Federal Court  Cour fédérale

Date: 20170214

Docket: T-1074-16

Citation: 2017 FC 185

Ottawa, Ontario, February 14, 2017

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

LENWORTH ROSE

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 18.1 of the *Federal Courts Act*, RSC 1985, c F-7 [Act] for judicial review of a decision of the Appeal Division [Appeal Division] of the Social Security Tribunal [SST], dated May 31, 2016 [Decision], which dismissed the Applicant's appeal of a decision of the General Division of the Social Security Tribunal [General Division].

II. BACKGROUND

[2] The Applicant first applied for a disability benefit under the *Canada Pension Plan*, SC 1985, c C-8 [*CPP*] on January 11, 2011. He had stopped working due to a severe motor vehicle accident that occurred on June 24, 2004 and which left him with serious physical and mental injuries. The application was denied on April 8, 2011 on the basis that he did not have a severe and prolonged disability at his minimum qualifying period [MQP] of December 31, 2006 and continuously thereafter. The Applicant requested a reconsideration of the decision, which confirmed the denial on July 25, 2011. The matter was then heard on August 9, 2012 by the Office of Commission of Review Tribunals [OCRT], which dismissed the Applicant's appeal on September 24, 2012 [2012 Decision].

[3] On October 4, 2012, the Applicant filed an application for leave to appeal via facsimile to the Pension Appeals Board [PAB], which application was never heard by the PAB.

[4] On April 1, 2013, the OCRT and the PAB were replaced by the General Division pursuant to s 224 of the *Jobs, Growth and Long-term Prosperity Act*, SC 2012, c 19.

[5] After a lack of response regarding his application for leave to appeal, the Applicant then filed an application for a time extension and leave to appeal the 2012 Decision, which the General Division acknowledged receipt of on November 13, 2013. The Appeal Division denied his request for an extension of time on April 8, 2014 because the Applicant had not raised any grounds of appeal that demonstrated a reasonable chance of success.

[6] The Applicant then submitted a second application for *CPP* disability benefits on April 29, 2014. This application was denied by letter dated September 26, 2014 [2014 Decision] on the basis that the 2012 Decision was final and binding. Upon the Applicant's request, the Minister reconsidered the 2014 Decision but confirmed the denial on December 31, 2014.

[7] The 2014 Decision was appealed to the General Division on January 5, 2015. The Respondent filed a Request for Summary Dismissal on August 6, 2015 on the basis that the matter was *res judicata* and the General Division informed the Applicant by letter dated September 17, 2015 that it intended to grant the Respondent's request. On October 6, 2015, the Applicant provided submissions on the merits of his claim. In a decision dated November 9, 2015, the General Division summarily dismissed the appeal and agreed that the matter was *res judicata*.

[8] The Applicant appealed the General Division's decision on November 23, 2015 to the Appeal Division.

III. DECISION UNDER REVIEW

[9] In a decision dated May 31, 2016, the Appeal Division refused the Applicant leave to appeal the General Division's summary dismissal decision.

[10] The Appeal Division first considered the preliminary issue that the Applicant had filed an application for leave to appeal the 2012 Decision with the PAB on October 4, 2012, which was not heard. The Applicant submitted proof in the form of a copy of the facsimile transmission and

the application for leave to appeal, both dated October 4, 2012. The Appeal Division found that the facsimile transmission sheet appeared to show that "on October 4, 2012 the application for leave was successfully transmitted to the [PAB]." However, the Appeal Division found that the documents had no effect on its decision on the basis that although they indicated the Applicant had been truthful about appealing the 2012 Decision, it was too late for remedial action since s 66(2) of the *Department of Employment and Social Development Act*, SC 2005, c-34 [*DESD Act*] imposes a one-year time limit to rescind or amend a decision.

[11] Next, the Appeal Division considered whether the General Division had erred in summarily dismissing the Applicant's appeal. The Appeal Division found that the General Division had correctly stated and applied the law in regards to s 53(1) of the *DESD Act* and the principle of *res judicata*. *Res judicata* applies where the issue to be decided and the parties are the same as that of a prior proceeding which rendered a final decision. In the Applicant's case, the issue was the same, which was whether the Applicant was eligible for *CPP* disability benefits at the end of his MQP. The 2012 Decision was a final decision since the Appeal Division had previously denied a time extension for leave to appeal. Finally, the parties in both proceedings were the same.

