



Social Security
Tribunal of Canada

Tribunal de la sécurité
sociale du Canada

Citation: *LS v Minister of Employment and Social Development and DS*, 2021 SST 75

Tribunal File Number: AD-20-845

BETWEEN:

L. S.

Appellant

and

Minister of Employment and Social Development

Respondent

and

D. S.

Added Party

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division

DECISION BY: Valerie Hazlett Parker

DATE OF DECISION: February 26, 2021

DECISION AND REASONS

DECISION

[1] The appeal is allowed.

[2] The Disabled Contributor's Child's Benefit (DCCB) should be paid to L. S. on behalf of the child from January 2018 until the child turned 18.

OVERVIEW

[3] L. S. (LS) is the Appellant. D. S. (DS) is the Added Party in this appeal. These parties married in 1995 and had two children. They physically separated in December 2017. Only one child was under 18 when the parties separated.

[4] LS began to receive a Canada Pension Plan disability pension before the parties separated. The DCCB was also paid to the parties pooled finances. When the parties separated, LS continued to receive DCCB payments. DS applied for the DCCB for the child in December 2018. He claimed that he had had custody and control of the child since January 2018, when he and LS physically separated, so he should receive the DCCB.

[5] The Minister of Employment and Social Development decided that the DCCB would be payable to DS beginning in December 2018. DS appealed this decision to the Tribunal. He claims that the DCCB should be payable to him starting in January 2018 until the child turned 18.

[6] The Tribunal's General Division allowed the appeal. It decided that only DS had custody and control of the child beginning in January 2018.

[7] LS was granted leave (permission) to appeal this decision to the Tribunal's Appeal Division. The appeal had a reasonable chance of success because the General Division may have based its decision on an important factual error.

[8] I have read all of the documents filed with the Appeal Division and the General Division. I listened to the recording of the General Division hearing and the parties' oral submissions. The appeal is allowed because the General Division based its decision on an important factual error.

Correcting this error, I find that both LS and DS had custody and control of the child at the relevant time. By operation of the law, the DCCB is payable to LS for the time in dispute.

PRELIMINARY MATTER

[9] During the Appeal Division hearing, the issue of the applicability of section 52 of the *Canada Pension Plan Regulations* came up. The parties were given time to file written submissions on this issue. Those submissions were considered in making this decision.

ISSUES

[10] Did the General Division fail to provide a fair process when it failed to tell LS in advance that DS would have a representative at the hearing?

[11] Did the General Division base its decision on at least one of the following important factual errors:

- a) that DS has custody and control of the child;
- b) that LS does not provide any support for the child;
- c) that LS and child only saw each other occasionally; or
- d) that LS was unaware of what was going on in the child's life?

ANALYSIS

[12] An appeal to the Tribunal's Appeal Division is not a rehearing of the original claim. Instead, the Appeal Division can only decide whether the General Division:

- a) failed to provide a fair process;
- b) failed to decide an issue that it should have, or decided an issue that it should not have;
- c) made an error in law; or

d) based its decision on an important factual error.¹

Did the General Division provide a fair process?

[13] The Tribunal must provide a fair process. This means that every party must have the opportunity to present their legal case to the Tribunal, to know and answer the other parties' legal case, and to have a decision made by an independent decision maker based on the law and the facts.

[14] LS argues that the General Division failed to provide this because she was not told before the hearing that DS's sister would represent him at the oral hearing. However, LS did not object to this at the hearing. Nothing indicates that LS was unable to properly present her case with the representative present. The representative did not interrupt LS during the hearing or disrupt her testimony. There is no indication that LS was prevented from presenting her case or responding to legal arguments made by other parties.

[15] I appreciate that LS would prefer to have known in advance that the representative would attend the hearing. However, advance notice of this is not required for the hearing process to be fair.

[16] Nothing suggests that the General Division member was biased or otherwise acted improperly.

[17] Therefore, the General Division provided a fair process.

Did the General Division base its decision on an important factual error?

[18] LS also argues that this appeal should be allowed because the General Division based its decision on a number of important factual errors. To succeed on this basis, she will have to prove three things for each alleged error:

a) that the finding of fact was erroneous (wrong);

¹ This paraphrases the grounds of appeal set out in section 58(1) of the *Department of Employment and Social Development Act*.

- b) that the finding was made perversely, capriciously, or without regard for the material that was before the General Division; and
- c) that the decision was based on this finding of fact.²

[19] The first finding of fact that LS says is wrong is the statement in the General Division decision that DS has custody and control of the child.³ By implication, the General Division found as fact that LS did not have custody and control of the child and so was not entitled to receive the DCCB on his behalf.

[20] However, LS and DS both testified that there was a joint custody agreement regarding their child and that there was none. No formal documents regarding this were filed with the General Division. However, both parties filed copies of the Family Court Order dated July 16, 2019, with the Appeal Division. It states that the parties have joint custody of the child.⁴ This is new evidence. The Appeal Division does not normally consider new evidence. However, it confirms the oral evidence of the parties and is not disputed.

