



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *J. L. v. Minister of Employment and Social Development*, 2016 SSTADIS 310

Tribunal File Number: AD-16-597

BETWEEN:

J. L.

Applicant

and

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

Respondent

and

S. A.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: August 10, 2016

REASONS AND DECISION

DECISION

Leave to appeal is refused.

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division (GD) of the Social Security Tribunal dated February 5, 2016. The GD had conducted an in-person hearing and determined that the Applicant was not eligible receive the *Canada Pension Plan* (CPP) orphan's benefit from July 2012 to December 2012.

[2] On April 28, 2016, within the specified time limitation, the Applicant submitted to the Appeal Division (AD) an Application Requesting Leave to Appeal detailing alleged grounds for appeal.

[3] For this application to succeed, I must be satisfied that the appeal has a reasonable chance of success.

OVERVIEW

[4] The Applicant's daughter passed away in March 2012, leaving two young children. The Applicant took her granddaughters into her home and began raising them, in accordance with what she believed were her daughter's wishes. On April 12, 2012, the Applicant submitted an application for the CPP orphan's benefit, which the Respondent subsequently approved. On or about June 29, 2012, the Added Party and father of the children, removed them from the Applicant's home and subsequently obtained court orders granting him custody. On December 6, 2012, the Added Party applied for the orphan's benefit. The Respondent granted this application and cancelled the benefits in respect of the Applicant. The Applicant then appealed this decision to the GD.

[5] At the hearing before the GD on January 15, 2016, the Applicant testified that she continued to receive the CPP orphan's benefit from July to December 2012 despite the fact that she no longer had physical custody of the children. However, she said that she spent all of the money she received from the benefit on the children and did not feel that she should be ordered to repay it. She understood that she was no longer entitled to the CPP orphan's benefit now that the children were living with their father. The Added Party testified he had informed the Applicant in advance that he intended to take physical custody of the children, which he in fact did in late June 2012. He subsequently obtained legal custody.

[6] In its decision, the GD dismissed the Applicant's appeal, finding that, while she did have custody and control of the children from the date of her daughter's death in March 2012, she ceased to have custody and control over the children as of June 29, 2012. The GD found that the Added Party was properly entitled to the CPP orphan's benefit from July to December 2012.

THE LAW

[7] According to subsections 56(1) and 58(3) of the *Department of Employment and Social Development Act* (DESDA), an appeal to the AD may only be brought if leave to appeal is granted and the AD must either grant or refuse leave to appeal.

[8] Subsection 58(2) of the DESDA provides that leave to appeal is refused if the AD is satisfied that the appeal has no reasonable chance of success.

[9] Section 74 of the CPP sets out the eligibility requirements for the CPP orphan's benefit. Section 75 specifies that payments shall be made to the person or agency having custody and control of an orphan under the age of 18 years.

[10] According to subsection 58(1) of the DESDA the only grounds of appeal are the following:

- (a) The GD failed to observe a principle of natural justice or otherwise acted beyond or refused to exercise its jurisdiction;
- (b) The GD erred in law in making its decision, whether or not the error appears on the face of the record; or

- (c) The GD 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.

[11] Some arguable ground upon which the proposed appeal might succeed is needed for leave to be granted: *Kerth v. Canada*.¹ The Federal Court of Appeal has determined that an arguable case at law is akin to determining whether legally an appeal has a reasonable chance of success: *Fancy v. Canada*.²

[12] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is a first hurdle for the Applicant to meet, but it is lower than the one that must be met on the hearing of the appeal on the merits. At the leave stage, the Applicant does not have to prove the case.

ISSUE

[13] Does the appeal have a reasonable chance of success?

SUBMISSIONS

[14] In her Application Requesting Leave to Appeal, the Applicant made the following submissions:

- (a) The GD failed to observe that benefits for the children were paid up to December of 2012, yet benefits were also made to the Added Party for the same period. The GD erred in failing to check records to see that benefits were paid from July to December of 2012 before ordering payment for the same period.
- (b) She understands that the orphan's benefit should be paid to the Added Party, but at the time he took the children he was not familiar with their needs. She provided care for them with the benefit monies that she received, and she continues to do so. This has caused her significant financial hardship.

