;
- the safeguards available to the parties at the administrative level;

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[3] See also *Jobs, Growth and Long-term Prosperity Act,* sections 260 and 262.
[4] See *Danyluk v Ainsworth Technologies Inc*., 2001 SCC 44.
[5] See *Danyluk*, paragraph 18.

- the expertise of the decision-maker at the administrative level; and
- the potential for injustice.

[14] Applying the *Danyluk* analysis, I find that the Appellant's condition and its effect on his ability to work before December 31, 1995, has already been adjudicated, For that reason, I can't revisit those questions.

– The Appellant's current appeal involves issues that the PAB addressed in its August 2000 decision

[15] At the time of the Appellant's first application, his MQP ended on December 31, 1995. That was the basis on which the PAB adjudicated his appeal in its August 2000 decision.

[16] I can't revisit that decision because *res judicata* bars me from considering matters that have already been decided. In this case, the PAB's August 2000 decision

- involved the same parties – the Appellant and the Minister;
- addressed, in part, the same issues – whether the Appellant had a severe and prolonged disability by December 31, 1995; and
- was final – the Appellant never sought judicial review.

[17] As well, the medical evidence about the Appellant's medical condition and work history before December 31, 1995, is essentially the same in all three of the applications that he has submitted.

[18] So, all three of the conditions in the *Danyluk* first step are met for the period up to December 31, 1995. As for the factors in the second step, I see no reason not to apply *res judicata* in this case. The Appellant attended the General Division hearing and gave evidence. He knew the case he had to make, as he had already been to the RT. I can't say he was deprived of an opportunity to have his CPP disability claim fairly assessed and adjudicated. I see no injustice on the face of the General Division's decision.

– **The RT's June 2004 decision didn't consider whether the Appellant became disabled after December 31, 1995**

[19] By the time of the Appellant's second application in January 2002, his MQP date had changed to December 31, 1997. However, in the June 2004 decision that flowed from this second application, the RT neglected to consider whether the Appellant became disabled between December 31, 1995 and December 31, 1997.

[20] For that reason, the RT's June 2004 decision fails the first step in the *Danyluk* analysis. While the parties were the same, and the decision was final, it is not clear that the RT's June 2004 decision actually answered the question before it. Although it was tasked with deciding whether the Appellant was disabled under the CPP as of December 31, 1997, the RT merely found that it did not have the jurisdiction to hear the appeal because of the August 2000 PAB decision.

[21] This is an error on its face. In fact, the PAB addressed a slightly different question in August 2000 than the one before the RT in June 2004. That's because the MQP date had changed from December 31, 1995 to December 31, 1997. The RT should have looked at whether the Appellant established the onset of a severe and prolonged disability in the two years leading up December 31, 1997.

[22] Instead, the RT simply affirmed the August 2000 PAB decision. But it failed to consider any evidence that might have indicated whether the Appellant became disabled during the additional two years. For that reason, the RT's June 2004 decision cannot be used to invoke *res judicata* beyond December 31, 1995.

The Appellant must show that he became disabled between December 31, 1995 and December 31, 1997

[23] Even though the Appellant cannot argue that he became disabled before December 31, 1995, this appeal can still proceed. The Appellant could qualify for a CPP disability pension if he establishes the onset of a severe and prolonged disability after December 31, 1995 and before December 31, 1997.

[24] The latter date represents the Appellant's revised MQP or coverage period. The Appellant extended his coverage by recording two additional years of qualified earnings and CPP contributions after his first application.[6] However, to be entitled to the CPP disability pension, the Appellant must not only show that he **was** disabled between December 31, 1995 and December 31, 1997, but that he **became** disabled during those two years. For that reason, I will be taking a close look at the available medical evidence from those years, particularly what it says about whether or how the Appellant's condition changed — for better or worse.

