[TRANSLATION]

Citation: *MP v Minister of Employment and Social Development*, 2023 SST 408

Social Security Tribunal of Canada
General Division – Income Security Section

Decision

Appellant:	M. P.
Respondent:	Minister of Employment and Social Development

Decision under appeal:	Minister of Employment and Social Development reconsideration decision dated April 5, 2022 (issued by Service Canada)

Tribunal member:	Jean Lazure
Type of hearing:	Teleconference
Hearing date:	September 1, 2022
Hearing participant:	Appellant
Decision date:	January 6, 2023
File number:	GP-22-925

Decision

[1] The appeal is dismissed.

[2] Because of the application of *res judicata*, I cannot consider whether the Appellant has a disability. This is because a Tribunal member has previously decided that she does not meet the requirements to be eligible for a *Canada Pension Plan* (CPP or Act) disability pension.

[3] This decision explains why I am dismissing the appeal.

Overview

[4] The Appellant was 52 years old at the time of the hearing. On March 18, 2005, she was involved in a motor vehicle accident. Since then, she has had after-effects, including pain. The Appellant says that these after-effects mean that she is disabled and unable to work.

[5] On June 20, 2007, the Appellant applied for a CPP disability pension for the first time. The Respondent refused this request initially and when it was reconsidered. The Appellant appealed that reconsideration decision.

[6] The Office of the Commissioner of Review Tribunals (OCRT) dismissed this appeal following a hearing held on August 17, 2010. At the time, the OCRT determined that the Appellant's minimum qualifying period (MQP) had ended on December 31, 2007.

[7] On October 25, 2013, the Appellant applied for a disability pension a second time. The Appellant's MQP was extended to December 31, 2009, because the child-rearing dropout (CRDO) provisions were applied. The Respondent also denied this second application initially and when it was reconsidered. The Appellant appealed that reconsideration decision.

[8] On October 28, 2016, my colleague Jude Samson, then a member of our Tribunal's General Division, dismissed the Appellant's appeal. By the Appellant's own admission,[1] the principle of *res judicata* applied, and the Tribunal had to decide whether it was more likely than not that the Appellant became disabled within the meaning of the Act between January 1, 2008, and December 31, 2009.

[9] In a particularly detailed decision that I will have the opportunity to review, the Tribunal dismissed the Appellant's appeal and found that she did not become disabled between January 1, 2008, and December 31, 2009. It should be noted that the Appellant did not appeal this decision to our Appeal Division.

[10] The Appellant applied for a CPP disability pension for a third time on February 17, 2021,[2] when the application was received by the Respondent. On November 8, 2021, the Respondent initially denied the Appellant's application.[3] Following a reconsideration request from the Appellant, the Respondent maintained its decision in a letter about its reconsideration dated April 5, 2022.[4]

[11] On May 17, 2022, the Appellant appealed[5] the Respondent's latest decision to the General Division of this Tribunal. It is this appeal that is before me.

[12] On July 20, 2022, in preparation for the September 1, 2022, hearing, I wrote to the Appellant[6] to tell her that [translation] "On October 28, 2016, the Tribunal decided [that she] did not have a severe and prolonged disability as of December 31, 2009."[7]

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[1] *MP v Minister of Employment and Social Development*, GP-14-1621, page 5, paragraph 13: "The Appellant also agrees that, based on res judicata, the Tribunal cannot second-guess the previous decision of the Office of the Commissioner of Review Tribunals (OCRT). As a starting point then, the Tribunal assumes that the Appellant did not have a severe and prolonged disability by December 31, 2007."
[2] This request is at GD2-4.
[3] GD2-29.
[4] GD1-8 to GD1-37.
[5] GD1-1.
[6] GD3-1.
[7] GD3-1.

[13] I also told her that this date was her MQP and that it would appear that she had [translation] “no contributions since then that would establish a minimum qualifying period after December 31, 2009.”[8]

[14] As a result, I advised the Appellant that it would appear [translation] “that I should follow a legal rule called *res judicata*”[9] and that it [translation] “therefore appears that I should follow [the] October 28, 2016, decision”[10] of my colleague Jude Samson, which I mentioned above.