¹ *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC)

² *Fancy v. Canada (Attorney General)*, 2010 FCA 63

- (c) The GD ignored the fact that, as the children's grandmother, she only had the children's best interest at heart. In her will, her daughter expressed the wish that her mother act as her children's guardian.
- (d) In paragraph 22 of its decision, the GD incorrectly listed June 29, 2010 as the date the Added Party took the children; in fact, it was June 29, 2012.

ANALYSIS

[15] I have reviewed the decision of the GD and found no grounds under subsection 58(1) that would have a reasonable chance of success on appeal. I will also address the Applicant's specific allegations.

Benefits were paid up to December 2012

[16] The Applicant suggests that the GD erred in ordering that the orphan's benefit be paid to the Added Party for June to December 2012, when the Respondent had already paid her for the same period.

[17] I do not see an arguable case on this ground. The Applicant is correct in noting that there can be only one beneficiary of an orphan's benefits at any given time—namely the person having custody and control over the child or children in question. Indeed, the GD's decision was an attempt to determine who had custody and control over the children—their father or their grandmother—and when they had it. There is no indication that the Respondent intended to pay two parties for the same period: In a letter dated June 21, 2013 (available at p. GD2-34 of the hearing file), the Respondent, having determined the Added Party was entitled to the benefit from July to December 2012, demanded repayment of \$2,700 that it considered was remitted to the Applicant in error.

Applicant used benefits to provide for the children's needs

[18] The Applicant alleges that the GD gave inadequate consideration to the fact she paid for the children's needs during the period in question and continues to do so.

[19] Again, I do not see an arguable case here. The Applicant made this submission before the GD, and the GD specifically addressed it in paragraph 24 of its decision:

The Tribunal does not find it reasonable that the Appellant continued to spend monies on the children, including registering them in summer programs when she knew Mr. S. A.'s intention to take physical custody as of June 29, 2012. The Tribunal finds that it is irrelevant how the Appellant spent the CPP orphan's benefit she received as the legislation requires that entitled to the benefit is based on who has custody and control of the orphan at the relevant time.

[20] In deeming the Applicant's expenditures irrelevant, I do not see how the GD erred in law. If she is requesting that I reconsider and reassess the evidence and substitute my decision for the GD's in her favour, I am unable to do this. My authority permits me to determine only whether any of the Applicant's reasons for appealing fall within the specified grounds of subsection 58(1) of the DESDA and whether any of them have a reasonable chance of success.

[21] The Applicant has also suggested that requiring her to return the overpayment will cause her financial hardship. While I sympathize with her plight, both the GD and the AD are obligated to follow our enabling statute. Our authority does not permit us the discretion to ignore the letter of the law and do what we think is fair. Support for this position may be found in *Pincombe v. Canada*,³ among other cases, which have held that an administrative tribunal is not a court but a statutory decision-maker and therefore not empowered to provide any form of equitable relief.

Children's mother wanted their grandmother to be their guardian

[22] The Applicant alleges that the GD ignored her love and concern for her grandchildren and her late daughter's desire to put them under her care.

[23] Again, I do not see how this ground would have a reasonable chance of success on appeal. The GD properly disregarded the intentions of the Applicant and her late daughter as irrelevant considerations, and I see no error in law or fact in this decision.

³ *Pincombe v. Canada* (A.G.) [1995] FCJ No. 1320 (FCA)

GD cited an incorrect date

[24] While the GD undoubtedly made a mistake in listing June 29, 2010 as the date on which the Added Party removed the children, I do not see this as an error that was “perverse or capricious,” nor was it material to the outcome. It amounts to a typographical error that occurred in a single instance, and the GD cited the correct date in several other passages of the decision.

CONCLUSION

[25] For the reasons discussed above, the Application is refused.



Member, Appeal Division