There isn't enough evidence to show that the Appellant developed a severe and prolonged disability during the two-year window

[25] For the Appellant to succeed, he had to prove that, more likely than not, he experienced the onset of a severe and prolonged disability during his coverage period.[7]

- A disability is **severe** if it makes a claimant incapable regularly of pursuing any substantially gainful occupation.[8] A claimant isn't entitled to a disability pension if they are regularly able to do some kind of work that allows them to earn a living.

- A disability is **prolonged** if it is likely to be long continued and of indefinite duration or is likely to result in death.[9] The disability must be expected to keep the claimant out of the workforce for a long time.

[26] As we have seen, the Appellant's coverage period for the purpose of this proceeding began on December 31, 1995 and ended on December 31, 1997. Having reviewed the record, I have concluded that the Appellant did not develop a severe and prolonged disability during those two years. Although the Appellant has a long history of

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[6] The Appellant's earnings and contributions are listed on his detailed record of earnings at GD2-242.
[7] Claimants for CPP disability benefits bear the burden of proving that they have a severe and prolonged disability.
[8] See *Canada Pension Plan*, section 42(2)(a)(i).
[9] See *Canada Pension Plan*, section 42(2)(a)(ii).

back pain, I couldn't find evidence showing that his condition deteriorated during the relatively narrow time frame under consideration.

[27] I base this conclusion on the following factors:

– A diagnosis does not equate to disability

[28] The Appellant has arthritis in his knees and back and degenerative disc disease of the cervical and lumbar spine. He has also been diagnosed with chronic rotator cuff disease and chronic pain syndrome.

[29] However, none of that necessarily means he became disabled between December 31, 1995 and December 31, 1997. I can't focus on the Appellant's diagnoses. Instead, I have to look at whether he developed functional limitations that got in the way of his earning a living.[10]

– Medical evidence is needed to prove disability

[30] It is not enough for the Appellant to say that he became disabled during the two-year window; he must also support it with medical evidence.[11]

[31] In his various applications for benefits, the Appellant has always indicated that his physical abilities are no better than fair to poor. He has said that he cannot sit, stand, or walk for long. He cannot twist his torso or reach above his head. He cannot remember things from one moment to the next because he is distracted by pain. The Appellant maintains that these limitations were just as disabling in 1996–97 as they are now.

[32] At the hearing, the Appellant testified that he injured his neck and back after a load of wood fell on him in a July 1983 workplace accident. After taking time off to

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[10] See *Ferreira v Canada (Attorney General)*, 2013 FCA 81.
[11] A claimant must provide a report of any physical or mental disability, including its nature, extent and prognosis; the findings upon which the diagnosis and prognosis were made; any limitation resulting from the disability, and any other pertinent information. See section 68(1) of the *Canada Pension Plan Regulations.* In *Warren v Canada (Attorney General)*, 2008 FCA 377, the Federal Court of Appeal said that there must be some objective medical evidence of a disability. See also *Canada (Attorney General) v Dean*, 2020 FC 206.

recover, he returned to work, but increasing pain led him to stop in March 1990. He described a very sharp stabbing sensation — “like a steak knife being poked in my back” — one that persists to this day. He has taken many pain medications, but they’ve only had limited effect.

[33] The Workplace Safety and Insurance Board of Ontario (WSIB) helped the Appellant get his high school equivalency, and it then enrolled him in a vocational rehabilitation program. He received training in electronics repair and, although he received a certificate, he maintains that he didn’t learn anything. After completing the program in January 1996, he applied for various job in his new field but didn’t get anywhere. He recalls having an interview with Future Shop in which he let it be known that he had back problems and wouldn’t be able to some of the tasks — such as bending, kneeling, and lifting — that would be expected of him.

[34] Although the Appellant may feel that he is chronically disabled, I must base my decision on more than just his subjective view of his capacity. In this case, the evidence, looked at as a whole, does not suggest the onset of a severe impairment that prevented the Appellant from performing suitable work during his coverage period. From what I can see, he was subject to some limitations in 1996–97, but he did not become incapable of all forms of work during that period.