[21] In addition, the General Division decision states that LS was not able to see the child after the separation because she moved to another town, she had no car, and the child relied on DS to lend him a car to see her.⁵ However, the testimony about this was that LS did not see the child often because of car issues only when she and DS first separated⁶ but that, more recently, she has had frequent contact with the child. She sees him regularly for coffee, to walk her dog, etc.⁷

[22] Also, the decision states that LS testified that she did not know what was going on in the child's life. However, LS's testimony was that she did not know what was going on with respect

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

³ General Division decision at para 17.

⁴ AD11.

⁵ General Division decision at para 10.

⁶ General Division hearing recording at approximate time 19:57, although the exact time may differ depending on the device used to listen to the recording.

⁷ General Division hearing recording at approximate time 21:20.

to the child's involvement with Cadets.⁸ It was not a general statement that she did not know about the child's affairs.

[23] Lastly, in this regard, LS testified that she assists the child in making decisions about work and his activities.⁹ For example, the child phoned LS when he was involved in a situation where police were called.¹⁰

[24] DS did not dispute any of this oral evidence. This supports LS's legal position that she was involved with caring for and making decisions for the child.

[25] For these reasons, I find that the General Division's finding of fact that DS had custody and control of the child was wrong. It was made without regard for all of the evidence that was before the General Division that LS also had custody and control of the child.

[26] The General Division also failed to consider that both parents could have custody and control of a child under the age of 18.

[27] The decision was based on this finding of fact.

[28] Therefore, the appeal must be allowed.

[29] LS argues that the General Division based its decision on other important factual errors as well. However, because the appeal is allowed for the reasons above, it is not necessary for me to consider these alleged errors.

REMEDY

[30] The Appeal Division can give a number of remedies when an appeal is allowed. It is appropriate for the Appeal Division to give the decision that the General Division should have given in this case for the following reasons:

- a) The record before me is complete;

⁸ General Division hearing recording at approximate time 11:17.

⁹ General Division hearing recording at approximate time 10:15.

¹⁰ General Division hearing recording at approximate time 17:16.

- b) The facts are not in dispute;
- c) LS and DS testified at the General Division hearing and had the opportunity to test the other parties' evidence;
- d) The Tribunal can decide questions of fact and law necessary to dispose of an appeal;¹¹ and
- e) Appeals must be concluded as quickly and efficiently as the circumstances and considerations of fairness and natural justice permit.¹²

Which parent should receive the DCCB on behalf of the child?

[31] The only issue in this appeal is whether LS or DS should receive the DCCB payments for the child after their separation until the child turned 18.

[32] The starting point to decide this is the *Canada Pension Plan* (CPP). It states that, where a DCCB is payable to a child under 18, payment is to be made to the person having custody and control of the child.¹³ It also says that the contributor is presumed to be the person having custody and control of the child except when the child is living apart from them.¹⁴

[33] To interpret this, one must examine the text, context, and purpose of the legislation.¹⁵ The words of the CPP are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.¹⁶ Doing so reveals the following:

[34] First, the DCCB is the child's benefit. It does not belong to either parent. Court decisions have confirmed this by stating the following:

Paragraph 44(1)(e) of the [CPP] specifically provides that “a disabled contributor’s child benefit shall be paid to each child of a disabled contributor ...”. As well, an application for the benefit is not made by the

¹¹ Section 64 of the *Department of Employment and Social Development Act*.

¹² Section 3 of the *Social Security Tribunal Regulations*.

¹³ Section 75 of the CPP.

¹⁴ Section 75(a) of the CPP.

¹⁵ *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.

¹⁶ *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC).

parent, but by the parent on behalf of the child. This is confirmed by s. 75, which provides that the benefit is payable directly to the child, unless the child is a minor, in which case the benefit is paid to the custodial parent. The [parent] has no entitlement to the benefit, he has no control over its payment, it is not taxable in his hands, and it is not included in his income for the purpose of calculating his child support obligation.¹⁷

[35] Second, the DCCB for a child under 18 can only be paid to one person, not split between parents if they both have custody and control of the child.

[36] The DCCB is paid to the person who has custody and control of the child. The term “custody and control” is not defined in the CPP. I accept the definition of custody set out by the British Columbia Court. It says:

In the narrow sense of the word, custody means physical care and control or day to day care and control of a child. In the broad sense of the word, “custody” means all of the rights and obligations associated with physical, day to day care and control of a child as well as the right and obligation to nurture the child by ensuring, providing for, and making decisions in relation to, a child’s physical and emotional health, education, religious or spiritual development, and all other matters that affect the welfare of the child.¹⁸

[37] In addition, the CPP refers to the person having both custody and control. The Pension Appeals Board decided that the parent who took responsibility for the child’s maintenance, schooling, participation in sports, and who was financially responsible for the child’s welfare retained “control” of the child.¹⁹ This decision is not binding on the Tribunal, which means that I do not have to follow it. However, I find it persuasive because the decision was about the DCCB, is consistent with court decisions about the meaning of custody, and has been followed in many other decisions.

