



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *L. M. v Minister of Employment and Social Development and D. C.*, 2020 SST 159

Tribunal File Number: AD-19-673

BETWEEN:

L. M.

Appellant

and

Minister of Employment and Social Development

Respondent

and

D. C.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Neil Nawaz

DATE OF DECISION: February 21, 2020

DECISION AND REASONS

DECISION

[1] The appeal is allowed. This matter will be returned to the General Division for a new hearing.

OVERVIEW

[2] This is a long running case involving two competing claims for a Canada Pension Plan (CPP) survivor's pension.

[3] For many years, D. C. was married to W. C., a CPP contributor. The two separated in 1997, and W. C. later lived with L. M. In 2013, W. C. was moved to an extended care home, where he died three years later. At that time, both D. C. and L. M. applied for the survivor's pension.

[4] The Minister granted the survivor's pension to L. M. based on a finding that she was the deceased contributor's common-law partner. D. C. appealed this decision to the General Division of the Social Security Tribunal. In November 2017, the General Division held a hearing in L. M.'s absence and allowed the appeal, awarding the benefit to D. C., who was still the deceased's legal spouse. The General Division concluded that, while W. C. had lived with L. M., the evidence did not show that he was in a common-law relationship with her at the time of his death.

[5] L. M. appealed this decision to the Appeal Division. She argued that the General Division had failed to explain to her the legal implications of not attending the hearing. My colleague on the Appeal Division dismissed the appeal, finding that the General Division had acted fairly when it proceeded in L. M.'s absence.

[6] Last September, the Federal Court of Appeal ruled that the Appeal Division's decision was unreasonable.¹ The Court returned the matter to the Appeal Division for a rehearing and explicitly required the Appeal Division to allow further submissions from the parties.

[7] In December, the Minister conceded that the General Division had not complied with the principles of natural justice and recommended that the matter be sent back to the General Division for a new hearing. At that point, I called a hearing of my own to give L. M. and D. C. an opportunity to present their views on whether the General Division had erred and, if so, what remedy was appropriate under the circumstances.

[8] In the end, I decided that there was not enough evidence on the record to allow me to make an informed assessment of the parties' claims. Rather than deciding this matter myself, I am sending it back to the General Division for a new hearing.

ISSUES

[9] 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 error of fact.²

[10] I had to decide the following questions:

Issue 1: Did the General Division act unfairly by proceeding in L. M.'s absence?

Issue 2: If so, what is the appropriate remedy?

ANALYSIS

Issue 1: Did the General Division act unfairly by proceeding in L. M.'s absence?

[11] I will not spend a great deal of time on this issue. The Federal Court of Appeal found that the General Division's staff provided L. M. with "incomplete or misleading information" that led her to believe the Minister would be defending her interests at the hearing. The Court added that

¹ Federal Court of Appeal decision dated September 23, 2019, AD5-2.

² Section 58(1) of the *Department of Employment and Social Development Act*.

the problem was compounded by the cryptic nature of the General Division's hearing notice, which did not indicate the consequences of non-attendance or explain that L. M. was free to call witnesses.

[12] Given these circumstances, I agree that the General Division denied L. M. her right to be heard³ when it conducted the hearing in her absence. D. C. has expressed her disagreement with this outcome, but the Federal Court of Appeal has made it clear that all parties deserve a fair opportunity to defend their interests in an adversarial proceeding.

Issue 2: What remedy is appropriate in these circumstances?

[13] The Appeal Division can provide a remedy for errors committed by the General Division. I have the power to give the decision that the General Division should have given; to refer the matter back to the General Division for reconsideration in accordance with directions; or to confirm, rescind, or vary the General Division's decision.⁴

[14] The Appeal Division is required to conduct proceedings as quickly as circumstances and considerations of fairness allow⁵ but, in this case, I feel my only option is to return this matter to the General Division for a new hearing.

[15] I do not think that the record is complete enough to allow me to decide this matter on its merits. The General Division's failure to observe a principle of natural justice led to the exclusion of evidence that, had it been considered, might have produced a different outcome. Unlike the Appeal Division, the General Division's primary mandate is to weigh evidence and make findings of fact. As such, it is better positioned than I am to hear L. M.'s testimony, together with D. C.'s, and to explore whatever avenues of inquiry that may arise.

³ The right to be heard is one of the key components of natural justice.

⁴ DESDA, section 59(1).

⁵ *Social Security Tribunal Regulations*, section 3.

CONCLUSION

[16] The General Division misled the Appellant about the potential legal consequences of not attending the November 2017 hearing. It then violated her to be heard by proceeding with the hearing in her absence.

[17] Because the record is not sufficiently complete to allow me to decide the substance of this matter, I am referring it back to the General Division for a *de novo*⁶ hearing.

[18] To avoid any perception of bias, I am directing the General Division to assign this matter to a member other than the member who heard this appeal previously. I am also directing the General Division to accept oral evidence and to conduct the new hearing by teleconference, videoconference, or personal appearance.



Member, Appeal Division

HEARING DATE	January 30, 2020
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	L. M., Appellant D. C., Added Party Matthew Vens, representative for the Respondent

⁶ This is a Latin phrase that means “fresh” or “completely new.”