

Federal Court of Appeal



Cour d'appel fédérale

Date: 20231211

Docket: A-139-22

Citation: 2023 FCA 239

**CORAM: BOIVIN J.A.
LASKIN J.A.
ROUSSEL J.A.**

BETWEEN:

DAWN PENTESCO

Applicant

and

**TRACEY FRASER and ATTORNEY
GENERAL OF CANADA**

Respondents

Heard at Toronto, on December 11, 2023.

Judgment delivered from the Bench at Toronto, Ontario, on December 11, 2023.

REASONS FOR JUDGMENT OF THE COURT BY:

BOIVIN J.A.

Federal Court of Appeal



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REASONS FOR JUDGMENT OF THE COURT

(Delivered from the Bench at Toronto, Ontario, on December 11, 2023).

BOIVIN J.A.

[1] Dawn Pentesco, the applicant, seeks judicial review of a decision of the Appeal Division of the Social Security Tribunal rendered on May 20, 2023 (AD-22-23). The Appeal Division found that the applicant was not entitled to a survivor's pension under the *Canada Pension Plan*, R.S.C., 1985, c. C-8 (CPP).

[2] The survivor's pension at issue has been the subject of contentious claims since 2017. The pension was initially awarded to the applicant, who claimed to be a common-law partner of the deceased contributor. Ms. Fraser, the individual respondent, who was legally married to the contributor, submitted a competing claim. The General Division awarded the pension to Ms. Fraser in July 2020. However, a new hearing was ordered to remedy issues of procedural fairness, at which the General Division awarded the pension to the applicant. That decision was appealed to the Appeal Division, which allowed the appeal and awarded the pension to the individual respondent. It is that decision that is at issue in the present application for judicial review.

[3] The CPP is a public social insurance program and a survivor's pension is payable to the survivor of a contributor. A survivor can be a person married to the contributor at the time of death or a common-law partner at the time of death (Subsection 42(1), CPP). More particularly, pursuant to the CPP, a common-law partner is someone who has cohabited with the contributor, in a conjugal relationship, for a continuous period of at least one year prior to his or her death. Based on its review of the evidence, the Appeal Division found that the applicant was ineligible to claim the survivor's pension, as she was only a common-law partner to the contributor for a period of seven months before his death.

[4] The applicant disagrees with this factual finding and alleges that the Appeal Division erred by overturning the General Division's decision based solely on one piece of contradictory evidence - *i.e.* the psychotherapist notes. She further argues that it was not open to the Appeal Division to interfere with the General Division's decision as the conditions permitting an appeal

under subsection 58(1)c) of the *Department of Employment and Social Development Act*, S.C. 2005, c. 34, were not fulfilled.

[5] We are all of the view that the Appeal Division's decision is reasonable. Specifically, it was open to the Appeal Division, after a careful evaluation of the evidence, to determine that the General Division had failed to address relevant evidence and explain how that evidence could be reconciled with other evidence on record. The said evidence ignored by the General Division was material as acknowledged by counsel for the applicant. It offered an objective, reliable and contemporaneous account of the deceased contributor's sentiments towards the applicant. Hence, failure by the General Division to address the evidence and explain how it could be reconciled with other evidence on record, opened the door, in these circumstances, to a review by the Appeal Division.

[6] We also are in agreement that the decision of the Appeal Division bears the hallmarks of justification, transparency, and intelligibility as required by Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653.

[7] The applicant is essentially asking this Court to reweigh the evidence and make a different determination. However, this is not the role of our court on reasonableness review.

[8] This application for judicial review will be dismissed. The respondents did not seek costs and none will be awarded.

"Richard Boivin"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-139-22

STYLE OF CAUSE: DAWN PENTESCO v. TRACEY
FRASER and ATTORNEY
GENERAL OF CANADA

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: DECEMBER 11, 2023

**REASONS FOR JUDGMENT OF THE COURT
BY:** BOIVIN J.A.
LASKIN J.A.
ROUSSEL J.A.

DELIVERED FROM THE BENCH BY: BOIVIN J.A.

APPEARANCES:

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Tracey Fraser FOR THE RESPONDENT
(ON HER OWN BEHALF)

Dani Grandmaitre FOR THE RESPONDENT

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