Citation: *J. W. O. v. Minister of Employment and Social Development,* 2014 SSTAD 305

Appeal No. CP16830

BETWEEN:

J. W. O.

Applicant

and

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

Respondent

SOCIAL SECURITY TRIBUNAL DECISION
Appeal Division – Rescind or Amend Decision

SOCIAL SECURITY TRIBUNAL MEMBER: Janet LEW

DATE OF DECISION: October 21, 2014

TYPE OF HEARING: On the Record

PARTIES

Applicant	J. W. O.
Representative for the Respondent	Tania Nolet (Counsel)

INTRODUCTION

[1] The Applicant filed a "new facts" application, pursuant to subsection 84(2) of the *Canada Pension Plan*, now repealed and replaced by section 66 of the *Department of Employment and Social Development Act* ("DESDA"), to re-open the decision of the Pension Appeals Board dated February 27, 2002, dismissing his appeal from the decision of a Review Tribunal dated April 19, 2000, on the grounds that there are now "new facts" or evidence that were unknown or unavailable previously. The "new facts" consist of the medical records of Dr. Wayne Gorman, his family physician.

BACKGROUND & HISTORY OF PROCEEDINGS

[2] The Applicant filed an application for Canada Pension Plan disability benefits on April 9, 1998. The Respondent denied his claim at the initial and reconsideration stages. A hearing before a Review Tribunal proceeded on February 10, 2000. On April 19, 2000, the Review Tribunal dismissed his application for disability benefits, as it found that his disability was not severe on or before his minimum qualifying period of December 1998 ("MQP"), pursuant to subsection 42(2) of the *Canada Pension Plan.*

[3] The Applicant appealed the decision of the Review Tribunal to the Pension Appeals Board, which heard the appeal on February 26, 2002. In reasons dated February 27, 2002, the Pension Appeals Board dismissed the appeal, on the grounds that the Applicant had not established disability within the meaning of the *Canada Pension Plan* on a preponderance of the evidence.

[4] The Applicant did not seek judicial review of the decision of the Pension Appeals Board.

[5] In a letter date- stamped received on January 22, 2007, the Applicant filed a "new facts" application (the "Application") with the Pension Appeals Board. The "new facts" consisted of three pages of clinical records, spanning the period from August 6, 1997 to August 17, 1998.

[6] On February 20, 2007, the Pension Appeals Board proposed to defer the application, to provide the Applicant with an opportunity to file a new application under subsection 84(2), in an effort to comply with *Kent v. Canada (Attorney General)* 2004 FCA 420. *Kent* stipulates that an applicant making a "new facts" application must firstly set out that the material was not discoverable with due diligence and why it was not so discoverable and secondly, must state how the material put forward as "new facts" may reasonably be expected to affect the outcome. The Pension Appeals Board gave no orders respecting timeframes as to when the Applicant might be required to file a new application.

[7] On April 1, 2013, this Application was transferred from the Pension Appeals Board to the Appeal Division of the Social Security Tribunal.

[8] In an undated letter date-stamped received by the Tribunal on November 18, 2013, the Applicant applied to re-open the decision of the Pension Appeals Board, on the basis of "new facts", pursuant to subsection 84(2) of the *Canada Pension Plan*. There is a hand-written notation "brought in for file July 5, 2013" in the top right-hand corner of the letter, but it is unclear who made the notation and what it represents. The Applicant explained that he had finally retrieved his medical records from Dr. Gorman, "after several years of trying". He explained that Dr. Gorman had been experiencing personal issues, resulting in incomplete reports and a delay in producing records. The Applicant submitted that these new records show that he has taken various medications since 1998 and that he had also been referred to Orthotics East for special orthopedic shoes. The Applicant did not file any supporting medical or other documentation or evidence.

[9] Sometime in early 2014, the Applicant filed approximately 90 pages of medical records, including specialists' consultation opinions and diagnostic reports. The Respondent acknowledged receiving a copy of the records. In a letter dated May 30, 2014, the Respondent submitted that the material does not contain an argument with respect to new

facts. The Respondent was of the position that the Applicant had not complied with section 46 of the *Social Security Tribunal Regulations*, in that he had not identified what new facts exist and how they meet the test for new facts, and he had not set out how they establish that he became disabled when he last qualified for benefits. (Section 46 of the *Regulations* sets out the form and content requirements for an application to rescind or amend.) Curiously, the Respondent claimed to be unable to respond to the Application, yet had already filed submissions in respect of the 90^{+}-page medical records, on March 31, 2014.

[10] In submissions dated March 31, 2014, the Respondent submitted that the Applicant's "new facts" application is out of time and therefore statute-barred, as it is deemed made and was in fact made more than one (1) year after the decision of the Pension Appeals Board had been communicated to him. The Respondent alternatively submitted that the evidence filed by the Applicant in support of his Application does not establish new facts, nor does it support a determination that his condition was severe and prolonged at his MQP of December 1998, and continuously thereafter.

