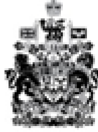

Citation: *DL v Minister of Employment and Social Development and MF*, 2022 SST 104

Social Security Tribunal of Canada
Appeal Division

Decision

Appellant:	D. L.
Respondent:	Minister of Employment and Social Development
Representative:	Jessica Grant
Added Party:	M. F.
Representative:	Mark A.B. Frederick

Decision under appeal:	General Division decision dated April 28, 2021 (GP-20-117)

Tribunal member:	Neil Nawaz
Type of hearing:	Teleconference
Hearing date:	January 26, 2022
Hearing participants:	Appellant Respondent Respondent's representative Added Party's attorney for property Added Party's representative
Decision date:	February 28, 2022
File number:	AD-21-255

Decision

[1] The appeal is dismissed. The General Division did not make any errors. Its decision stands.

Overview

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

[3] The Applicant, D. L., married M. P., a contributor to the CPP, in 1977. They separated in 1990, although they remained married until M. P.'s death on January 28, 2015.

[4] The following month, the Added Party, M. F., applied for a CPP survivor's pension. In her application, she indicated that she was in a common-law relationship with M. P. at the time of his death. She also submitted a sworn statement declaring that she lived with M. P. from February 1991 until his death.

[5] The Minister granted M. F. the survivor's pension.

[6] In June 2016, D. L. also applied for the survivor's pension. The Minister denied this application because it had already found that M. P. was living in a common-law relationship with someone else when he passed away.

[7] D. L. appealed this decision to the General Division of the Social Security Tribunal. The General Division held a hearing by teleconference and, in a decision dated April 28, 2021, dismissed the appeal. The General Division considered the evidence about M. P.'s living arrangements in his final years and concluded that he was in a common-law relationship with M. F. when he died.

The Claimant's Allegations

[8] D. L. then asked the Appeal Division for permission to appeal,[1] alleging that the General Division made the following errors in coming to its decision:

- It incorrectly placed the burden of proof on her, as the married spouse of the deceased contributor, to show that M. P. was **not** in a common-law relationship with M. F. when he died;
- It failed to recognize that there was no evidence M. F. was cohabiting with M. P. in the year before his death;
- It incorrectly stated that she had no telephone contact with M. P. after 2000;
- It failed to notice that M. F. had given different dates (February 1991 in her statutory declaration[2] versus March 1991 in her letter to Service Canada[3]) as the start of her cohabitation with M. P.;
- It failed to consider the fact that M. P. described M. F. merely as his "friend" in his will and death benefits plan;
- It failed to address the fact that M. P. did not specify with whom he wanted to share his CPP retirement pension when he applied for that benefit in 2004;[4]
- It found that M. P.'s driver's licence listed his address as "X, Kingston" (a property owned by M. F.), even though there was no such evidence on file;
- It failed to recognized that M. P.'s vehicle registration slip listed his address as "X," rather than X;
- It failed to appreciate that a sample cheque listing both M. F. and M. P. at the same address did not necessarily prove they lived together in the year before M. P.'s death; and

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[1] Claimant's application requesting leave to appeal from the Appeal Division dated May 13, 2021 (AD01), with supplemental reasons dated July 26, 2021 (AD03).
[2] M. F.'s Statutory Declaration of Common-law Union dated February 6, 2015, GD2-92.
[3] M. F.'s letter to Service Canada dated September 26, 2018, General Division2-119.
[4] M. P.'s application for the CPP retirement pension dated January 14, 2004, GD2-113.

- It relied on the testimony of H. F., even though, as M. F.'s sister-in-law, she was not an impartial witness.[5]

[9] In a decision dated August 20, 2021, I granted D. L. permission to proceed because I thought she had raised an arguable case. Last month, I held a hearing by teleconference to discuss her allegations in full.

[10] Now that I have heard submissions from all the parties,[6] I have concluded that none of D. L.'s allegations justifies overturning the General Division's decision.

