Social Security Tribunal of Canada | Tribunal de la sécurité sociale du Canada

Citation: *M. J. v. Minister of Employment and Social Development*, 2018 SST 15

Tribunal File Number: AD-17-465

BETWEEN:

M. J.

Applicant

and

Minister of Employment and Social Development

Respondent

and

J. J.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: January 5, 2018

Canada

DECISION AND REASONS

DECISION

[1] Leave to appeal is refused.

OVERVIEW

[2] This case involves two competing claims for survivorship under the *Canada Pension Plan* (CPP). The Applicant, M. J., was married to a CPP contributor, the late P. J., from February 1993 until their divorce in August 2008. The deceased contributor married the Added Party, J. J., in January 2009. They separated in April 2010, although they remained married until the deceased contributor's death in December 2012.

[3] Both parties applied for a CPP survivor's pension in January 2013. After an investigation, the Respondent, the Minister of Employment and Social Development (Minister), determined that the Applicant was entitled to the survivor's pension.

[4] The Added Party appealed that decision to the General Division of the Social Security Tribunal of Canada (Tribunal). After conducting hearings on the matter by means of teleconference and written questions and answers, the General Division concluded, in a decision dated March 28, 2017, that the Added Party, as the deceased contributor's legal spouse, should have been properly awarded the survivor's pension. It also found that the Applicant had failed to establish that she and the deceased contributor were in a common-law relationship at the time of the latter's death.

[5] On June 26, 2017, the Applicant submitted an application for leave to appeal to the Tribunal's Appeal Division, alleging that the General Division had erred in rendering its decision. In particular, she claimed that the General Division had failed to

(i) consider her evidence in applying the CPP's survivorship provisions;

(ii) apply *McLaughlin v. Canada*[1] in finding that she had not rebutted the presumption that a deceased contributor's spouse is entitled to the survivor's pension; and

(iii) analyze the law with regard to the facts, which provided a *prima facie* case that she met the criteria of a common-law spouse.

[6] These allegations were contained in an 11-page brief that summarized much of the evidence that was before the General Division, as well as "new evidence" that had not been raised previously.

[7] Having examined the General Division's decision against the record, I have concluded that the grounds of appeal put forward by the Applicant would have no reasonable chance of success on appeal.

ISSUES

[8] According to subsection 58(1) of the *Department of Employment and Social Development Act* (DESDA), there are only three grounds of appeal to the Appeal Division: The General Division (i) failed to observe a principle of natural justice; (ii) erred in law; or (iii) based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material. An appeal may be brought only if the Appeal Division first grants leave to appeal,[2] but the Appeal Division must first be satisfied that it has a reasonable chance of success.[3] The Federal Court of Appeal has held that a reasonable chance of success is akin to an arguable case at law.[4]

[9] My task is to determine whether any of the grounds that the Applicant has put forward fall into the categories specified in subsection 58(1) of the DESDA and whether any of them would have a reasonable chance of success on appeal.

---

[1] *McLaughlin v. Canada (Attorney General)*, 2012 FC 556.
[2] DESDA at subsections 56(1) and 58(3).
[3] *Ibid*. at subsection 58(1).
[4] *Fancy v. Canada (Attorney General)*, 2010 FCA 63.

ANALYSIS

[10] Many of the Applicant's submissions are, in essence, a recapitulation of evidence and argument that have already been presented to the General Division. Unfortunately, the Appeal Division has no mandate to rehear claims on their merits. While applicants are not required to prove their grounds of appeal at the leave stage, they must set out some rational basis for their submissions that corresponds to the grounds of appeal set out in subsection 58(1) of the DESDA. It is not sufficient for the Applicant to merely state her disagreement with the General Division's decision, nor is it enough to maintain that the evidence proved she was the deceased contributor's survivor under the CPP. Ultimately, I find this line of argument so broad as to amount to a request to retry the entire claim—something that is beyond my jurisdiction.

[11] That said, the Applicant did make a number of specific allegations of error, which I will address individually.

Did the General Division fail to consider the evidence?

[12] The Applicant alleges that the General Division failed to consider relevant evidence, but I see no arguable case on this point. My review of its decision indicates that the General Division engaged in a comprehensive survey of the material before it and gave due consideration to the Applicant's evidence that she was in a common-law relationship with the deceased contributor in the final two years of his life. Having done so, it came to the defensible conclusion that the Applicant had failed to rebut the presumption that the Added Party, as the deceased contributor's legal spouse, was his survivor. I see no indication that the General Division erred in law or that it ignored or gave inadequate consideration to any significant aspect of the evidentiary record.

