



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *Minister of Employment and Social Development v. C. W.*, 2017 SSTADIS 37

Tribunal File Number: AD-16-1096

BETWEEN:

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

Applicant

and

C. W.

Respondent

and

Niagara Region Community Services

Added Party

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of decision: February 10, 2017

REASONS AND DECISION

DECISION

Leave to appeal is granted.

INTRODUCTION

[1] The Applicant seeks leave to appeal the decision of the General Division of the Social Security Tribunal dated June 2, 2016. The General Division had conducted a hearing based on the documentary record and determined that the Applicant erred in paying a death benefit under the *Canada Pension Plan* (CPP) to the Added Party, rather than the Respondent.

[2] On May 30, 2016, within the specified time limitation, the Applicant submitted to the Appeal Division an application requesting leave to appeal detailing alleged grounds for appeal. For this application to succeed, I must be satisfied that the appeal has a reasonable chance of success.

[3] Pursuant to subsection 10(1) of the *Social Security Tribunal Regulations*, I have elected to add Niagara Region Community Services as a party, as it has a direct interest in the outcome of this proceeding.

FACTUAL OVERVIEW

[4] On September 13, 2013, John Wayne Sunday (the deceased contributor) passed away. On October 29, 2013, the Respondent submitted an application for the CPP death benefit for the estate of the deceased contributor. She said that she was the spouse and common-law partner of the deceased contributor as well as the executrix of the estate, but she also completed a section in the application indicating that there was no will and that she was applying as the common-law spouse of the estate. The Respondent submitted with her application the following documents:

- a copy of the proof of death certificate;
- a copy of the funeral services contract;

- an invoice that showed that the Respondent had paid \$240.88 in funeral services;
- a handwritten will, signed and witnessed by the deceased contributor on July 8, 2013.

[5] On November 14, 2013, the Added Party submitted an application for the CPP death benefit for the estate of the deceased contributor. It asserted that it was responsible for the payment of the deceased contributor's funeral expenses and submitted a copy of the proof of death certificate as well as a statement indicating that Department of Community Services, Niagara Region, paid for funeral expenses in the amount of \$4,022.56.

[6] The Applicant approved the Added Party's application and paid it the proceeds of the death benefit.

[7] In a letter dated November 18, 2013, the Respondent was informed that her application for a death benefit had been denied as she did not meet the CPP eligibility. On December 11, 2013, the Respondent requested a reconsideration of the decision to deny her application for the death benefit, but the Applicant affirmed its decision in a letter dated January 28, 2014.

[8] On February 2, 2014, the Respondent submitted a notice of appeal to the General Division. On April 28, 2016, the member of the General Division presiding over the matter requested submissions from the Applicant on the extent to which it had investigated whether the deceased contributor had a will. The Applicant filed submissions on May 27, 2016, and the General Division issued its decision within the week. It found the Applicant's submissions contradictory and concluded: "[T]he Minister erred by applying section 64 of the CPP regulations when it should have applied section 71(1) of the regulations,¹ which directs that the death benefit should be paid to the estate."

¹ This is presumably an error, and the General Division likely intended to refer to subsection 71(1) of the CPP, rather than the CPP Regulations.

THE LAW

Department of Employment and Social Development Act

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

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

[11] According to subsection 58(1) of the DESDA 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 made in a perverse or capricious manner or without regard for the material before it.

[12] Some arguable ground upon which the proposed appeal might succeed is needed for leave to be granted: *Kerth v. Canada*.² 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*.³

[13] 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.

² *Kerth v. Canada (Minister of Human Resources Development)*, [1999] FCJ No. 1252 (FC).

³ *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

CPP and Associated Regulations

[14] Subsection 57(1) of the CPP states that, subject to subsection (1.1), a death benefit payable to the estate of a contributor is a lump sum amount equal to: (a) six times the amount of the contributor's retirement pension, calculated as provided in subsection (2), or (b) ten per cent of the Year's Maximum Pensionable Earnings for the year in which the contributor died, whichever is the lesser.

[15] Subsection 57(1.1) states that where the contributor's death occurs after December 31, 1997, the lump sum referred to in subsection (1) shall not exceed \$2,500.

[16] Section 71 of the CPP states the following:

71. (1) Where payment of a death benefit is approved, the Minister shall, except as provided in subsections (2) and (3), pay the death benefit to the estate of the contributor.
- (2) The Minister may direct payment of a death benefit in whole or in part to such person or body as is prescribed where
- (a) he is satisfied, after making reasonable inquiries, that there is no estate;
 - (b) the estate has not applied for the death benefit within the prescribed time interval following the contributor's death; or
 - (c) the amount of the death benefit is less than the prescribed amount.