Issues

[11] There are only four grounds of appeal to the Appeal Division. A claimant must show that the General Division

- proceeded in a way that was unfair;
- acted beyond its powers or refused to exercise those powers;
- interpreted the law incorrectly; or
- based its decision on an important factual error.[7]

[12] My job is to determine whether any of D. L.'s allegations fall into one or more of the permitted grounds of appeal and, if so, whether any of them have merit.

Analysis

[13] In its decision, the General Division listed, with apparent approval, the following items of evidence that the Minister relied on to award M. F. the survivor's pension:

(i) a signed declaration from M. F.;

[5] D. L. also alleged that the General Division failed to draw a negative inference from the Minister's refusal to send a representative to the hearing. At the hearing, D. L. advised the Tribunal that she would not be pursuing this allegation.
[6] On February 21, 2022, D. L. filed with the Tribunal a post-hearing brief that supplemented her oral submissions (see AD-31). The Appeal Division has accepted this brief and given it due consideration.
[7] *Department of Employment and Social Development Act* (DESDA), section 58(1).

(ii) a certified copy of a cheque from a joint bank account held by M. F. and M. P.;

(iii) a copy of M. P.'s driver's licence that listed his address as X, Kingston, Ontario;

(iv) a copy of M. P.'s Ontario vehicle permit, effective date 09/04/08, listing his address as X;

(v) a copy of a statutory declaration M. P. signed on January 4, 1999 regarding his separation from D. L. on or about September 1990;

(vi) a copy of M. P.'s death certificate that lists M. F. as informant and spouse that lists their home address as X;

(vii) a copy of M. P.'s will dated December 9, 1998 bequeathing all of his estate to M. F. of X;

(viii) a copy of M. P.'s death benefits plan signed on December 9, 1998 designating M. F. as the beneficiary;

(ix) M. P.'s CPP retirement pension application dated January 14, 2004 listing his home address as X and a request that his pension be shared with M. F., who he listed as his common-law partner; and

(x) a statement from M. F. dated October 2, 2018 indicating that she and M. P. resided together from March 1, 1990 until January 28, 2015.

[14] D. L. took issue with every one of these items, casting doubt on their reliability and arguing that none of them proved M. P. was living with M. F. in the last year of his life.

[15] In my view, although D. L. highlighted some weaknesses in the evidence favouring M. F., she failed to identify significant errors in the General Division's analysis that would justify overturning its decision.

The General Division did not shift the burden of proof to D. L.

[16] D. L. alleges that the General Division improperly required her to prove that she was entitled to the survivor's pension. She argues that this was an error of law because the *Canada Pension Plan* makes it clear that the pension automatically goes to the legal spouse of a deceased contributor **unless** another party can prove they were in a common-law relationship with the contributor at the time of death. D. L. says that it was up to M. F. to prove that she was M. P.'s survivor, yet the General Division placed the burden of proof on her, even though she was still married to M. P. when he died.

[17] I have carefully reviewed the General Division's decision, as well as the recording of the hearing by teleconference that took place on April 13, 2021. I have concluded that the General Division considered and analyzed the evidence in compliance with the law.

[18] Section 42(1) of the *Canada Pension Plan* sets out the following definition:

> Survivor in relation to a deceased contributor, means
>
> (a) if there is no person described in paragraph (b), a person who was married to the contributor at the time of the contributor's death, or
>
> (b) a person who was the common-law partner of the contributor at the time of the contributor's death…

[19] There is no question that the onus is on the person claiming to be the common-law partner of the contributor. That remains so even if, as in this case, it is the spouse who brings the appeal.

[20] Against this background, I am satisfied that the General Division understood that the burden of proof lay with M. F. and not D. L. First, there is the fact that the General Division correctly cited the relevant provisions of the *Canada Pension Plan* in its decision. It also cited two cases, *Betts v Shannon* and *Canada v Tait*,[8] that discuss both

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[8] The General Division cited *Tait v Canada (Attorney General)* 2009 FC 1278, a case involving a late application for CPP disability benefits that has nothing to do with the burden of proof in CPP survivorship cases. I will assume that this a typographical error and that the General Division meant to cite *Canada*

the burden of proof and standard of proof for a successful survivorship claim. The recording of the hearing indicates that the presiding General Division member accurately summarized the law and explained what the parties had to do to make their respective cases.[9]

