Citation: ***A. O. v. Minister of Employment and Social Development*, 2015 SSTAD 570**

Date: May 7, 2015

File number: AD-15-127

APPEAL DIVISION

Between:

A. O.

Applicant

and

Minister of Employment and Social Development
(formerly known as the Minister of Human Resources and Skills Development)

Respondent

Decision by: Valerie Hazlett Parker, Member, Appeal Division

REASONS AND DECISION

INTRODUCTION

[1] The Applicant applied for a *Canada Pension Plan* disability pension and claimed that she was disabled by mental illness. The Respondent denied her claim initially and after reconsideration. The Applicant appealed to the Office of the Commissioner of Review Tribunals. After a hearing, a Review Tribunal dismissed the appeal in a decision dated January 24, 2013.

[2] The Applicant sought leave to appeal from this decision. The matter was transferred to the Appeal Division of the Social Security Tribunal on April 1, 2013 pursuant to *the Jobs, Growth and Long-term Prosperity Act*. On May 14, 2013 the Appeal Division refused the Applicant’s request for leave to appeal.

[3] On March 4, 2015 the Applicant filed this Application requesting that the decision refusing leave to appeal be rescinded or amended (Application). She presented a letter from her family doctor dated February 10, 2015 and an undated letter from her family counsellor in support of this Application.

[4] The Respondent requested an extension of time to file submissions. This was granted. The Respondent filed brief submissions after this date. The Respondent contended that the Application should be refused because it was filed late and was therefore statute-barred. These submissions were considered together with the submissions and documents filed by the Applicant.

[5] The matter was decided on the written record. The issues were dependent on the documents presented by the Applicant, and both parties were given an adequate opportunity to provide written submissions.

ANALYSIS

Late Application to Rescind or Amend

[6] The *Department of Employment and Social Development Act* governs the operation of this Tribunal. Section 66 of this Act states:

> 66. (1) The Tribunal may rescind or amend a decision given by it in respect of any particular application if
>
> > (a) in the case of a decision relating to the *Employment Insurance Act*, new facts are presented to the Tribunal or the Tribunal is satisfied that the decision was made without knowledge of, or was based on a mistake as to, some material fact; or
> >
> > (b) in any other case, a new material fact is presented that could not have been discovered at the time of the hearing with the exercise of reasonable diligence.
>
> (2) An application to rescind or amend a decision must be made within one year after the day on which a decision is communicated to the appellant…
>
> (4) A decision is rescinded or amended by the same Division that made it.

[7] The Applicant has correctly brought the Application to the Appeal Division of the Tribunal.

[8] The legislation is clear. An Application must be made within one year after the day on which the decision was communicated to the Applicant. In this case, the Applicant wrote in her Application that she received the Appeal Division decision refusing leave to appeal on May 21, 2013. She did not file the Application until March 2015. This was after the time to do so had expired.

[9] The Applicant made no request for this time limit to be extended. She presented no grounds upon which such a request could be considered.

[10] As the Application was not filed within the time required to do so, it must be dismissed.

No New Facts

[11] If I am wrong on this, and the Application was not filed late, I must consider whether the Applicant has presented any new material facts as set out in the *Department of Employment and Social Development Act* (DESD Act). The language of section 66 of the DESD Act is taken from decisions which interpreted subsection 84(2) of the *Canada Pension Plan*, which provided for decisions to be rescinded or amended prior to the DESD Act coming into force.

[12] In interpreting subsection 84(2) of the *Canada Pension Plan*, the Federal Court of Appeal clearly set out a two-part test for evidence to be admissible as a "new fact":

(1) It must establish a fact (usually a medical condition in the context of the *Canada Pension Plan*) that existed at the time of the original hearing but was not discoverable before the original hearing by the exercise of due diligence (the "discoverability test"), and

(2) The evidence must reasonably be expected to affect the result of the prior hearing (the "materiality test"); *Canada (Attorney General) v. MacRae*, 2008 FCA 393, at paragraph 16; see also *Kent v. Canada (Attorney General)*, 2004 FCA 2083, at paragraphs 33-35; *Canada (Minister of Human Resources Development) v. Macdonald*, 2002 FCA 197, at paragraph 2; *Mazzotta v. Canada (Attorney General)*, 2007 FCA 1209, at paragraph 45, *Higgins v. Canada (Attorney General)*, 2009 FCA 322, at paragraph 8.

[13] This two-part test developed by the Federal Court of Appeal is now reproduced in section 66 of the DESD Act when it refers to "new material fact" discoverable through the exercise of "reasonable diligence".

[10] Therefore, the Tribunal must determine if the proposed new evidence submitted with the Application meets the "new material facts" test with regard to the Applicant's alleged disability as of the Minimum Qualifying Period (MQP) date.

[11] The Applicant presented a letter from Dr. Parmar dated February 10, 2015 as a new material fact. This letter speaks to the Applicant's condition at that time, and his treatment recommendations. It does not refer to her condition at her Minimum

Qualifying Period. Therefore, it is not material to the question of whether the Applicant was disabled at the Minimum Qualifying Period. This information was also discoverable at the time that the decision refusing leave to appeal was made. Hence, this document is not a new material fact under the DESD Act.

[14] The Applicant also presented an undated letter from her family counsellor regarding her participation in treatment as a new material fact. The letter states that the Applicant was referred for counselling in April 2014 and chronicles her participation in treatment since that time. This information did not exist at the time of the leave to appeal decision and does not refer to her condition at the Minimum Qualifying Period. Therefore, it does not meet the legal test for a new material fact under s. 66 of the DESD Act.

CONCLUSION

[15] The Application is refused because the Application to Rescind or Amend the decision of the Appeal Division of the Tribunal was not made within the time permitted to do so. For the reasons set out above, I am also not satisfied that the Applicant presented any new material facts under the DESD Act.

Valerie Hazlett Parker
Member, Appeal Division