



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *The late S. K. v. Minister of Employment and Social Development*, 2016 SSTGDIS 53

Tribunal File Number: GP-13-1379

BETWEEN:

The late S. K.

Appellant

and

**Minister of Employment and Social Development
(formerly Minister of Human Resources and Skills Development)**

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
General Division – Income Security Section

DECISION BY: Virginia Saunders

DATE OF DECISION: July 15, 2016

REASONS AND DECISION

INTRODUCTION

[1] The Appellant's application for a *Canada Pension Plan* (CPP) survivor's pension was date stamped by the Respondent on October 1, 2012. The Respondent denied the application initially and upon reconsideration. The Appellant appealed the reconsideration decision to the Social Security Tribunal (Tribunal).

[2] The Appellant died on January 3, 2014, after the appeal was filed. Tribunal records indicate that Tribunal staff tried unsuccessfully to obtain information regarding the Appellant's estate, and to contact next-of-kin who might wish to pursue the appeal on behalf of the estate.

[3] The appeal was decided on the basis of the documents and submissions filed as the Tribunal determined that no further hearing was required, and that this method of proceeding respects the requirement under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

THE LAW

[4] Part II of the CPP governs pensions and supplementary benefits, as well as appeals from decisions made regarding them. It is administered by a department of the federal government that has had a variety of names over the years. Recently the department was called Human Resources and Skills Development. In 2013 it was continued as Employment and Social Development. Subsection 42(1) of the CPP now provides that references to "the Minister" in Part II mean the Minister of Employment and Social Development.

[5] Paragraph 44(1) (d) of the CPP provides for a survivor's pension to be paid to the survivor of a deceased contributor who made contributions to the CPP for not less than the minimum qualifying period, if the survivor meets certain other requirements.

[6] The term "survivor" is defined in subsection 42(1) of the CPP, and includes a common-law partner. If there is no common-law partner, the survivor is a person who was married to the contributor at the time of the contributor's death.

[7] “Common-law partner” is defined in subsection 2(1) of the CPP as a person who is cohabiting with the deceased contributor in a conjugal relationship at the time of the contributor’s death, having so cohabited with the contributor for a continuous period of at least one year.

[8] Subsection 60(1) of the CPP provides that a benefit is not payable unless an application has been made, and payment approved. Under subsection 60(7), upon receiving an application the Minister must consider it and either approve the benefit and the amount, or determine that no benefit is payable. The Minister must notify the applicant in writing of the decision.

[9] Subsection 81(1) of the CPP provides that an applicant who is dissatisfied with certain decisions, including a decision made under section 60, may ask the Minister to reconsider that decision. Subsection 81(2) provides that the person who made the request shall be notified in writing of the reconsideration decision and the reasons for it. Section 82 of the CPP provides that a party who is dissatisfied with a reconsideration decision made under section 81 may appeal it to the Tribunal.

[10] Before April 1, 2013, an appeal made under section 82 was heard by a Review Tribunal established under subsection 82(2) of the CPP. An appeal of a Review Tribunal decision could be made to the Pension Appeals Board under section 83. Subsection 84(1) of the CPP stated that the decision of the Review Tribunal, except as provided in the Act; or the decision of the Pension Appeals Board, except for judicial review under the *Federal Courts Act*; was final and binding for all purposes of the CPP.

[11] On April 1, 2013, the Review Tribunals and the Pension Appeals Board were replaced, respectively, with the General Division and the Appeal Division of the Social Security Tribunal established under the *Department of Employment and Social Development Act* (DESDA). Appeals of reconsideration decisions are now heard by the Social Security Tribunal – General Division. A person who is unhappy with a decision made by the General Division may seek leave to appeal to the Appeal Division. Section 68 of the DESDA provides that a decision of the Tribunal “is final and, except for judicial review under the *Federal Courts Act*, is not subject to appeal to or review by any court.”