[21] There is one sentence in the General Division's decision that gives me pause. At paragraph 5, the General Division wrote, "The Claimant [D. L.] must prove that it is more likely than not that she, and not the Added Party [M. F.], met the definition of a 'survivor.'" On the face of it, this sentence suggests that the General Division reversed the onus: D. L., after all, didn't have to prove anything; it was M. F.'s job to show that she was the rightful survivor. However, I don't think this unfortunate use of words is fatal to the General Division's decision, whose main thrust was the sheer volume of evidence showing that M. F. was involved in a common-law relationship with M. P. at the time of his death. Implicit in the General Division's analysis was its conclusion that M. F. rose to the challenge of rebutting the presumption that D. L. was the survivor. D. L. did not have to submit evidence, but she chose to do so anyway, doing her best to discredit M. F.'s case. In the end, the General Division found her arguments unconvincing, but that does not mean it shifted the burden of proof to D. L.

The General Division was entitled to weigh the available evidence – as long as it does not stray into error

[22] Many of D. L.'s arguments revolve around her conviction that the General Division paid too much attention to M. F.'s evidence and too little to hers. She argues that the General Division selectively placed weight on information that supported M. F.'s claim that she was M. P.'s common-law partner at the time of his death while ignoring information that proved otherwise.

[23] I carefully examined D. L.'s arguments on this point. In the end, I found them less than persuasive.

(Minister of Human Resources Development Canada) v Tait 2006 FCA 380, a case that is directly on point with this one.

[9] Recording of General Division hearing at 12:45.

[24] One of the General Division's roles is to establish facts. In doing so, it is entitled to some leeway in how it weighs evidence. The Federal Court of Appeal addressed this topic in a case called *Simpson*,[10] in which the claimant argued that the tribunal attached too much weight to certain medical reports. In dismissing the application for judicial review, the Court 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.[11]

[25] D. L. criticizes how the General Division weighed the available evidence, but none of her criticisms fall under any of the permitted grounds of appeal. To be more specific:

– **The General Division did not err by disregarding the "absence" of evidence that M. P. cohabited with M. F. in his final year**

[26] It is true, as D. L. noted, that there was no third-party document on file definitively demonstrating that M. P. resided with M. F. at X in the 12 months immediately preceding his death. However, that does not mean M. F. was destined to fail. No case is perfect, and M. F.'s certainly wasn't either. But, as the General Division recognized, she did manage to present a volume of evidence that, **considered as a whole**, strongly suggested a marriage-like relationship between herself and M. P. Most importantly, there was no evidence on the record to suggest that the relationship had ended by the time M. P. died.

[27] I agree with M. F.'s legal representative that D. L. was, in effect, demanding an impossibly high standard of proof for survivorship. At times, it appeared that she would have been satisfied by nothing less than, say, a comprehensive video record of her husband's activities in the final year of his life, one that conclusively proved beyond doubt that M. P. was in a common-law relationship with M. F. up to the point of death.

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[10] *Simpson v Canada (Attorney General)*, 2012 FCA 82.
[11] *Simpson*, paragraph 10.

Achieving that standard is not realistic and, more to the point, it is not necessary. All that was needed was evidence, on a balance of probabilities, that M. F. was M. P.'s survivor, as defined by the *Canada Pension Plan*.

– The General Division did not err by failing to consider how M. P. described his relationship with M. F.

[28] D. L. criticizes the General Division for ignoring the fact that M. P. described M. F. as his "friend" in his will and death benefits plan. She argues that the description indicated that M. P. always regarded M. F. as something less than a spouse.

[29] I don't see merit in this argument. The General Division did not address this point in its decision but, then again, it didn't have to. A court or tribunal is presumed to have considered all of the material before it, and the General Division was therefore not required to address each and every one of D. L.'s submissions.[12]

[30] It is likely that the General Division didn't mention M. P.'s choice of words because it didn't attach any significance to it. The word "friend" can mean different things in different contexts. It is often used as decorous way of describing a lover, a girlfriend and, yes, a common-law partner. The General Division chose to attach minimal weight to this usage, and I see no reason to second-guess that choice.

