



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *D. W. v Minister of Employment and Social Development*, 2020 SST 52

Tribunal File Number: AD-19-900

BETWEEN:

D. W.

Applicant
(Claimant)

and

Minister of Employment and Social Development

Respondent
(Minister)

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

Leave to Appeal Decision by: Neil Nawaz

Date of Decision: January 21, 2020

DECISION AND REASONS

DECISION

[1] Leave to appeal is refused.

OVERVIEW

[2] This case involves an interruption of children's benefits that occurred after the recipients' father went missing.

[3] The Claimant is the mother of four children. Their father, P. W., received the Canada Pension Plan (CPP) disability benefit and, as a result, they also received the disabled child contributors benefit (DCCB).

[4] In December 2011, Service Canada, acting on behalf of the Minister, suspended P. W.'s disability benefit because his disability cheques were not being cashed. At that point, three of his children were still under 18. Since their benefits were tied to their father's, their DCCB payments were also suspended.

[5] The Claimant objected to the suspension on her children's behalf and asked the Minister to document its decision. In April 2012, the Minister issued a letter saying, "All eligible benefits will remain suspended until updated information is received regarding the main benefit."¹

[6] The Claimant took steps to have her husband declared legally dead. In February 2016, the Supreme Court of British Columbia declared that P. W. was presumed to have died as of September 14, 2009.

[7] In November 2016, the Claimant submitted an application for the CPP survivor's pension and the orphan's benefit.² In reviewing the application, Service Canada concluded that it had erred by neglecting to invite the Claimant to apply for survivors' benefits in April 2012. In an apparent effort to remedy its error, Service Canada deemed the Claimant's application to have

¹ Minister's letter dated April 5, 2012, GD3-2.

² GD2-4. The CPP orphan's benefit is also referred to as the survivor's child's benefit.

been received as of April 2012, rather than the actual date of receipt. Doing so allowed Service Canada to commence the CPP survivor's pension and orphan's benefits as of May 2011. This was the earliest possible effective date under the law, which permits payment of no more than 11 months of retroactive benefits from the deemed date of application.³

[8] Service Canada then calculated the arrears owed to the Claimant and her three eligible children for, respectively, the survivor's benefit and the orphan's benefits. From the latter, it deducted DCCB amounts that had been previously paid from October 2009 to November 2011 (a period during which it was now presumed the children's father was deceased) to arrive at a net amount owing of \$12,224.⁴

[9] The Claimant asked the Minister to reconsider the start date of her survivor's benefits and her children's orphan's benefits. She claimed that Service Canada staff had previously told her that, if approved, the benefits would be retroactive to P. W.'s date of death, once it was established. She suggested that effective date of the benefits should have therefore been October 2009.

[10] The Minister reviewed the Claimant's reconsideration request and determined that Service Canada had erred when it deemed the Claimant's application to have been made in April 2012, rather than November 2016, when the application was actually submitted. The Minister correspondingly determined that the benefits should have started in December 2015, 11 months before the actual application date.⁵ The Minister recalculated the amount of the arrears owing based on the revised start date and determined that the Claimant had been overpaid by \$21,018. However, the Minister decided, in its discretion, not to seek repayment of this amount.

[11] On December 20, 2019, the Claimant applied for leave to appeal to the Appeal Division alleging various errors on the part of the General Division. The General Division held a hearing by teleconference and, in a decision dated September 25, 2019, dismissed the appeal, finding that the Minister had correctly determined the date of application to be November 2016. The General

³ Sections 72 and 74 of the *Canada Pension Plan* for, respectively, the survivor's pension and the orphan's benefit.

⁴ Minister's letter dated March 10, 2017 (GD2-15), amended March 17, 2017 (GD2-18).

⁵ Minister's letter dated May 15, 2018.

Division found nothing in the law that permitted the survivor's pension and orphan's benefits to commence any earlier than December 2015.

THE CLAIMANT'S REASONS FOR APPEALING

[12] The Claimant alleges that the General Division did not taken into account the extenuating circumstances that led her to apply for the CPP survivor's and surviving children's benefits when she did. She insisted that Service Canada staff had given her bad advice in 2012, telling her that any payments, when approved, would be backdated to the month in which P. W. was declared legally dead.

[13] The Claimant maintains that she did not submit an application until 2016, because she was led to believe, in error, that she needed proof of death, among other documentation, before she could apply for the survivors' benefits. It took years to obtain such proof, she said, because she had to wait, first for the police to produce her husband's file, and then for the courts to declare him dead. There was no way she could have applied for the CPP benefits sooner.

[14] The Claimant also takes issue with the Minister's finding that it overpaid her children's DCCB, which it then deducted from the lump-sum amount that it calculated was due to her in surviving children's benefits.

ISSUE

[15] There are only three grounds of appeal to the Appeal Division. A claimant must show that the General Division acted unfairly, interpreted the law incorrectly, or based its decision on an important factual error.⁶

[16] An appeal can proceed only if the Appeal Division first grants leave to appeal.⁷ At this stage, the Appeal Division must be satisfied that the appeal has a reasonable chance of success.⁸

⁶ Section 58(1) of the *Department of Employment and Social Development Act* (DESDA).