[12] In addition to the appeal process, subsection 84(2) of the CPP set out a procedure by which a person could apply to have a decision of a Review Tribunal or the Pension Appeals Board rescinded on the basis of “new facts.” This provided an avenue of relief to applicants who had new evidence that could not have been discovered at the time of the original hearing with the exercise of reasonable diligence.

[13] This process continues to be available with the Social Security Tribunal. A person may now apply under paragraph 66(1)(b) the DESDA to have a decision rescinded or amended if a new material fact is presented. The application is made to the same Division that made the original decision. The test for “new facts” or a “new material fact” is a narrow one, and there is now a limitation period of one year from the date the decision was communicated to the applicant.

ISSUE

[14] In this case, the Tribunal must decide if *res judicata* prevents the Appellant from pursuing this appeal and, if not, whether the Appellant is eligible to receive a CPP survivor’s pension as the common-law partner of W. K.

EVIDENCE

[15] W. K. is the deceased contributor. He died on June 6, 2007. In July 2007 the Appellant applied for a CPP survivor’s pension. In her application she stated that she and Mr. W. K. were married on December 14, 1985, and were still married at the time of his death but were not living together. They had a son, born in 1986. Subsequently it was learned that the Appellant and Mr. W. K. had in fact divorced on December 15, 2006. Her application was denied, and she appealed unsuccessfully to a Review Tribunal.

[16] The Appellant then appealed to the Pension Appeals Board. The appeal was heard in March 2010. In its decision dated April 19, 2010, the Board noted that the application had been denied by the Minister and by the Review Tribunal because the Appellant “could not fit herself within the relevant enabling language of the *Canada Pension Plan*.” It stated that the Appellant had to establish “on a balance of probabilities . . . that she was cohabiting with Mr. W. K. in a

conjugal relationship at the time of death, and having so cohabited with him for a continuous period of at least one year.”

[17] The Board reviewed the evidence before it and concluded as follows:

[33] In our opinion, the definition of "survivor" contained in subsection 42(1) makes it abundantly clear that Mrs. S. K. has failed to prove her claim under either of the alternatives provided for under the definition.

[34] The Appellant has not discharged the onus upon her by establishing that she cohabited with Mr. W. K. in a conjugal relationship continuously for the year before his death on June 6, 2007.

[18] The Appellant submitted the present application for survivor's benefits in October 2012. In that application she named W. K. as the deceased contributor. She stated that they were married on December 14, 1985, but were not married at the time of his death. She stated that she and Mr. W. K. were living together from May 2006 until his death on June 6, 2007, and were planning to get married again. She indicated that Mr. W. K. became sick with cancer in May 2006; that she was his primary caregiver until he went into the hospital before his death; that he lived in "his own basement suite but he stayed sometimes at my place because of the weather conditions;" and that when he was in the hospital she and her son went to see Mr. W. K. every day.

[19] The application was denied on November 14, 2012, because the Appellant and Mr. W. K. were divorced at the time of his death. In its reconsideration decision of April 25, 2013, the Respondent varied the initial decision and stated that it now denied the application because it related to the same contributor and circumstances as the Appellant's first application. The Respondent stated that it was bound by the Pension Appeals Board decision of April 19, 2010, respecting that application.

[20] In the reconsideration decision the Respondent noted that the Appellant had supplied some evidence that had not been submitted on her first application. The Respondent suggested that the Appellant contact the Tribunal to enquire about recourse under paragraph 66(1)(b) of the DESDA to have the Pension Appeals Board decision amended based on a new material fact.

[21] The Appellant did not make an application under paragraph 66(1)(b). She filed a Notice of Appeal to the General Division on May 29, 2013, appealing the reconsideration decision of April 25, 2013.

SUBMISSIONS

[22] The Appellant submitted that she qualifies for a survivor's pension because she and Mr. W. K. were living in a common-law relationship at the relevant time.

[23] The Respondent made no submissions to the Tribunal.