[13] In her submissions, the Applicant listed evidence in support of her claim and insisted that there was "no evidence to the contrary" that she and the deceased contributor were in a conjugal relationship at the time of the latter's death. However, it appears that there was in fact evidence to the contrary—including indications that the Applicant did not share a residence with her former husband. As the Applicant notes elsewhere in her submissions, the existence of a common-law partnership may depend on many factors, of which continuing sexual relations is only one.

Did the General Division fail to apply *McLaughlin?*

[14] Again, I do not see an arguable case. *McLaughlin*, a decision of the Federal Court, reiterates the presumption, created by subsection 42(1) of the CPP, that a person who was married to the contributor at the time of death is his or her survivor. It also provides a non-exhaustive list of factors to consider in assessing whether that presumption has been rebutted. As the Applicant acknowledges, the General Division accurately summarized this case, which reflects the prevailing jurisprudence on this subject. It then methodically applied its principles to the facts at hand, ultimately finding that the Applicant had failed to rebut the presumption that the Added Party was the deceased contributor's survivor. In alleging that the General Division did not weigh the evidence as prescribed in *McLaughlin*, the Applicant is doing no more than rearguing her case on its merits.

Did the General Division fail to analyze the law with regard to the facts?

[15] Here, the thrust of the Applicant's submissions was that the General Division dismissed her appeal despite what she contends was a "*prima facie* case" indicating that she was the rightful survivor according to CPP criteria.

[16] I do not see a reasonable chance of success on this ground. The Applicant suggests that the outcome was obvious, but she herself concedes that relationships within her family were complicated. In her submissions, the Applicant argued that documents prepared pursuant to family law proceedings were unreliable and circumstantial, but she had the opportunity during the hearings before the General Division to place those documents and other adverse evidence in what she felt was appropriate context. The Applicant criticized the General Division for assigning excessive weight to a child psychology report and to the deceased contributor's discovery testimony, but she did not otherwise specify how the General Division misinterpreted or mischaracterized that evidence.

[17] In the end, the Applicant is unhappy because her preferred evidence was discounted at the expense of competing evidence, but in every instance, the General Division took pains to explain its reasoning. The courts have previously addressed the issue of evidentiary weight in

cases such as *Simpson v. Canada*,[5] in which the appellant's counsel identified a number of medical reports that, according to her, the Pension Appeals Board ignored, attached too much weight to, misunderstood, or misinterpreted. In dismissing the application for judicial review, the Federal Court of Appeal held:

> [A]ssigning weight to evidence, whether oral or written, is the province of the trier of fact. Accordingly, a court hearing an appeal or an application for judicial review may not normally substitute its view of the probative value of evidence for that of the tribunal that made the impugned finding of fact.

I see no indication that the General Division ignored, or gave inadequate consideration to, the totality of the evidence before it. The Applicant may not agree with the General Division's analysis, but it is open to an administrative tribunal, as trier of fact, to weigh the evidence as it sees fit, so long as it arrives at a defensible conclusion.

Connor Estate

[18] A brief word about *Re: Connor Estate*,[6] a case that the Applicant cites and discusses at length. First, I see that it was issued after the General Division's March 28, 2017, decision and therefore could not have been submitted to, much less considered by, the General Division. Second, it focuses on a definition of "spouse," as set out in a British Columbia statute governing wills and estates that has no bearing on the CPP. In any event, cases that attempt to characterize domestic relationships often stand on their particular facts. That said, none of the jurisprudence that guided the General Division would appear to be at odds with the major principle from *Conner*: "Objective evidence of the parties' lifestyle and interactions will also provide direct guidance on the question of whether the relationship was 'marriage-like.'"

New Documents

[19] The application for leave to appeal included information that was not presented to the General Division. As noted, given the constraints of subsection 58(1) of the DESDA, the Appeal Division does not hear arguments on the merits, nor does it ordinarily consider evidence that was, or could have been, submitted to the General Division. Once a hearing is concluded,

---

[5] *Simpson v. Canada (Attorney General)*, 2012 FCA 82.
[6] *Re: Connor Estate*, 2017 BCSC 978.

there is a very limited basis upon which any new or additional information can be raised, although an applicant does have the option of making an application to the General Division to rescind or amend its decision. However, in that event, an applicant would need to comply with the requirements set out in section 66 of the DESDA and sections 45 and 46 of the *Social Security Tribunal Regulations*, which impose strict deadlines and require an applicant to demonstrate that any new facts are material and could not have been discovered at the time of the hearing without exercise of reasonable diligence.

CONCLUSION

[20] As the Applicant has not identified any grounds of appeal that would have a reasonable chance of success, the application for leave to appeal is refused.

Member, Appeal Division