[17] Section 64 of the *Canada Pension Plan Regulations* (CPP Regulations) states the following:

64. (1) When paragraph 71(2)(a) of the Act applies or when the estate of a deceased contributor has not applied for the death benefit within the interval of 60 days after the contributor's death, or when the amount of the death benefit is less than two thirds of 10% of the Year's Maximum Pensionable Earnings for the year in which the contributor died, in the case of a death that occurred before January 1, 1998, or less than \$2,387, in the case of a death that occurred after December 31, 1997, a direction under subsection 71(2) of the Act may, subject to subsections (2) and (3), be given for payment of the death benefit

- (a) to the individual or institution who has paid or is responsible for the payment of the deceased contributor's funeral expenses;
 - (b) in the absence of an individual or institution described in paragraph (a), to the survivor of the deceased contributor; or
 - (c) in the absence of an individual or institution referred to in paragraph (a) and a survivor referred to in paragraph (b), to the next of kin of the deceased contributor.
- (2) No amount in excess of the actual funeral expenses shall be paid pursuant to paragraph (1)(a).
- (3) Where, by virtue of subsection (2), an amount paid pursuant to paragraph (1)(a) is less than the amount of the death benefit, a direction pursuant to subsection (1), in so far as it relates to the remainder of the death benefit, may be given as if in the absence of an individual or institution described in that paragraph.

ISSUE

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

SUBMISSIONS

[19] In its application requesting leave to appeal, the Applicant submitted that the General Division erred when it stated that the Minister should have applied subsection 71(1) of the CPP, instead of section 64 of the CPP Regulations. At paragraph 3 of its decision, the General Division stated that entitlement to the death benefit solely depends on whether an applicant is the executor or executrix of the deceased contributor's estate, but the question is more complicated than that.

[20] Subsection 71(1) of the CPP contains the general rule that the death benefit is paid to the estate of a deceased contributor, but there are exceptions to this rule, set out in subsection 71(2), which the General Division failed to recognize. Specifically, paragraph 71(2)(c) permits the Applicant to direct payment of a death benefit in whole or in part to such person or body as is prescribed by the CPP Regulations where the amount of the death benefit is less than a specified

amount. In the present case, even though the Respondent was executrix of the deceased contributor's estate, the death benefit was less than the amount listed in subsection 64(1) of the CPP Regulations, which is \$2,387. Therefore, the Applicant was within its authority under the same subsection to award payment of the death benefit to the individual or institution that paid for the deceased contributor's funeral expenses, which in this case was the Added Party.

ANALYSIS

[21] To begin, it seems to me that the Respondent cannot be blamed for believing that she was the rightful recipient of the death benefit paid on behalf of the deceased contributor. She was his common-law spouse and was named executrix in his last will and testament. More importantly, both of the Applicant's identically worded letters denying her claim (the initial response dated November 18, 2013 and the reconsideration response dated January 28, 2014) offered only a vague and incomplete explanation for its decision—one that would have led any reasonable person to wonder why she was not entitled to the death benefit. Neither letter made any mention of paragraph 71(2)(c) of the CPP or subsection 64(1) of the CPP Regulations, the provisions that formed the basis for the Applicant's decision to favour the Added Party.

[22] That said, I have reviewed the decision of the General Division against the record, and I agree with the Applicant that the grounds it has advanced carry a reasonable chance of success on appeal. It is clear from its decision that the General Division believed that the essential question in this appeal was whether the Respondent legitimately represented the deceased contributor's estate. Having found that she did, the General Division applied subsection 71(1) of the CPP but went no further.

[23] I see an arguable case that the General Division erred in disregarding subsection 71(2) of the CPP, which gives the Applicant the discretion to direct the death benefit to someone other than the estate, provided certain conditions are met. One of those conditions is found in paragraph 71(2)(c), which makes an exception if the amount of the death benefit is less than the prescribed amount. Subsection 64(1) of the CPP Regulations specifies the prescribed amount as \$2,387 for deaths occurring after December 31, 1997.

[24] One question that arises is the actual amount of the payable death benefit. I could find nothing in the file, or the Applicant's submissions, to indicate what amount was paid to the Added Party and, other than the Applicant's word, there was no confirmation that the payable death benefit was, in fact, below \$2,387. I trust this question will be answered prior to the hearing of this matter on its merits.

[25] If the amount payable was below the prescribed threshold, subsection 64(1) would appear to permit the Applicant to award it to the individual or institution that, in its estimation, actually paid for the deceased contributor's funeral. The Applicant determined that the Added Party, and not the Respondent, met this criterion, thereby entitling it to the death benefit. However, I see no indication that the General Division engaged in this calculus, or even realized that it was necessary.

CONCLUSION

[26] For the reasons discussed above, the leave to appeal is granted.

[27] I invite the parties to provide submissions on whether an oral hearing is required. This decision granting leave to appeal does not presume the result of the appeal on the merits of the case



Member, Appeal Division