– The Appellant was found not to be disabled as of December 31, 1995

[35] The Appellant’s coverage window began on December 31, 1995, the date on which the PAB found that he was not disabled. In part, the PAB based this finding on two reports that offered detailed descriptions of the Appellant’s condition close to that time.

[36] In August 1995, the Appellant saw Dr. Paul Hanson, his general practitioner, for chronic low back pain. On examination, the Appellant displayed limited flexion and

extension of his lumbar spine. Dr. Hanson concluded that the Appellant would not likely get better and would need inflammatory drugs to control his pain.[12]

[37] In December 1995, an orthopedic surgeon, Dr. Paul Pepin, saw the Appellant for intermittent acute pain in his neck and back.[13] Dr. Pepin relayed the Appellant's description of his pain as an ache in his lower back, with occasional episodes of burning and sharp pain. The pain, according to the Appellant, was worse when he bent, sat, or stood for prolonged periods. He had trouble writing. As for his neck pain, the Appellant reported an "uncomfortable ache" that was aggravated by nodding and shaking. Dr. Pepin concluded that the Appellant's complaints weren't in keeping with objective findings.

[38] The Appellant completed a labour market re-entry program in January 1996. The Minister's medical witness, Dr. Isabelle-Sophie Jolin, observed that the WSIB wouldn't have enrolled the Appellant in such a program if there hadn't been a reasonable prospect of a successful outcome. I see this point, which reinforces my impression that the Appellant had, at minimum, residual capacity at the beginning of his coverage window.

– There is no evidence that the Appellant's condition significantly deteriorated in the two years after December 31, 1995

[39] There is comparatively little medical evidence on file from the two-year coverage window, and none of it indicates the onset of a severe disability. Instead, it shows that the Appellant's conditions and functional limitations remained essentially the same from December 31, 1995 to December 31, 1997.

[40] The Appellant saw Dr. Hanson in April, June, and September 1996.[14] He continued to report back and leg pain, for which he was taking Tylenol 3 and Voltaren.

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[12] See letter dated August 2, 1995 by Dr. Paul Hanson, general practitioner, GD2-416.
[13] See report dated December 8, 1995 by Dr. Paul Pepin, orthopedic surgeon, GD2-395.
[14] See Dr. Hanson's clinical notes dated April 17, 1996, June 17, 1996, and September 27, 1996, GD2-333.

In the June visit, he told his family doctor that his back and legs were improving but still tender.

[41] In October 1996, two WSIB chronic pain assessors found that the Appellant's main problem was low back pain, which they said had a mechanical element. They concluded that the Appellant had no significant coexisting conditions, and they expected "no significant deterioration in the near future."[15]

[42] Nine months went by without any further medical evidence. In July 1997, the Appellant saw Dr. Hanson for what appears to be the only time that year. Dr. Hanson noted only that the Appellant had considerable pain in his joints and hands, for which he recommended unspecified "testing." It is not clear whether the Appellant ever received such testing or, if so, what it revealed.[16] The Appellant did not see Dr. Hanson again until February 1998. On that visit, the main topic of discussion was, not back pain, but the Appellant's depression after his marriage broke up.

– The Appellant admitted that nothing changed during the two-year window

[43] None of the available evidence suggests a significant change in the Appellant's functional capacity from December 31, 1995 to December 31, 1997. Nor did his oral evidence assist him either.

[44] Asked about his functional limitations during the coverage window, the Appellant said that he couldn't bend over a computer, give his son a bath, or do housework. He said that he had difficulty walking after sitting for extended periods. He said that he couldn't raise his arms over his head. However, these limitations did not appreciably differ from the limitations he was reporting before 1996.

[45] At both his General Division and Appeal Division hearings, was directly asked whether he thought his condition had deteriorated during the relevant period. On both occasions, he replied that it hadn't.

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[15] See memo dated October 4, 1996 by D.Y. Sutherland, general practitioner, and V. Helwig, psychologist, GD4-13.
[16] See Dr. Hanson's clinical note dated July 16, 1997, GD2-332.