[15] I also told the Appellant that [translation] “the only way I can ignore this October 28, 2016, decision is if it is unfair (unjust) for me to follow that decision.”[11] I asked the Appellant to explain to me at the hearing why she believes [translation] “that it is unfair (unjust) for me to follow the October 28, 2016, decision and apply the *res judicata* rule.”[12] Finally, I told the Appellant that [translation] “following the **September 1** hearing, I will make a written decision on the application of *res judicata*.”[13]

[16] So, after sending this letter to the Appellant, I held the September 1, 2022, hearing.

What I have to decide

[17] Since the Tribunal had previously assessed the Appellant’s eligibility for CPP disability benefits up to December 31, 2009, I have to decide whether the conditions for *res judicata* have been met.

[18] If these conditions have been met, then I have to decide whether to use my discretion to apply *res judicata*.

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[8] GD3-1.
[9] GD3-1.
[10] GD3-2.
[11] GD3-2.
[12] GD3-2.
[13] GD3-2.

Preliminary issue – post-hearing documents from the Appellant

[19] On November 25, 2022, the Appellant submitted an [translation] "update on [her] case."[14] She essentially told the Tribunal about her medical follow-up after the hearing.

[20] I accepted these documents from the Appellant, even though, for the reasons that follow, they were not relevant to my decision.

Reasons for my decision

[21] I find that *res judicata* applies here, so I am dismissing the Appellant's appeal. The following explains why that is.

The preconditions for *res judicata* have been met

[22] The principle of *res judicata* is a rule of law that prohibits from deciding questions that have already been decided. It has been the subject of several Supreme Court of Canada cases.[15] This rule of law applies to administrative tribunals such as the Social Security Tribunal of Canada.[16]

[23] In this context, the rule has an important objective, as the Supreme Court noted in *Danyluk*: "...the more specific objective is to balance fairness to the parties with the protection of the administrative decision-making process, whose integrity would be undermined by too readily permitting collateral attack or relitigation of issues once decided."[17]

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[14] See GD6-1 of the record.
[15] The main cases are *Danyluk v Ainsworth Technologies Inc.*, [2001] 2 SCC 44; and *Penner v Canada Niagara (Regional Police Services Commission)*, [2013] SCC 19.
[16] *Danyluk,* supra; *Penner*, supra; *Canada (Minister of Human Resources Development) v MacDonald*, 2002 FCA 48; *Belo-Alves v Canada (Attorney General)*, 2014 FC 1100.
[17] *Danyluk*, supra, page 474.

– **What are the preconditions**

[24] The Supreme Court developed the following three preconditions for the application of *res judicata*:

> (1) that the same question has been decided in earlier proceedings
>
> (2) that the earlier judicial decision was final
>
> (3) that the parties to that decision or their privies are the same in both the proceedings[18]

– **The preconditions have been met in this case**

[25] In this case, a comparison of my colleague Jude Samson's October 28, 2016, decision and my decision shows that the preconditions have been met.

[26] The issue raised by the Appellant is the same in both proceedings. The issue before the Tribunal in October 2016 was whether the Appellant's disability became severe and prolonged between January 1, 2008, and December 31, 2009. Since there was no change in the Appellant's MQP between the October 28, 2016, decision and the September 1, 2022, hearing, the same issue is raised by this appeal.

[27] The October 28, 2016, decision by our General Division has not been appealed to our Appeal Division. That means it is final.

[28] Finally, the parties in both proceedings are the same.

Discretion criterion

[29] But, it is not enough that the three preconditions have been met for the principle of *res judicata* to apply automatically. The Supreme Court has said that the

[18] *Danyluk,* supra, page 460.

decision-maker, faced with the possible application of *res judicata*, "must still determine whether, as a matter of discretion"[19] *res judicata* should be applied.