– The General Division did not err by finding that M. P. designating M. F. as his retirement pension beneficiary

[31] Among the items of evidence listed in the General Division's decision was

> the Contributor's CPP retirement pension application dated January 14, 2004 listing his home address as X in Kingston, Ontario and a request that his pension be shared with the Added Party who he listed as his common-law partner.[13]

[32] In my leave to appeal decision, I noted that this item was not exactly as described. As reproduced in the hearing file, the application did not name M. F. Instead, it showed that that M. P. ticked a box indicating that he wanted his CPP retirement

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[12] See *Simpson*, note 7.
[13] General Division decision, paragraph 14(i).

pension shared with his "spouse or common-law partner." Underneath, where applicants are asked to disclose their spouse or common-law partner's social insurance number (SIN),[14] there was a blank space. It appears that M. P. originally wrote something in the space. It appears that someone whited out, or redacted, it.

[33] D. L. alleges that the General Division committed an error because there was nothing on the record to indicate that M. P. intended to share his retirement pension with M. F.

[34] I can't agree.

[35] The General Division only referred to M. P.'s retirement pension application when listing it among several items that **the Minister** relied on to conclude that M. F. was his common-law partner. The General Division itself made no finding about that document and did not mention it in its analysis of the evidence.[15]

[36] It was obvious that the Minister was the party responsible for redacting the pension application, likely for misplaced privacy considerations. Since the Minister obviously knew whose SIN lay below the redaction, the General Division was not wrong to relay the Minister's assertion that it awarded M. F. the survivor's pension based, in part, on what M. P. wrote on his CPP retirement application. We now know, thanks to the Minister's disclosure of the unredacted application,[16] that M. P. did in fact list M. F.'s SIN.

[37] In referring to the Minister's reasons for favouring M. F. over D. L., the General Division did not base its decision on an erroneous finding of fact that it "made in a perverse or capricious manner or without regard for the material before it." Instead, it merely passed on the Minister's rationale for acting as it did.

[14] M. P.'s CPP retirement pension application dated January 14, 2004, GD2-113.
[15] The General Division's discussion of the evidence is contained in paragraphs 15 to 19 of its decision.
[16] See Minister's letter, with enclosures, dated September 28, 2021, AD07-12.

- **The General Division did not err by giving weight to a vehicle registration slip that listed M. P.'s address as X**

[38] D. L. alleges that the General Division ignored the fact that M. P.'s vehicle registration slip listed his address as X, rather than X, as claimed by M. F.

[39] Again, I find little merit in this allegation.

[40] M. F. submitted a copy of a vehicle registration slip to Service Canada in support of her survivorship claim.[17] It seems that the copy was poor to begin with and became even blurrier when it was reproduced for the hearing file that went before the General Division. At the General Division, D. L. argued that the registration slip read 48 rather than 46—an argument that the General Division acknowledged in its decision, although it made no explicit finding on this issue.

[41] However, even if the General Division accepted that the registration slip read X, I do not regard it as an erroneous finding of fact, much less one that was "perverse or capricious" or "made without regard for the material." In my view the reproduction in the hearing file was genuinely unclear—it could be read in good faith either way. As it happens, the Minister later submitted a more faithful copy, which clearly showed that M. P.'s residence was listed as X.[18]

- **The General Division did not err by mistaking M. F.'s driver's licence for M. P.'s**

[42] This is another supposed error that comes from the General Division's choice to list all the items that the Minister relied upon to grant M. F. the survivor's pension. One of those listed items was "a copy of the Contributor's driver's licence that lists his address as X in Kingston, Ontario."[19]

[43] As I noted in my leave to appeal decision, I was unable to find a copy of M. P.'s driver's licence anywhere in the file. There was a copy of **M. F.'s** driver's licence,

[17] See first copy of M. P.'s Ontario vehicle permit, expiration date April 2, 2008, GD2-91.
[18] See second copy of M. P.'s Ontario vehicle permit, AD07-10.
[19] See General Division decision, paragraph 14(c).