[12] The Appeal Division then dismissed the appeal on the basis that the General Division's conclusion in respect of whether *res judicata* applied was correct and that the decision to summarily dismiss the appeal was also correct.

IV. ISSUES

[13] Based on the Applicant's submissions, it appears the following are at issue:

(a) Was the Applicant denied procedural fairness in not having his application for leave to appeal the 2012 Decision, submitted via facsimile on October 4, 2012, considered?

(b) If the Applicant was denied procedural fairness, should the 2012 Decision be considered a final decision?

(c) If the 2012 Decision is not a final decision, should the Applicant be permitted to appeal the 2012 Decision, or, in the alternative, be permitted to have his 2014 application for *CPP* disability benefits considered?

[14] The Respondent submits that the following is at issue in this application:

(a) Was the Appeal Division's decision to deny the appeal of the summary dismissal decision of the General Division reasonable?

V. STANDARD OF REVIEW

[15] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[16] The standard of review for questions of procedural fairness is correctness, with some deference to the particular tribunal: see *Reinhardt v Canada (Attorney General)*, 2016 FCA 158 at para 14 [*Reinhardt*].

[17] The standard of review for any findings of fact by the SST and for the interpretation of the *DESD Act* is reasonableness: see *Reinhardt*, above, at para 15.

[18] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at para 47, and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

VI. STATUTORY PROVISIONS

[19] The following provisions from the *DESD Act* are relevant in this proceeding:

Dismissal	**Rejet**
53 (1) The General Division must summarily dismiss an appeal if it is satisfied that it has no reasonable chance of success.	53 (1) La division générale rejette de façon sommaire l'appel si elle est convaincue qu'il n'a aucune chance raisonnable de succès.

Decision

(2) The General Division must give written reasons for its decision and send copies to the appellant and the Minister or the Commission, as the case may be, and any other party.

Appeal

(3) The appellant may appeal the decision to the Appeal Division.

…

Appeal — time limit

57 (1) An application for leave to appeal must be made to the Appeal Division in the prescribed form and manner and within,

…

(b) in the case of a decision made by the Income Security Section, 90 days after the day on which the decision is communicated to the appellant.

Extension

(2) The Appeal Division may allow further time within which an application for leave to appeal is to be made, but in no case may an application be made more than one year after the day on which the decision is communicated to the appellant.

Motifs

(2) Elle rend une décision motivée par écrit et en fait parvenir une copie à l'appelant et, selon le cas, au ministre ou à la Commission, et à toute autre partie.

Appel à la division d'appel

(3) L'appelant peut en appeler à la division d'appel de cette décision.

…

Modalités de présentation

57 (1) La demande de permission d'en appeler est présentée à la division d'appel selon les modalités prévues par règlement et dans le délai suivant :

…

b) dans le cas d'une décision rendue par la section de la sécurité du revenu, dans les quatre-vingt-dix jours suivant la date où l'appelant reçoit communication de la décision.

Délai supplémentaire

(2) La division d'appel peut proroger d'au plus un an le délai pour présenter la demande de permission d'en appeler.

Grounds of appeal

58 (1) The only grounds of appeal are that

(a) the General Division failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;

(b) the General Division erred in law in making its decision, whether or not the error appears on the face of the record; or

(c) the General Division based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it.

…

Decision

(3) The Appeal Division must either grant or refuse leave to appeal.

…

Time limit

66 (2) An application to rescind or amend a decision must be made within one year after the day on which a decision is communicated to the appellant.

Moyens d'appel

58 (1) Les seuls moyens d'appel sont les suivants :

a) la division générale n'a pas observé un principe de justice naturelle ou a autrement excédé ou refusé d'exercer sa compétence;

b) elle a rendu une décision entachée d'une erreur de droit, que l'erreur ressorte ou non à la lecture du dossier;

c) elle a fondé sa décision sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments portés à sa connaissance.

…

Décision

(3) Elle accorde ou refuse cette permission.

…

Délai

66 (2) La demande d'annulation ou de modification doit être présentée au plus tard un an après la date où l'appelant reçoit communication de la décision.

VII. ARGUMENTS

A. *Applicant*

[20] The Applicant is representing himself. Based upon his submissions, the Applicant argues that the 2012 Decision is not a final decision and therefore, *res judicata* should not apply to his 2014 application.