– There is limited evidence that chronic pain prevented the Appellant from working during the two-year window

[46] The courts have recognized that chronic pain syndrome is a genuine condition whose existence and severity may not be supported by objective findings. In a case called *Martin*, the Supreme Court of Canada ruled that chronic pain syndrome and related conditions can be genuinely disabling and, as such, found that its blanket exclusion from the Nova Scotia workers' compensation scheme infringed the claimant's equality rights under the *Canadian Charter of Rights and Freedoms*.[17]

[47] However, it does not follow that every claim of chronic pain must result in a finding of disability. *Martin* contains no specifics on the question of **how** evidence of chronic pain is to be evaluated in assessing disability and, in particular, it is silent on the question of the extent, if any, to which subjective evidence must be considered by the trier of fact.

[48] In this case, the Appellant insists that chronic pain rendered him disabled between December 31, 1995 and December 31, 1997, even though the medical evidence did not indicate a decline in his condition during that period. It is true that a WSIB-commissioned multidisciplinary team recommended the Appellant for a permanent chronic pain disability award in October 1996,[18] but that recommendation was for 15 percent of the maximum — a rate that remained unchanged until nine years later, when it increased to 25 percent. Indeed, the file suggests that, although the Appellant may have chronic pain syndrome now, it didn't escalate until years after his MQP.[19]

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[17] See *Nova Scotia (Workers' Compensation Board) v Martin,* 2003 SCC 54, [2003] 2 S.C.R. 504.
[18] See the Sutherland-Helwig memo dated October 4, 1996, GD4-13.
[19] In a report dated September 2, 2015 (GD1-51), Gail Simon, social worker, wrote that the Appellant's functional limitations and depression got worse in 2002−03.

– The Appellant's condition didn't prevent him from real-world work

[49] Based on the medical evidence, I find that the Appellant had at least some work capacity during the relevant period. I am reinforced in this belief when I look at his overall employability.

[50] To qualify for the CPP disability pension, an applicant has to have a severe disability. A case called *Villani* explains what it means for a disability to be severe. *Villani* requires the Tribunal, when assessing disability, to consider a disability claimant as a "whole person" in a real-world context. Employability is not to be assessed in the abstract, but rather in light of "all of the circumstances."[20]

[51] When deciding whether the Appellant can work, I can't just look at his medical conditions. I must also consider factors such as his age, level of education, language abilities, past work and life experience. These factors help me decide whether the Appellant could work in the real world when he had coverage.

[52] The Appellant is a native-born English speaker and was only 38 years old when he last had CPP disability coverage — decades from the typical age of retirement. Although he has only a high school education, he has shown himself capable of completing several retraining courses, even after his injuries. As noted, he completed a microcomputer electronics technology program at the Toronto School of Business in January 1996. He later enrolled in an electronic computer network technology program and achieved an A+ certification at the Toronto School of Business.[21]

[53] In all, I am satisfied that, despite his lack of education, the Appellant had residual capacity to pursue another career as of December 31, 1997. Even with lower back pain, the Appellant was capable of pursuing a sedentary job during the two years in which he had coverage.

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[20] See *Villani v Canada (Attorney General)* 2001 FCA 248.
[21] See Gail Simon's social work report dated September 2, 2015, GD1-51.

– I don’t have to consider whether the Appellant has a prolonged disability

[54] A disability must be severe **and** prolonged.[22] Since the Appellant has not proved that his disability was severe, there is no need for me to assess whether it was also prolonged.

Conclusion

[55] The evidence shows that the Appellant had physical problems during the period between December 31, 1995 and December 31, 1997, but I am not convinced that they prevented him from regularly pursuing a substantially gainful occupation during that period. The Appellant was not disabled at the end of 1995, I didn’t see enough evidence to show that his condition significantly worsened over the following two years.

[56] The appeal is dismissed.

Member, Appeal Division

[22] See *Canada Pension Plan*, section 42(2)(a).