



Citation: *SW v Minister of Employment and Social Development and IR*, 2022 SST 1226

**Social Security Tribunal of Canada
General Division – Income Security Section**

Decision

Appellant: S. W.

Respondent: Minister of Employment and Social Development
Representative: Andrew Kirk

Added Party: I. R.

Decision under appeal: Minister of Employment and Social Development
reconsideration decision dated July 15, 2022 (issued by
Service Canada)

Tribunal member: George Tsakalis

Type of hearing: On the record

Decision date: November 30, 2022

File number: GP-22-1482

Decision

[1] The appeal is allowed.

[2] The Appellant, S. W., is eligible for a Disabled Contributor's Child benefit (DCCB) for E. and R.. Payments start as of April 2021. This decision explains why I am allowing the appeal.

Overview

[3] The Appellant and Added Party separated in 2017. They have two children who are under 18 years of age, E. and R..

[4] The Added Party receives a Canada Pension Plan (CPP) disability pension. He applied for a DCCB in May 2021 on behalf of the children.

[5] The Appellant applied for a DCCB on behalf of the children in March 2022. The Minister of Employment and Social Development (Minister) denied her application because it had already approved the Added Party's DCCB application.

[6] The Minister awarded the Added Party the DCCB because it had a policy in place to provide the DCCB to a disabled contributor who had even minimal custody and control of the children.

[7] The Appellant appealed the Minister's decision to the General Division of the Social Security Tribunal of Canada.

[8] I scheduled a prehearing conference. I asked for the attendance of a Minister's representative. I asked the Minister if it was changing its position on this appeal because of a recent Federal Court of Appeal decision called *Sibbald*. The *Sibbald* decision and other Tribunal decisions suggested that the DCCB for children under 18 should go to the parent with actual custody and control of a child.¹

¹ See *Sibbald v. Canada (Attorney General)*, 2022 FCA 157 and the Tribunals decisions in *KM v. Minister of Employment and Social Development and MM*, 2021 SST 693 and *MM v. KM and Minister of Employment and Social Development*, 2022 SST 575.

[9] The Minister sent submissions to the Tribunal before the prehearing conference. The Minister changed its position because of the *Sibbald* decision. The Minister said I should allow the appeal and award the Appellant the DCCB. This is because the Appellant is the primary decision-maker for the children and is the parent who is most intimately acquainted with the children's needs.²

[10] The Added Party acknowledged at the prehearing conference that the Appellant had custody and control of the children.

[11] I am writing a decision based on the documents in the file because I must conduct proceedings as informally and quickly as the circumstances and the considerations of fairness and natural justice allow. In addition, all the parties agreed at the prehearing conference that I should write a decision awarding the Appellant the DCCB.

The DCCB – What it is

[12] The DCCB is a flat-rate monthly benefit that is paid for each child of a person receiving the CPP disability benefit.³

[13] The CPP says that where a DCCB is payable to a child under 18, payment is made to the person having custody and control of the child.⁴ The CPP also says that the contributor is presumed to be the person having custody except when the child is living apart from them.⁵

[14] The CPP does not define the term “custody and control”. The Tribunal has accepted the definition of custody set out by a 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

² See GD7

³ See paragraph 44(1)(e) of the *Canada Pension Plan*

⁴ See section 75 of the *Canada Pension Plan*

⁵ See subsection 75(a) of the *Canada Pension Plan*

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.⁶

[15] In a case called *Warren*, 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.⁷

Reasons for my decision

[16] I am awarding the Appellant the DCCB because she has custody and control of the children.

[17] The Added Party acknowledged on his application that the children lived with the Appellant.⁸

[18] The Appellant in her March 2022 application said that the children lived with her.⁹

[19] The Added Party spoke to a Minister's representative in April 2022. He said he had some care and custody of the children every other weekend. The Added Party expressed an interest in changing who should receive the DCCB, but not at that time.¹⁰

[20] The Appellant also spoke to a Minister's representative in April 2022. She advised that she had full custody of the children since she separated from the Added Party in 2017.¹¹

[21] The Tribunal file contains a Family Court Order (Order) dated September 28, 2021. The Order says that the Added Party has decision-making responsibility for the children and they are to primarily reside with her. The Added Party was given parenting time with the children every other weekend. The Appellant was to be the primary or first

⁶ See *Abbott v. Abbott*, 2001 BCSC 232

⁷ See *Minister of Human Resources Development v. Warren* (December 10, 2001) CP 14995 (PAB). This decision does not bind me, but I find it persuasive. It has been followed by the Tribunal in other cases.

⁸ See GD2-84

⁹ See GD2-46-47

¹⁰ See GD2-42

¹¹ See GD2-43

contact person with the school, doctor, dentist, or any institution providing extra-curricular activities.¹²

[22] The Tribunal file contains a letter from a school that says the children resided with the Appellant.¹³

[23] The CPP says that where a DCCB is payable to a child under 18, payment is made to the person having custody and control of the child. The CPP also says that the contributor is presumed to be the person having custody except when the child is living apart from them.

[24] In this case, the Appellant rebutted the presumption of custody on the party of the Added Party. The evidence showed the children live with her. She is the primary decision maker for the children. She is the parent who is most intimately acquainted with the children's needs.

[25] The Appellant is therefore entitled to the DCCB.

[26] The Minister might contact the Added Party to pursue overpayment of benefits that the Appellant should have been entitled to. If that occurs the Added Party can request the waiver or reduction of any overpayments because of financial hardship. The Tribunal does not have jurisdiction to deal with the issue of any overpayments made to the Added Party.

When payments start

[27] Payments of the DCCB can start no earlier than 11 months before the Minister received the DCCB application.¹⁴

[28] The Minister received the Appellant's DCCB application in March 2022. Payment of the DCCB to the Appellant starts in April 2021.

¹² See GD2-50-51

¹³ See GD2-39

¹⁴ See subsection 74(2) of the *Canada Pension Plan*

Conclusion

[29] I find that the Appellant is eligible for the DCCB because she had primary or actual custody and control of E. and R.

[30] This means the appeal is allowed.

George Tsakalis
Member, General Division – Income Security Section