[21] The Applicant contends that on October 4, 2012, he submitted an application for leave to appeal the 2012 Decision. During that time, the OCRT and PAB were transitioning into the General Division and Appeal Division; as such, the Applicant surmises that his application was misplaced. A decision in regards to his application for leave to appeal was never rendered.

[22] Although the Applicant submitted the application for leave to appeal a second time, the second application was outside of the 90-day limit. Moreover, the Appeal Division refused to grant a time extension and also rejected his leave to appeal. The Applicant says this is a breach of procedural fairness as he deserved to have his initial leave to appeal application considered. The Applicant submits that he deserved to have the opportunity to have his case heard on the merits of the medical documents by the then-newly formed General Division or Appeal Division.

[23] As a result of the Appeal Division's denial of leave to appeal in 2014, the Applicant submitted a new application for *CPP* disability benefits. The second application has been dismissed on the principle of *res judicata*, but the Applicant argues *res judicata* does not apply

because the 2012 Decision should not have been considered a final decision, since an application to appeal was submitted but never considered.

B. *Respondent*

[24] The Respondent submits that the Decision is reasonable. The Appeal Division did not err in denying the Applicant's appeal because the Applicant failed to demonstrate that the General Division's decision contained any errors that may ground an appeal as per s 58(1) of the *DESD Act*.

(1) Finality of the 2012 Decision

[25] While the General Division may grant a time extension for an application for leave to appeal, s 57(2) of the *DESD Act* prohibits an application for leave to appeal more than one year after the day on which the decision is communicated. In the current case, the Applicant applied to the General Division to appeal the decision almost 14 months after the 2012 Decision was communicated. The Appeal Division's decision to deny the time extension and leave to appeal in regards to the 2012 Decision was not appealed; as such, the General Division was reasonable in concluding that the 2012 Decision was final and binding. The Appeal Division's re-examination of the issue of finality resulted in the same conclusion.

[26] In his submissions to the Appeal Division, the Applicant failed to demonstrate how the General Division's conclusion regarding the finality of the 2012 Decision contained an error pursuant to the grounds of appeal enumerated in s 58(1) of the *DESD Act*. Instead, his arguments

were that he should have been granted an extension of time to file the appeal of the 2012 Decision, thereby rendering it as not final, and that the merits of his claim warranted his appeal to be heard. Since neither of these arguments fall within s 58(1), the Appeal Division was reasonable in dismissing his appeal.

(2) *Res Judicata*

[27] The doctrine of *res judicata* has been found to apply specifically to decisions of the SST: see *Belo-Alves v Canada (Attorney General)*, 2014 FC 1100. *Danyluk v Ainsworth Technologies Inc*, [2001] 2 SCR 460 at paragraph 25 establishes three conditions for the application of *res judicata*: the issue is the same as decided in the prior decision; the prior decision was final; and the parties in both proceedings are the same. The Respondent submits that the present case fulfils these conditions.

[28] The issue in the Applicant's 2011 application for *CPP* disability benefits was whether the Applicant was disabled within the meaning of the *CPP* on or before his MQP. The facts and issues have not changed since the 2011 application, since the Applicant has not made additional valid contributions which would allow for a change in the MQP. Second, as stated above, the 2012 Decision is final and binding. The 2012 Decision was appealed late and was denied an extension of time, which was not appealed. Thus, the Applicant's appeal rights have been exhausted. Finally, the Applicant and Respondent are the same parties to both appeals.

[29] Given these facts and the applicable law, the only possible conclusion for the General Division was that *res judicata* applied to prevent further litigation on the issue of

disability between the parties. The appeal was bereft of any chance of success and the summary dismissal was the only acceptable outcome. As such, it was reasonable for the Appeal Division to dismiss the appeal on the basis that the Applicant had not established the General Division had made an error enumerated in s 58(1) of the *DESD Act*.

(3) Summary Dismissal

[30] Section 53 of the *DESD Act* allows the General Division to summarily dismiss an appeal when it has no reasonable chance of success. The General Division provided notice to the Applicant of its intention to summarily dismiss the appeal. In his submissions, the Applicant did not provide reasons as to why the appeal should not be summarily dismissed.