⁷ DESDA, ss 56(1) and 58(3).

⁸ DESDA, s 58(2).

This is a fairly easy test to meet, and it means that a claimant must present at least one arguable case.⁹

[17] I have to decide whether there is an arguable case for any of the Claimant's reasons for appealing.

ANALYSIS

[18] I have reviewed the General Division's decision against the record. I have concluded that none of the Claimant's reasons for appealing have a reasonable chance of success on appeal.

[19] I should make it clear that I sympathize with the Claimant and her children. They are victims of a series of unfortunate events in which the law, and possibly the Minister, let them down. However, my hands are tied, as were the General Division's, for reasons that I will explain.

[20] The Claimant comes to the Appeal Division making, in essence, the same argument that she made to the General Division. She argues that the General Division failed appreciate that her delay in applying for the survivor's pension and orphan's benefits resulted from circumstances beyond her control. This may be true, but I do not see an arguable case that there is anything in the law that can help her.

[21] Entitlement to CPP benefits is application-driven; a person might meet all the qualifications for a particular benefit, but they will not get that benefit unless they first submit an application for it. Once their application is approved, they cannot receive more than 11 months of backdated payments. These limits on retroactive benefits are clearly specified by the law. The Minister enforced those limits, and I do not see an argument that the General Division erred in upholding the Minister's actions.

[22] At some point, P. W. disappeared, although the Minister did not suspend his children's DCCB payments until November 2011. P. W. was eventually declared dead by court order as of October 2009. This meant that there was a 25-month period in which the children received benefits to which they were not entitled under the law, for the simple reason that their father—

⁹ *Fancy v Canada (Attorney General)*, 2010 FCA 63.

the recipient of the primary pension from which their benefits were derived—was no longer alive. For that reason, the Minister demanded the return of the DCCB paid from October 2009 to November 2011. The General Division implicitly endorsed this demand, and I do not see an arguable case that it was wrong to do so.

[23] When the children's father died, they were left without a benefit—neither the DCCB, for which they had just been rendered ineligible, nor the orphan's benefit, to which they would not become entitled until their mother applied for it. Unfortunately, that application was not submitted until November 2016, which meant that the first payment date could be no earlier than December 2015, leaving lengthy monetary gaps of varying durations, depending on when each child turned 18.

[24] I recognize that the Claimant had good reasons for the delay: she likely did not realize that P. W. was missing until later; she must have needed time to search for his whereabouts; and, of course, she had to go through the lengthy and expensive process of getting a court to declare her husband dead. Unfortunately, neither the General Division nor I can take these factors into account; under the *Canada Pension Plan*, the only thing that matters is when the Claimant actually submitted her applications for the survivor's pension and orphan's benefits.

[25] The Claimant also blames the delay on another factor: erroneous advice that she insists she received from Service Canada staff assuring her that any survivors' benefits would be backdated to P. W.'s date of death, whenever that date was established. I see no evidence on the record that such advice was, in fact, ever offered, but it is not difficult to imagine government officials occasionally getting their facts wrong. Still, even if Service Canada did offer such erroneous advice, and even if the Claimant relied on it, the law does not permit me to give her a remedy.

[26] Under section 66(4) of the *Canada Pension Plan*, a decision to remedy erroneous advice is a discretionary matter for the Minister, and the Minister only. In this case, the Minister initially admitted that it had made an error and backdated the survivor's and orphan's benefit payments to May 2011. It later withdrew that admission but nevertheless permitted the Claimant and her

children to keep whatever survivor's and orphan's benefits they had already received.¹⁰ All of these actions were discretionary and therefore beyond the jurisdiction of either the General Division or the Appeal Division. I do not doubt that the Claimant sincerely believed that she had the luxury of waiting to submit her applications, but that is irrelevant. If the Minister did in fact provide the Claimant with erroneous advice but did not see fit to take remedial action, then it is not the Social Security Tribunal's role to step in and vary that decision.

[27] Ultimately, I am bound to follow the law as written. I cannot simply ignore the explicit terms of the *Canada Pension Plan* and impose a solution that I happen to think is fair. Such power, known as "equity," has traditionally been reserved to the courts, although even they typically exercise it only if there is no adequate remedy at law. In *Canada v Esler*,¹¹ for example, the Federal Court reversed an attempt by the General Division's predecessor tribunal to extend retroactive Old Age Security (OAS) benefits beyond the legislative limitation, stating: "The Review Tribunal is a pure creature of statute and as such, has no inherent equitable jurisdiction which would allow it to ignore the clear legislative provision contained in [the *OAS Act*] and use the principle of fairness to grant retroactive benefits in excess of the statutory limit."¹²

CONCLUSION

[28] The Claimant has not identified any grounds of appeal that would have a reasonable chance of success on appeal. Thus, the application for leave to appeal is refused.



Member, Appeal Division

REPRESENTATIVE:	D. W., self-represented
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¹⁰ Less whatever DCCB payments the children received from October 2009 to November 2011.

¹¹ *Canada (Minister of Human Resources Development) v Esler*, 2004 FC 1567.

¹² *Ibid.*, para 33.