– **Factors to be weighed when exercising discretion**

[30] The Supreme Court has identified a (non-exhaustive) list of seven factors that can be considered when deciding whether to apply *res judicata*. These factors are the following:

> (a) The Wording of the Statute from which the Power to Issue the Administrative Order Derives
>
> (b) The Purpose of the Legislation
>
> (c) The Availability of an Appeal
>
> (d) The Safeguards Available to the Parties in the Administrative Procedure
>
> (e) The Expertise of the Administrative Decision Maker
>
> (f) The Circumstances Giving Rise to the Prior Administrative Proceedings
>
> (g) The Potential Injustice[20]

[31] However, the Supreme Court later clarified its position about the application of the above factors in *Penner*. To begin with, it indicated that the above factors are not exhaustive. Nor is it a checklist that must be applied mechanically.[21] As a result, the decision-maker may not have to consider all factors, just as they may have to consider other factors.

[32] My colleague Kate Sellar of our Appeal Division said this about the Tribunal's discretion on *res judicata*: "The purpose of the rule is to promote the orderly

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[19] *Ibid.,* page 462.
[20] *Ibid.,* pp. 494 ff.
[21] *See*, supra, page 145: "The list of factors in Danyluk merely indicates some circumstances that may be relevant in a particular case to determine whether, on the whole, it is fair to apply issue estoppel. The list is not exhaustive. It is neither a checklist nor an invitation to engage in a mechanical analysis."

administration of justice, but not at the cost of real injustice in the particular case. Before applying the rule, the decision-maker needs to consider whether it might cause injustice."[22]

[33] Also, my colleague Shannon Russell of our General Division listed a few examples as "circumstances where other decision makers have used their discretion to find that *res judicata* should not apply," which I summarize below:

- The Appellants had not been given notice of or a chance to respond[23] to the other party's allegations.

- The previous decision was unintelligible or confusing, could not be understood, and the Appellant had not appealed that decision because they had instead been treated for depression recommended by the decision-maker.[24]

- The previous decision was rendered without jurisdiction, even though the Appellant had withdrawn their appeal before the Tribunal hearing, but the Tribunal still held a hearing and dismissed the appeal.[25]

- The Appellant was on maternity leave and represented herself in a case with a complex procedural history.[26]

- There was an important difference between the purpose, process, and stakes in the two proceedings.[27]

[34] The Supreme Court, in *Penner*, refers to "basic principles of fairness."[28] This means that there can be a denial of natural justice, in keeping with the examples above.

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[22] *C.M. v Minister of Employment and Social Development,* 2019 SST 629, page 4.
[23] *Danyluk*, supra.
[24] *M.L. v Minister of Employment and Social Development*, 2018 SST 861.
[25] *A.H. v Minister of Employment and Social Development*, 2018 SST 1015.
[26] *Tempest Global Telecom Inc. v Kelly Maddison*, 2016 CanLII 17188 (ON LRB).
[27] *Id v Adan*, 2019 ONSC 1070 (CanLII).
[28] *Penner*, supra, page 128.

It is neither unfair nor unjust that *res judicata* apply in this case

[35] I must exercise my discretion to decide whether it is unfair or unjust to apply *res judicata* in this case. Failing to do so would be a reason for my decision to be overturned on appeal. I am of the view that it is neither unfair nor unjust that the principle of *res judicata* apply in this case, for the following reasons.

– **Appellant's evidence at the hearing**

[36] As I explained above,[29] I wrote to the Appellant on July 20, 2022, more than a month before the September 1, 2022, hearing to tell her about the principle of *res judicata*. I also noted in that letter that this principle had also been applied by the Tribunal in the October 28, 2016, decision.

[37] Also, as I noted above,[30] the Appellant had acknowledged the application of *res judicata* at the hearing that gave rise to this decision. It should be noted that she did not recognize the application of this principle in this case.

[38] At the beginning of the hearing, I asked the Appellant how it would be unfair or unjust to apply *res judicata*.

[39] In her testimony, the Appellant mostly told me about her condition, her pain ([translation] "hurt"), and that she had been [translation] "explaining her physical and mental condition to everyone" since her accident.

[40] The Appellant told me that the Perkins report, which [translation] "explained my situation very well," had not been considered and that it had been [translation] "trivialized."