[31] Since the requirements of *res judicata* were met, the General Division correctly found no reasonable chance of success for the Applicant's appeal in its decision to summarily dismiss the appeal. The Appeal Division found that the General Division had applied the correct test in determining the matter was *res judicata*, thereby rendering the summary dismissal also correct. There was no error in law that had been committed contrary to s 58(1)(b) of the *DESD Act*; thus, the Appeal Division reasonably denied the Applicant's appeal.

VIII. ANALYSIS

[32] The essence of the Applicant's argument before me is that:

(a) Following the negative OCRT decision of September 24, 2012 (the hearing was held August 9, 2012), the Applicant appealed to the PAB;

(b) The PAB became defunct and never rendered a decision on the Applicant's appeal;

(c) The appeal was ostensibly transferred to the SST which replaced the PAB on April 1, 2013;

(d) The Applicant was never given a chance to be heard by the new SST because his leave to appeal application was misplaced when the PAB was replaced by the SST and there was a huge backlog of cases to be dealt with;

(e) This means that the Applicant's *CPP* application has not yet been dealt with and the decision under review should be set aside.

[33] The Applicant also disputes the *res judicata* findings of the Appeal Division decision and says that he wants the Court to hear that "I deserve to receive my CPP disability benefits…."

[34] The Applicant's position is not supported by the facts. His appeal to the former PAB did not proceed because the PAB was replaced by the SST on April 1, 2013. On November 13, 2013, the SST acknowledged to the Applicant receipt of his application for leave to appeal the denial of *CPP* benefits by the OCRT of September 24, 2012 and a decision was made on April 8, 2014 by the Appeal Division of the SST that refused the Applicant's leave to appeal the OCRT decision of September 24, 2012 and denied the Applicant's request for an extension of time to make an application for leave to appeal. The Applicant did not challenge the April 8, 2014 decision of the Appeal Division, as he could have done in this Court. This is the root of his problems because that decision still stands unchallenged.

[35] Having failed to appeal the April 8, 2014 decision of the Appeal Division, the Applicant then re-applied for *CPP* benefits on April 29, 2014 citing the same facts as were contained in his earlier application and with no change to the MQP of December 31, 2006. This second application was denied on the basis that the September 24, 2012 decision of the OCRT was final

and binding. This was confirmed by the Minister in a reconsideration decision of December 31, 2014.

[36] The Applicant then proceeded to appeal the denial of his second April 29, 2014 application to the General Division. This appeal was eventually dismissed on November 9, 2015 by the General Division on the basis that the matter was *res judicata*; the Applicant had never appealed the final decision of the Appeal Division of April 8, 2014 which had been made on the basis of the same facts and the same MQP date of December 31, 2006.

[37] The Applicant then appealed the General Division decision of November 9, 2015 to the Appeal Division citing the following grounds of appeal:

(a) The General Division did not receive his appeal which was delivered to the PAB, and he should not be penalized by not having his case heard;

(b) On a balance of probabilities, it would be reasonable to conclude that an error was made by the PAB and the failure of the SST to transfer the file, and;

(c) It would be a miscarriage of justice to not allow him to be heard on the merits of the medical documents prior to the MQP of 2006.

[38] In a decision of May 31, 2016, the Appeal Division denied the appeal and made the following important findings of relevance to the assertions that the Applicant now brings before the Court:

> [8] A claim for similar benefits was dated January 11, 2011. That claim was determined by a Review Tribunal. Its decision was rendered on August 9, 2012. The hearing took place and decision was made after the MQP of the Appellant had expired.
>
> [9] An application for extension of time for leave to appeal of that decision was denied by the SST Appeal Division on April 8, 2014.

> [10] The parties and the issues in the previous proceedings before the Review Tribunal that resulted in the decision dated August 9, 2012 and the current proceedings are the same.
>
> **SUBMISSIONS**
>
> [11] The Appellant made no submissions on the issue of res Judicata[.]
>
> [12] The Respondent submitted that the appeal cannot succeed because it the [*sic*] issue has already been decided and the case must be considered on the legal principal [sic] of Res Judicata.

