



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *J. G. v. Minister of Employment and Social Development*, 2016 SSTADIS 493

Tribunal File Number: AD-16-1248

BETWEEN:

J. G.

Applicant/Appellant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Decision by: Shu-Tai Cheng

Date of Decision: December 20, 2016

REASONS AND DECISION

INTRODUCTION

[1] On March 4, 2015, the General Division (GD) of the Social Security Tribunal of Canada (Tribunal) determined that the Applicant is ineligible for a survivor pension. The GD decision confirmed the Respondent's determination that the Applicant was not entitled to a *Canada Pension Plan* survivor pension on the basis that at the time of the deceased contributor's death, the Applicant was not his common-law spouse.

[2] The Applicant filed an application for leave to appeal with the Appeal Division (AD) of the Tribunal on March 27, 2015. The AD refused leave to appeal on April 23, 2015. The Applicant sought judicial review of the April 23, 2015 AD decision.

[3] On October 19, 2016, the Federal Court set aside the April 23, 2015 AD decision and referred the matter back to the AD for redetermination by a different Member.

ISSUES

[4] Whether the appeal has a reasonable chance of success.

[5] If the appeal is determined to have a reasonable chance of success, should a decision be rendered on the record or does the matter require a hearing?

[6] Then the AD must decide whether to dismiss the appeal, give the decision that the GD should have given, refer the matter back to the GD for reconsideration in accordance with any directions that the AD considers appropriate or confirm, rescind or vary the decision of the GD in whole or in part.

LAW AND ANALYSIS

[7] Pursuant to paragraph 57(1)(b) of the *Department of Employment and Social Development Act* (DESD Act), an application must be made to the AD within 90 days after the day on which the decision appealed from was communicated to the appellant.

[8] According to subsections 56(1) and 58(3) of the DESD Act, “An appeal to the Appeal Division may only be brought if leave to appeal is granted” and “The Appeal Division must either grant or refuse leave to appeal.”

[9] Subsection 58(2) of the DESD Act provides that “Leave to appeal is refused if the Appeal Division is satisfied that the appeal has no reasonable chance of success.”

[10] Subsection 58(1) of the DESD Act states that the only grounds of appeal are the following:

- (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.

[11] The Federal Court found, among other things, that the GD failed to give the Applicant an opportunity to explain some conduct of concern (between the Applicant and her non-lawyer representative during the course of the oral hearing before the GD) and that this failure constitutes a breach of the duty of fairness owed to the Applicant.

Leave to Appeal

[12] Given the finding of the Federal Court, on the ground that GD failed to observe a principle of natural justice, I am satisfied that the appeal has a reasonable chance of success.

Breach of Duty of Fairness

[13] Subsection 59(1) of the DESD Act sets out the powers of the AD. It states: The Appeal Division may dismiss the appeal, give the decision that the General Division should have given, refer the matter back to the General Division for reconsideration in accordance with any

directions that the Appeal Division considers appropriate or confirm, rescind or vary the decision of the General Division in whole or in part.

[14] This appeal proceeded on the basis of the record for the following reasons:

- a) The lack of complexity of the issue(s) under appeal;
- b) The decision of the Federal Court; and
- c) The requirements under the *Social Security Tribunal Regulations* to proceed as informally and quickly as circumstances, fairness and natural justice permit.

[15] Based on the Federal Court decision and my review of the GD decision and the appeal record, I find that the GD's failure to give the Applicant an opportunity to explain the conduct of concern constitutes a breach of a duty of fairness owed to the Applicant.

[16] Given all of the foregoing, I allow the appeal. In the interest of natural justice and procedural fairness, the matter should be returned to the GD for determination.

CONCLUSION

[17] The application for leave to appeal is granted.

[18] The appeal is allowed. The case will be referred back to the General Division of the Tribunal for reconsideration.

Shu-Tai Cheng
Member, Appeal Division