[41] The Appellant told me that she has been ashamed of being on welfare for years and that it was [translation] "insulting to be told I have not made efforts to help myself." She said that [translation] "I will never stop asking for my disability."

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[29] Paragraphs 12 to 15 of that decision.
[30] Paragraph 8 of that decision.

[42] When I pointed out to her that the decision-maker in October 2016 had already decided these questions, the Appellant told me, [translation] “He misjudged me, Sir.” She said that he had [translation] “improperly based his decision, didn’t make a good decision,” that “the pain has been there since,” and that she “doesn’t deserve to be on welfare.”

[43] I understand from the Appellant’s testimony that she certainly disagrees with the October 28, 2016, decision. I will make two comments on this:

- First, she did not appeal that decision.

- Second, there is a difference between an unfavourable decision and an unfair or unjust decision. So, I will now consider the October 28, 2016, decision.

– **The General Division’s October 28, 2016, decision is neither unfair nor unjust**

[44] As noted above,[31] my colleague Jude Samson’s October 28, 2016, decision is particularly extensive. I am not saying this hastily, but rather after a careful review of this 19-page decision. This is a long and well-founded decision.

[45] In the first five pages, the Tribunal gives an overview of the issues, how to proceed, the applicable law, and the issue under appeal.

[46] The Tribunal then spends more than 10 pages summarizing and going through the evidence, with more than 8 pages dealing with medical evidence. I note that the Tribunal does this methodically and precisely, by referring to the reports of the various doctors or experts on file, including Dr. Isabelle Dupuis, Dr. Philippe Perkins, Dr. Smith, Dr. Béliveau, psychologist Richard Bérubé, Dr. Éfoé, Dr. Vaucher, and social worker Andrée Marquis.

[47] In paragraphs 39 to 44, about two and a half pages, the Tribunal deals specifically with Dr. Philippe Perkins’ opinion. The Appellant’s representative had also

[31] Paragraph 9 of that decision.

argued that the Tribunal should give particular weight to this opinion of the [translation] "greatest orthopedist in the region."[32]

[48] The Tribunal then summarizes the parties' arguments and analyzes the evidence from pages 14 to 19 (6 pages). It goes through the Appellant's arguments one by one. The Tribunal does so, as it should, in light of the Appellant's new MQP of December 31, 2009. The Tribunal had to decide whether the Appellant had become disabled with a severe and prolonged disability between January 1, 2008, and January 31, 2009. The Tribunal founded the following:

> "The Tribunal carefully reviewed the medical reports and listened to the Appellant's testimony. The Tribunal recognizes that the Appellant has significant limitations, but the evidence on file did not allow the Tribunal to assess how those limitations might have evolved during 2008 and 2009. To accept the Appellant's arguments, the Tribunal is of the view that the OCRT decision would have to be reconsidered, which the Tribunal is unable to do."[33]

[49] When I read the decision, I see it as a decision that is clearly unfavourable to the Appellant, but it is neither unfair nor unjust. It simply resulted from a process in which the decision-maker meticulously weighed the evidence before him and in which the Appellant and her arguments could be heard.

[50] As a result, I cannot see how the October 28, 2016, decision was made in a way that was unfair or unjust.

[51] Also, I do not believe that it is unjust or unfair to oppose the outcome of that decision in this case. The Supreme Court, in *Penner*, points out that that may happen "where there is a significant difference between the purposes, processes or stakes involved in the two proceedings."[34] But there is nothing like that here. Also, the Appellant could have appealed that October 28, 2016, decision, which she never did.

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[32] *Poitras*, supra, page 12.
[33] *Ibid.,* page 19.
[34] *Penner*, supra, page 127.

Conclusion

[52] Because of the application of *res judicata*, I cannot consider whether the Appellant suffers from a disability because a Tribunal member has already decided that she does not meet the requirements to be eligible for a Canada Pension Plan (CPP) disability pension.

[53] This means that the appeal is dismissed.

Jean Lazure
Member, General Division – Income Security Section