[39] The facts clearly show that the Applicant's application to the former OCRT was not entirely lost or neglected when that tribunal was replaced by the SST on April 1, 2013. The SST considered the Applicant's leave to appeal and request for an extension of time and denied it in a decision of April 8, 2014, which the Applicant did not appeal. That decision considers the usual criteria for an extension of time, most of which favoured the Applicant, but concluded that there was no point in granting an extension of time and proceeding with the leave to appeal because the Applicant had put forward no grounds of appeal:

> [15] In assessing whether the Appellant has an arguable case, the Tribunal is bound by section 58 of the DESD Act which sets out an exhaustive list of grounds of appeal.
>
> [16] In this case, the Appellant did not allege that the Review Tribunal made any error of law or fact in reaching its conclusion. Therefore, no grounds of appeal are estab1ished on this basis.
>
> [17] The Appellant submitted a report penned by Dr. KaKar dated October 1, 2012 as new evidence. The provision of new evidence is not a ground of appeal under the DESD Act Therefore, the presentation of a new medical report is not a ground of appeal that has a reasonable chance of success.
>
> …
>
> [19] While all of the factors above must be considered in a request for an extension of time for leave to appeal, they are not to be given equal weight in each case. In this case, I place significant

> weight on the fact that the Applicant did not advance any grounds of appeal that demonstrate that he has a reasonable chance of success. This is a critical element of the application for leave to appeal. Without this, even though he had a continuing intention to appeal, and a reasonable explanation for his delay, this application fails.
>
> [emphasis added]

[40] In other words, the Applicant simply tried to appeal on the basis of new medical evidence and advanced no grounds of appeal that would justify allowing an extension of time.

[41] In his judicial review application before me, the Applicant does not address or engage with the merits of that decision and the central *res judicata* issue. He simply asserts (but fails to establish) that the merits of his *CPP* application have never been dealt with. But the facts are clear that they were dealt with in 2011 by the OCRT and his appeal of this decision was dealt with by the Appeal Division on April 8, 2014 which refused his application for leave to appeal, in a final decision that the Applicant has never challenged, on the grounds that there was no point in granting an extension of time because the Applicant had put forward no arguable case for an appeal.

[42] The appeal letter to the SST sent by Medication Services on behalf of the Applicant and dated November 15, 2013 says that the Applicant had an "arguable case" but fails to disclose any grounds of appeal that could be argued, so it is not difficult to see why the Appeal Division came to the conclusion it did in its April 8, 2014 decision.

[43] The Applicant appears to be of the view that having failed to challenge the April 8, 2014 decision of the Appeal Division, he can simply make another application for *CPP* benefits based upon the same facts and the same MQP. The Appeal Division decision he now challenges before the Court provides the factual and legal reasons why he cannot do this. The Applicant has failed to address the merits of that decision and my review of it leads me to conclude that it is a reasonable decision based upon the facts and the law.

[44] The Applicant's real complaint is that the appeal of his first application for *CPP* benefits was, to use his words, "messed up by somebody" and now he has to bear the consequences in a context where his health continues to deteriorate, he cannot work, and he does not have the resources to hire a lawyer to assist him. If any such "mess up" occurred, it occurred several years ago now and the Court does not have the record or the legal argument to deal with it in this review. The only Decision before me is the Appeal Division decision of May 31, 2016 which upheld the General Division summary dismissal decision of November 9, 2015 that the appeal was *res judicata*. The Court cannot review that Decision from the perspective of the April 8, 2014 decision that the Applicant did not seek to have reviewed by this Court and which must stand as a final decision on his claim for *CPP* benefits.

[45] The Applicant presents an extremely sympathetic case but too much time has now passed for the Court to revisit decisions that were made years ago and that were not appropriately handled or appealed. If someone did "mess up" as the Applicant says, the record before the Court is insufficient to make any determination on the issue, even if it could be considered at this time. The real problem is that the Applicant has been representing himself and the time has long gone

since he could have taken action to address his problems. On the other hand, the record is clear that the Applicant's claim for *CPP* benefits was dealt with in 2012 and there is really nothing before me to suggest that there is anything wrong with that decision other than the Applicant's natural disappointment. The Applicant would like the Court to re-examine the merits of his original claim but that is not the matter before me in this application which is based upon a *res judicata* decision for which the Applicant offers no grounds of review.

[46] With great regret, the Court must dismiss the application. When the Appeal Division was asked to consider the Applicant's request for an extension of time to appeal the August 9, 2012 decision that had denied his claim for disability benefits, the Applicant and those acting for him did not explain what issue he took with the 2012 Decision. In other words, no grounds of appeal were articulated. Hence, there was no point in proceeding with an appeal. The Applicant did not dispute this conclusion in coming to this Court.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. No order is made as to costs.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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