although, like the vehicle registration slip discussed above, it was badly obscured.[20] At first, I thought that the Minister had mistaken M. F.'s licence for M. P.'s.[21] However, when I looked at the Minister's written submissions to the General Division, I see that it correctly listed the driver's licence as M. F.'s.[22]

[44] It now appears that the General Division misattributed the driver's licence to M. P. when reproducing the Minister's list for its decision. I suspect that this was purely a mistake of inadvertence—a momentary lapse—that had no bearing on its decision. I say this because I don't see any other sign that the General Division mistook M. F.'s licence for M. P.'s. In its analysis, the General Division placed no weight on a finding that the driver's licence was M. P.'s and it mentioned the licence only to confirm that X was M. F.'s address.[23]

– **The General Division did not err by inferring an ongoing relationship from the existence of a joint cheque**

[45] In support of her survivorship claim, M. F. submitted a blank, unsigned cheque in both her name and M. P.'s, indicating that their address was X. She said that this showed that they lived together and held a joint account together.

[46] D. L. alleges that the General Division committed a factual error by describing this item as a "cancelled cheque," rather than a blank cheque. She argues that this mistake is significant because a blank cheque by itself does not necessarily mean that M. F. and M. P. ever combined their funds or actively used a joint account. She also argues that the General Division should not have assigned this item significant weight because, in contrast to what a cancelled cheque might have disclosed, it said nothing about **when** M. F. and M. P. might have been using a joint account or for what purpose.

[47] I don't see merit in these arguments.

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[20] Certified copy of M. F.'s Ontario driver's licence, GD2-91.
[21] The Minister later produced a clearer version of the same image, confirming that the licence in question did belong to M. F. See. AD07-10.
[22] See Minister's submissions dated June 24, 2020, GD4-7.
[23] See General Division decision, paragraphs 15 and 16.

[48] Strictly speaking, D. L. is correct. The cheque was never dated, signed, or made out to anyone. It was never cashed. It cannot accurately be described as “cancelled.” That said, I don’t think the General Division’s error in terminology was significant. However it was described, the cheque nonetheless existed, and it had some evidentiary value. True, it was not definitive proof that M. P. and M. F. were cohabiting at the time of M. P.’s death, but then the General Division never said that it was. The General Division did not base its decision entirely on the cheque. Rather, the General Division considered the cheque among several items that, taken together, strongly suggested a common-law relationship between M. P. and M. F. in the period leading up to January 28, 2015.

– **The General Division did not err by relying on H. F.’s evidence**

[49] H. F. is the Added Party’s sister-in-law. She also lives three doors down from M. F. at X and holds power of attorney for her personal care and property. She swore an affidavit and gave testimony supporting her sister-in-law’s claim that she cohabited with M. P. in a conjugal relationship starting in mid-1990s and lasting until his death.

[50] D. L. argues that the General Division should have discounted H. F.’s evidence because she was not an impartial witness. I don’t agree.

[51] It is true that H. F. was no one’s idea of a disinterested observer, but that is true of most witnesses in cases like these. The challenge for a decision-maker assessing a survivorship claim is to piece together a picture of a relationship from incomplete or fragmentary documentary evidence while relying on the memories of witnesses who have prior allegiances to one party or another.

[52] There is no question that the General Division placed weight on H. F.’s evidence, but I don’t see how it was wrong to do so. Members of the Tribunal are trained to assess evidence. The General Division member was obviously aware that H. F. came forward to support her sister-in-law, and it presumably took that into account when assessing her credibility as a witness. The member made it clear why it preferred H. F.’s evidence over D. L.’s: the former could credibly say that she had personal knowledge of M. P.’s activities later in life, while D. L., by her own admission, could not.

[53] There was nothing on the record that contradicted H. F.'s recollections or impugned her overall credibility. The General Division was within its authority to accept her testimony and her affidavit and to weigh it against the remaining evidence.

