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

Citation: *J. E. v. Minister of Employment and Social Development and M. M.*, 2018 SST 749

Tribunal File Number: AD-18-381

BETWEEN:

J. E.

Applicant

and

Minister of Employment and Social Development

Respondent

and

M. M.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION

Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: July 19, 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, J. E., was married to a Canada Pension Plan (CPP) contributor, the late T. E., but they were separated when he died in February 2007. The Added Party, M. M., claims that she and the deceased contributor were common-law partners from March 2005 until his death. The Applicant disputes this, claiming that her husband and the Added Party did not begin living together until September 2006 and, in any event, had a tumultuous relationship that never solidified into a common-law partnership

[3] The Applicant and Added Party submitted separate applications for a CPP survivor's pension in March 2007 and April 2007, respectively. The Respondent, the Minister of Employment and Social Development, initially allowed the Applicant's application and denied the Added Party's application. It subsequently reversed its position, allowing the Added Party's application and denying the Applicant's application. The Applicant appealed the denial of her application to the Office of the Commissioner of Review Tribunals, and, in May 2012, a Review Tribunal (RT) determined that she was entitled to the survivor's pension.

[4] In January 2013, the Pension Appeals Board (PAB) granted the Added Party leave to appeal the Review Tribunal decision. When the RT and PAB were abolished, the appeal was transferred to the Appeal Division of the Social Security Tribunal. The Appeal Division allowed the appeal in May 2014, but its decision was later reversed by the Federal Court of Appeal because the hearing was conducted in the Applicant's absence.

[5] The matter was returned to the Appeal Division for redetermination. In August 2016, the Appeal Division allowed the Added Party's appeal and referred the matter to the General Division for a new hearing. The General Division held a hearing by videoconference and, in a decision issued on March 17, 2018, awarded the survivor's pension to the Added Party, finding

that she had established, on a balance of probabilities, that she and the deceased contributor began living together as common-law partners in June 2005 and continued to do so until T. E.'s death.

[6] On June 14, 2018, the Applicant submitted an application for leave to appeal to the Appeal Division, alleging that the General Division had erred in rendering its decision. In particular, she claimed that the General Division

1. ignored the Added Party's use of false information—for example, that S. E. was her daughter—to claim the survivor's pension;
2. disregarded evidence that, while she and her late husband became estranged, their marriage and family were intact as late as July 2006; and
3. prevented her from giving testimony, cutting her off twice when she attempted to speak.

[7] Having examined the General Division's decision against the record, I have concluded that the Applicant's reasons for appealing 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,[1] but the Appeal Division must first be satisfied that it has a reasonable chance of success.[2] The Federal Court of Appeal has held that a reasonable chance of success is akin to an arguable case at law.[3]

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

[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.

ANALYSIS

Issue 1: Did the General Division ignore false information from the Added Party?

[10] The Applicant alleges that the Added Party lied during the proceedings and that the General Division erred in failing to detect those lies.

[11] I do not see an arguable case on this point. One of the purposes of a hearing, such as the one before the General Division, is to sort out the truth. As held in *Simpson v. Canada*, the General Division, as trier of fact, is to be afforded a measure of deference in how it assesses the quality of the evidence before it:

> 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.

[12] Deference on factual questions is also built into subsection 58(1) of the DESDA, which permits the Appeal Division to intervene only when the General Division commits a material error that is "perverse or capricious" or made "without regard for the material before it." In this case, the General Division made what I regard as a genuine attempt to sift through many competing, and sometimes contradictory, strands of evidence—including witness testimony. It ultimately decided that the Added Party's oral evidence was essentially credible and worthy of some weight—alongside various documents that it found also supported her side of the story.

[13] In any event, having reviewed the record, whether the Added Party asserted a parental relationship with S. E. was, in my view, of limited relevance to the former's survivorship claim. Moreover, the General Division's decision gives no hint that such an assertion, if made, was a material factor in its reasoning.

Issue 2: Did the General Division disregard evidence that, while the Applicant and her late husband became estranged, their marriage and family were intact as late as July 2006?

[14] The Applicant alleges that the General Division ignored evidence that she and her late husband continued to act as a family unit up to a year before the latter's death.

[15] Again, I do not see a reasonable chance of success on appeal for this argument, which essentially repeats, in capsule form, her main submission to the General Division. Broad allegations of error are insufficient grounds of appeal. In the absence of a specific allegation of error, I find this submission amounts to a request to retry the entire claim. If the Applicant is asking me to reassess the evidence and substitute my judgment for the General Division's, I am unable to do so; my authority as a member of the Appeal Division permits me to determine only whether any of a claimant's reasons for appealing fall within the grounds specified under subsection 58(1) and whether any of these reasons have a reasonable chance of success.

[16] 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.

Issue 3: Did the General Division deny the Applicant her opportunity to testify?

[17] The Applicant alleges that, during the hearing of November 16, 2017, the presiding General Division member engaged in behaviour that hindered or prevented her from giving evidence.

[18] I do not see an arguable case here. I have listened to the relevant portions of the audio recording of the hearing and heard nothing to substantiate the Applicant's allegation. To be sure, the General Division member was not a mere passive observer of the proceedings, and he interjected frequently (as he did with the other witnesses) to ask questions or guide testimony, but in every instance he did so with the manifest intention of clarifying the evidence.

[19] On several occasions, the General Division member cautioned the Applicant not to give irrelevant or hearsay evidence, warning her that he would be either disregarding such statements or giving them little weight. I heard nothing inappropriate in these interventions. At the time of

the hearing, the Applicant was represented by counsel. He led his client through direct examination and was by her side during cross examination. He sometimes sparred with the General Division member in a bid to admit testimony and, at times, he persuaded the General Division member to relent. None of what I heard was anything out of the ordinary in an adversarial proceeding. At no time did the Applicant or her representative raise a general objection to General Division's conduct.

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

REPRESENTATIVE:	J. E., self-represented