¹⁷ *Williams v Williams*, 1995 CanLII 17843 (ON SCDC); *Sipos v Sipos*, 2007 ONCA 126.

¹⁸ General Division decision at para 6, quoting *Abbott v Abbott*, 2001 BCSC 232.

¹⁹ *Minister of Human Resources Development v Warren* (December 10, 2001) CP 14995 (PAB).

[38] The *Canada Pension Plan Regulations*²⁰ set out information that must be provided to the Minister if requested when an application for DCCB is made. This includes information about whether the child was legally or in fact in the applicant's custody or control.

[39] Therefore, custody and control of the child may be legal or factual.

[40] Third, the overall context and purpose of the CPP must also be considered. The CPP is benefits conferring legislation and therefore should be given a large and generous interpretation.²¹ The CPP sets out a program of benefits for those who experience a loss of earnings because of retirement, disability, or death of a wage-earning spouse or parent.²² The DCCB is a benefit for a child of a disabled contributor, payable to offset the costs associated with caring for a child of a disabled contributor.

[41] The General Division decision also refers to the Minister's policy direction²³ and correctly states that the Tribunal does not have to follow it. Despite this, the policy can assist in interpreting the legislation. A copy of the policy was filed with the Appeal Division.²⁴ This document states that its purpose is to provide direction on determining which parent has custody and control of a child and should receive payment of the DCCB for a child under 18. It also intends to provide clear and consistent policy to ensure payment of the DCCB to the disabled contributor when they have custody and control, including shared/joint custody of a child regardless of where the child resides.²⁵ At the Appeal Division hearing, the Minister's counsel explained that this policy was the basis on which it made the decision to pay the DCCB to LS in this case.

[42] LS and DS both testified that they have joint custody of the child. The child resides with DS most of the time. He attends school in the town where DS lives, and his doctor and dentist are there. The child spends time with LS as they arrange themselves. LS is also involved in

²⁰ Section 52 of the *Canada Pension Plan Regulations*.

²¹ *Rizzo & Rizzo Shoes Ltd. (Re)*, 1998 CanLII 837 (SCC).

²² *Granovsky v Canada (Minister of Employment Insurance)*, 2000 SCC 28.

²³ General Division decision at paras 3, 8, and 9.

²⁴ AD8. This document was not filed with the General Division. The Minister's counsel explained at the Appeal Division hearing that it was filed because the General Division decision refers to it.

²⁵ AD8-4.

decision-making for the child.²⁶ She has contact with the child's school and attends his activities. When the child was involved with police, he called LS first.²⁷

[43] In addition, I am satisfied that LS supports the child financially. She makes no direct child support payment. However, she receives a lower amount of spousal support to account for this.²⁸ I reject DS's argument that LS's obligation to pay child support was not considered when the amount of spousal support was agreed to. There is no evidence before the Tribunal to support this, and both parties have a legal obligation to provide financial support for a child.

[44] On a review of all of the evidence, I am satisfied that LS has legal and factual custody and control of the child.

[45] There is no dispute that DS also has legal and factual custody and control of the child. He provides the child's primary residence. DS is also involved with the child's activities and decision-making regarding the child.

[46] However, the CPP only permits one parent to receive the DCCB on behalf of the child. Therefore, I must decide which parent should receive this benefit for the child when they both have custody and control of the child and live apart.

[47] The purpose of the DCCB is instructive in this regard. It is to provide some financial support to a child of a disabled parent and to help offset additional costs associated with these circumstances. LS is the disabled parent. Therefore, she incurs these additional costs to care for the child. She would incur these costs whether the child resides with her primarily or only part of the time. This is because the additional costs relate to LS's status as a disabled parent.

[48] Therefore, the purpose of the DCCB is served when payment is made to LS for the child before he turned 18. This is also consistent with the Minister's policy to pay the benefit to the disabled parent on behalf of the child so long as they have custody and control of the child, no matter how minimal.

²⁶ General Division hearing recording at approximate time 8:55.

²⁷ General Division hearing recording at approximate time 17:16.

²⁸ AD11 is a copy of the court order that confirms this.

[49] Therefore, under these circumstances, the DCCB should be paid to LS for that period that LS and DS lived separately until the child turned 18.

CONCLUSION

[50] The appeal is allowed.

[51] The DCCB is payable to LS from January 2018 until the child turned 18.

Valerie Hazlett Parker
Member, Appeal Division

HEARD ON:	February 3, 2021
METHOD OF PROCEEDING:	Teleconference
APPEARANCES:	L. S., Appellant Patricia Vachon, Representative for the Appellant Jordan Fine, Counsel for the Respondent D. S., Added Party J. S., Representative for the Added party