



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *The Estate of J. S. v. Minister of Employment and Social Development*,
2017 SSTADIS 479

Tribunal File Number: AD-17-244

BETWEEN:

The Estate of J. S.

Applicant

and

Minister of Employment and Social Development

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: September 13, 2017

REASONS AND DECISION

DECISION

Leave to appeal is refused.

INTRODUCTION

[1] The late J. S., a contributor to the *Canada Pension Plan* (CPP), died on September 17, 2015, at the age of 66. His brothers, representing the deceased's estate (Estate), applied for the CPP retirement pension on October 16, 2015. The Respondent refused the application initially and upon reconsideration because Mr. J. S. had died before the application was made and had not yet reached the requisite age of 70 years old. The Estate then appealed this decision to the General Division of the Social Security Tribunal of Canada (Tribunal). Following a hearing based on the existing documentary record, the General Division dismissed the appeal on January 13, 2017, having determined that the Estate was unable to apply the incapacity provision of the CPP where a deceased contributor, who never reached the age of 70, had not applied for a retirement benefit at the time of his death.

[2] On March 20, 2017, within the specified time limitation, the Estate submitted to the Tribunal's Appeal Division an application requesting leave to appeal detailing alleged grounds for appeal.

THE LAW

Canada Pension Plan

[3] Subsection 60(2) of the CPP reads as follows:

Notwithstanding anything in this Act, but subject to subsections (2.1) and (2.2), an application for a benefit, other than a death benefit, that would have been payable in respect of a month to a deceased person who, prior to the person's death, would have been entitled on approval of an application to payment of that benefit under this Act may be approved in respect of that month only if it is made within 12 months after the death of that person by the estate, the representative or heir of that person or by any person that may be prescribed by regulation.

[4] Further to a post-mortem retirement pension application received under subsection (2), the Minister is bound by subsection 60(2.2) of the CPP, which outlines the restrictions upon which such an application may then be approved:

- (2.2) An application referred to in subsection (2) in respect of a retirement pension may only be approved in respect of a month after the deceased contributor had reached age 70.

[5] Subsections 60(8) to 60(10) of the CPP set out the requirements for a finding of incapacity:

- (8) Where an application for a benefit is made on behalf of a person and the Minister is satisfied, on the basis of evidence provided by or on behalf of that person, that the person had been incapable of forming or expressing an intention to make an application on the person's own behalf on the day on which the application was actually made, the Minister may deem the application to have been made in the month preceding the first month in which the relevant benefit could have commenced to be paid or in the month that the Minister considers the person's last relevant period of incapacity to have commenced, whichever is the later.
- (9) Where an application for a benefit is made by or on behalf of a person and the Minister is satisfied, on the basis of evidence provided by or on behalf of that person, that
 - (a) the person had been incapable of forming or expressing an intention to make an application before the day on which the application was actually made,
 - (b) the person had ceased to be so incapable before that day, and
 - (c) the application was made
 - (i) within the period that begins on the day on which that person had ceased to be so incapable and that comprises the same number of days, not exceeding twelve months, as in the period of incapacity, or
 - (ii) where the period referred to in subparagraph (i) comprises fewer than thirty days, not more than one month after the month in which that person had ceased to be so incapable,

the Minister may deem the application to have been made in the month preceding the first month in which the relevant benefit could have commenced to be paid or in the month that the Minister considers the person's last relevant period of incapacity to have commenced, whichever is the later.

- (10) For the purposes of subsections (8) and (9), a period of incapacity must be a continuous period except as otherwise prescribed.

Department of Employment and Social Development Act

[6] 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.

[7] 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.

[8] 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.

[9] Some arguable ground upon which the proposed appeal might succeed is needed for leave to appeal 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

[10] A leave to appeal proceeding is a preliminary step to a hearing on the merits. It is an initial hurdle for an 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 to appeal stage, the applicant does not have to prove the case.

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

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

SUBMISSIONS

[11] In their application requesting leave to appeal, the Estate’s representatives stated that the General Division’s decision had left them perplexed. They referred to paragraph 16, which states “it was obvious that the late J. S. was incapacitated during this time.” Citing subsections 60(7) and 60(8) of the CPP, the Estate’s representatives insisted that they had applied for the retirement benefit in the prescribed manner and provided appropriate supporting medical documentation. They also noted that, although their brother had problems with alcohol and had permanently lost his driver’s licence, he kept working and contributing to the CPP.

ISSUES

[12] The Appeal Division must decide whether the Estate has a reasonable chance of success in arguing that the General Division misapplied the CPP’s incapacity provisions for deceased contributors who did not reach the age of 70.

ANALYSIS

[13] This case required the General Division to investigate the extent to which the law permitted the estate of a deceased contributor to invoke the CPP’s incapacity provision. The essential facts are not in dispute: The late Mr. J. S. died in September 2015, when he was 66 years old; his estate applied for the CPP retirement pension one month later.

[14] The General Division began its analysis by noting that subsection 60(2.2) of the CPP permits approval of a post-mortem retirement pension application only if the deceased contributor was over 70 at the time of death. It then explored whether the incapacity provision set out in subsection 60(8) created an exception to this rule; in the end, it concluded that it did not.

[15] I have examined the General Division’s reasoning on this issue and see no arguable case that it committed any error—either factual or legal. I note that the incapacity provision of subsection 60(8) applies “[w]here an application for a benefit is made on behalf of a person...” Subsection 60(2) specifically and categorically bars an application to be brought by deceased contributor under the age of 70. The General Division was guided by *MHRD v. Kirby*³ in

³ *Minister of Human Resources and Development v. Kirby*, (27 Nov. 2001) CP17189 (PAB).

concluding that that subsections 60(2) and 60(8) are mutually exclusive, the former explicitly referring to deceased persons and the latter dealing with persons who are alive at the time of application. Although *Kirby* emanated from the now-defunct Pension Appeal Board and carries no binding authority on the Tribunal, its reasoning remains sound and it retains persuasive value.

[16] As for the Estate's suggestion that the General Division somehow conceded, in its decision, that Mr. J. S. had been incapacitated at the relevant time, I must disagree. It is clear that the paragraph in question is no more than a summary of a letter in which the Estate's representatives themselves attempted to make a case that their late brother had been incapacitated. I see no contradiction or inconsistency in the General Division's reasons.

[17] For the preceding reasons. I do not think that there is an arguable case for this appeal. The General Division correctly concluded that, since the Estate was unable to bring an application on behalf of the deceased contributor, there was no need to consider evidence of his incapacity. The material documenting Mr. J. S.'s final days was therefore irrelevant.

CONCLUSION

[18] As the Estate has not identified any grounds of appeal under subsection 58(1) of the DESDA that would have a reasonable chance of success on appeal, the application for leave to appeal is refused.



Member, Appeal Division