The General Division is permitted to make factual errors – as long as they are not material

[54] A factual error by itself is not enough to overturn a decision of the General Division. An appellant must also show that the General Division **based** its decision on that error, which itself must have been "made in a perverse or capricious manner or without regard for the material before it."[24] In other words, the error must be material **and** glaring.

[55] D. L. has identified what she regards as several factual errors in the General Division's decision. In my view, they are all relatively minor and do not meet the threshold required by the law.

– It is immaterial whether the General Division misstated M. P.'s funeral arrangements

[56] D. L. criticizes the General Division for finding that M. F. was responsible for M. P.'s "funeral arrangements and expenses." She notes that M. P. was in fact cremated.

[57] I don't see how the General Division's decision turned on this error, if that's what it was. Whether or not M. P. was cremated or buried, had a funeral service or not, someone had to pay for his interment in compliance with provincial law. There was no evidence on the record to suggest that anyone other than M. F., as executor of the estate, incurred that cost.

– It is immaterial whether the General Division misstated the extent of M. P.'s contact with D. L.

[58] D. L. objects to the General Division's finding that she had "limited knowledge of the Contributor's personal relationships over the past 25 years."[25] She specifically takes

[24] This is the formal definition for factual error as set out in section 58(1)(c) of the DESDA.
[25] General Division decision, paragraph 15.

issue with the General Division's statement that, "Apart from a handful of emails and one in-person visit in 2001, the Claimant and the Contributor had no direct contact after 2000."[26] She claims to have told the General Division that she did occasionally have telephone calls with her estranged husband.

[59] Again, I don't see how this alleged error is significant, much less "perverse or capricious" or "without regard for the material." In her written submissions to the General Division, D. L. did disclose at least one telephone call with M. P., but it is clear that this call, in 2004, was made in the context of an ongoing property dispute between the two.[27] The balance of the record indicates that M. P. had infrequent contact with D. L. during the last two decades of his life. The fact remains that, as the General Division noted, D. L. did not learn of M. P.'s passing until well after it happened. D. L. insists that this is because his death was purposely concealed from her, but she did not provide any evidence to support this allegation. Even if she had provided such evidence, I am not sure how much relevance it would have had to the larger question of what she could credibly say about her husband's living arrangements in the final years of his life.

– **It is immaterial whether the General Division failed to notice that M. F. gave two different dates for the start of her cohabitation with M. P.**

[60] D. L. alleges that the General Division erred by failing to notice a discrepancy in M. F.'s evidence: In the statutory declaration that M. F. submitted with her application for the CPP survivor's pension, she claimed to have cohabited with M. P. since February 1991.[28] However, in another statement, she declared that she and M. P. resided together starting March 1990.[29]

[61] The General Division did not address this discrepancy in its written reasons, but I don't think that was an error. That is because I don't see how the discrepancy had any bearing on the General Division's decision. There was evidence that M. P. and M. F.'s relationship deepened throughout the 1990s, and I don't think much turns on precisely

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[26] General Division decision, paragraph 11.
[27] See D. L.'s written submission dated March 31, 2021, GD11-17.
[28] See M. F.'s statutory declaration of common-law union dated February 6, 2015, GD2-91.
[29] See letter to Service Canada from M. F. dated September 26, 2018, GD2-119.

when the two started cohabiting 25 to 30 years ago. The proper focus of the inquiry was their status at the end of their relationship, not the beginning.

Conclusion

[62] In sum, the General Division did not make any legal errors or significant factual errors. It made a full and genuine effort to sort through the relevant evidence and assess its quality. I see no reason to question the General Division's choices to give some items of evidence more weight than others.

[63] The Supreme Court of Canada, reiterating one of the principles of natural justice, has held that reasons must rest on a "logical connection between the evidence, the law on one hand, and the verdict on the other."[30] In this case, I am satisfied that the General Division successfully linked its findings to the evidence and the law.

[64] For these reasons, D. L. has not demonstrated to me that the General Division committed an error that falls within the permitted grounds of appeal.

[65] The appeal is therefore dismissed.

Member, Appeal Division

[30] *R. v R.E.M.*, [2008] 3 S.C.R. 3, 2008 SCC 51.