ANALYSIS

[24] This appeal must fail on the grounds of *res judicata*. This doctrine was recently applied to the CPP appeal process by the Federal Court of Canada in *Belo-Alves v. Canada (Attorney General)*, 2014 FC 1100. The Court noted that *res judicata* has two forms: cause of action estoppel and issue estoppel. Issue estoppel stands for the proposition that once a question of fact or law has been litigated and determined by a competent decision maker, the decision is final and it cannot be re-determined in subsequent proceedings. The Court cited the elements of issue estoppel that were set out in *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460:

- a) The same question has been decided;
- b) The judicial decision was final; and
- c) The parties to the previous decision are the same parties to the proceeding in which issue estoppel is raised.

[25] Applying those factors to the present case:

- a) The question to be decided on this appeal was whether the Appellant was the common-law partner of the deceased contributor, W. K.; that is, was she cohabiting with him in a conjugal relationship at the time of his death, having so cohabited with him for a continuous period of at least one year. The Pension Appeals Board decided that same question in its decision of April 19, 2010.

- b) The decision of the Pension Appeals Board was final, by virtue of subsection 84(1) of the CPP, which was in force when that decision was made. If the decision had been made by a Division of the Tribunal, section 68 of the DESDA would similarly apply.
- c) The parties to the previous decision were the Appellant and the Minister of Human Resources and Skills Development. The Minister of Employment and Social Development, the Respondent in the present appeal, is the successor to the Minister of Human Resources and Skills Development. The parties are the same in both proceedings.

[26] In *Danyluk* the Supreme Court of Canada stated that the rules governing issue estoppel should not be mechanically applied. If the three elements of issue estoppel exist, “the court must still determine whether, as a matter of discretion, issue estoppel *ought* to be applied.” That two-step approach was not referred to in *Belo-Alves*, but was in *Kaminsky v. Canada (Attorney General)* 2014 FC 238, another decision of the Federal Court in relation to a decision of the Pension Appeals Board.

[27] In *Danyluk* the Court stated that there is an open list of discretionary factors to consider when deciding whether or not to exercise the discretion. These may include:

- 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 initial decision-maker;
- f) the circumstances giving rise to the first proceedings; and
- g) any potential injustice.

[28] The Court stated that the objective of the exercise of discretion “is to ensure that the operation of issue estoppel promotes the orderly administration of justice but not at the cost of real injustice in the particular case.”

[29] The CPP is not a social welfare scheme; it is a program to provide social insurance to eligible Canadians who lose earnings due to a number of factors (*Belo-Alves, supra*, citing *Granovsky v. Canada (Minister of Employment and Immigration)*, [2000] 1 S.C.R. 703)). The survivor's pension is intended to compensate for the lost earnings of a deceased partner. Whether a person is eligible depends on whether she meets the definition of survivor that is set out in subsections 42(1) and 2(1) of the CPP.

[30] The CPP set out a clear procedure by which the Appellant could seek review of the decision that was made regarding her 2007 application. She availed herself of three levels of appeal, and at all levels she was able to present evidence to support her case. She provided oral testimony to the Review Tribunal and the Pension Appeals Board. In deciding the Appellant's appeal, the Pension Appeals Board was interpreting its enabling statute, with which it had particular familiarity. Subsection 84(1) stated that that decision was final.

[31] The Appellant's 2012 application was for the same benefit with respect to the same contributor. There is nothing contained in the application or in any of the material subsequently filed by the Appellant that points to any potential injustice in preventing her from duplicating the decision-making and appeal process that she already employed between 2007 and 2010.

[32] In consideration of the above, the Tribunal has concluded that *res judicata* and the principle of issue estoppel apply to the present case. The question of the Appellant's eligibility for a survivor's pension as a common-law partner was decided by the Pension Appeals Board in 2010, and it cannot be re-litigated.

CONCLUSION

[33] The appeal is dismissed.

Virginia Saunders
Member, General Division - Income Security