[11] The Applicant responded to the Respondent's letter of May 30, 2014. He submitted that the evidence filed in support of his Application is new, as neither the Review Tribunal nor Pension Appeals Board had previously seen the information. He submitted that the evidence was not previously discoverable, as Dr. Gorman neglected to include vital medical information and also failed to address the progressive and prolonged nature of his disability. The Applicant noted that he underwent right and left hip replacement in April 2011 and February 2014, respectively, as evidence of the progressive nature of his disability. He explained that he has been on medication since 1997, and has to replace his inner soles and orthopedic shoes every two to three years. He included a letter dated July 2, 2013, from the Yarmouth Regional Hospital, which referred to enclosed reports. (The reports were not attached to the letter of July 2, 2013.) The Applicant also attached information about osteoarthritis from an online medical dictionary.

[12] On June 24, 2014, the Social Security Tribunal invited the Applicant to provide written submissions in response to the Respondent's submissions of March 31, 2014 and in particular, a response to the issues raised by subsection 66(2) of the DESDA, as well as the mode or format of hearing before me.

[13] The Applicant responded in July 2014. He advised that following the 2002 decision of the Pension Appeals Board, he had contacted "the Canada Pension Officer for Nova Scotia" who apparently had advised him to complete another disability application "based on a late extension". He also advised that he had received a blue book and white book in 2004, indicating that he was to have been placed on a Tribunal hearing list for 2004, but that a hearing apparently never took place. He claims that when he finally obtained his medical records "several years later", the records were incomplete as they did not document his drug usage between 1993 and 1997. He faults Dr. Gorman for the incomplete records. The Applicant provided an update regarding his current medical status, advising that he had undergone two total hip replacements, and that he continued to take medication and wear orthotics. The Applicant did not provide any submissions specifically addressing the issues raised by subsection 66(2) of the DESDA.

ISSUES

[14] The issues before this Tribunal are as follows:

(a) Is the application to rescind or amend filed on November 18, 2013, a "new application" or is it a deferral of the "new facts" application filed on January 22, 2007 with the Pension Appeals Board?

(b) Is the "new facts" Application filed on January 22, 2007 with the Pension Appeals Board statute-barred? If the application to rescind or amend filed with the Social Security Tribunal on November 18, 2013 can be considered a "new application," is it statute-barred?

(c) If neither of the Applications of January 22, 2007 or November 18, 2013 are statute-barred, does the evidence filed by the Applicant in support of his

Application of November 18, 2013 constitute "new facts" within the meaning of paragraph 66(1)(b) of the DESDA?

(d) If the materials constitute "new facts" within the meaning of paragraph 66(1)(b) of the DESDA, does the overall evidence support a determination that the Applicant's disability was severe and prolonged within the meaning of the *Canada Pension Plan*, on or before his MQP, and continuously since then?

MEDICAL EVIDENCE BEFORE THE PENSION APPEALS BOARD

[15] In its decision of February 26, 2002, the Pension Appeals Board referred to the documentary medical evidence before it. The medical records included the following:

- Medical reports of Dr. Gorman, dated April 6, 1998 and July 17, 2000
- consultation reports of Dr. A.F.B. Connelly, an orthopaedic surgeon, dated October 16, 1997, October 20, 1998 and March 25 and October 21, 1999
- consultation report of Dr. D. Petrie, also an orthopaedic surgeon, dated May 25, 1999 and October 6, 2000
- diagnostic reports dated January 3, 1997 and October 16, 1997

"NEW FACTS" DOCUMENTS

[16] The 90^{+}-page medical records filed in support of the "new facts" Application consist of the following:

- Yarmouth Regional Hospital E.R. notes, dated October 17, 1992, which indicate that the Applicant attended at the hospital due to back pain;
- Clinical notes of Dr. Gorman for the period from October 27, 1992 to November 19, 2001, largely regarding the Applicant's back, feet and psoriasis;

- Various reports and referrals including:

    1. Consultation report of Dr. Rob Miller, dermatologist, dated June 26, 1998;

    2. Consultation reports of Dr. Connelly, orthopaedic surgeon, dated October 16, 1997, October 20, 1998, March 25 and October 21, 1999, February 21, 2007 and April 23, 2009; letter regarding employability, dated July 24, 2000;

    3. Consultation report of Dr. David Petrie, orthopaedic surgeon, dated May 25, 1999;

    4. Facsimile from MacKenzie Orthotics, dated December 12, 2005 and February 9, 2006;

    5. Referral of November 15, 2006 by Dr. N. Anand to an orthopaedic surgeon;

    6. Report of Dr. Anand, dated September 9, 2008;

    7. Referral letter of Dr. Anand to Dr. A.B.F. Connelly, dated March 16, 2009;

    8. Orthopaedic assessments of Dr. William Beveridge, dated March 29 and November 28, 2012, and March 26, 2013 ; and

    9. Medical Report prepared by Dr. Zia Rahman, dated May 16, 2013

- Various diagnostic examinations of primarily the Applicant's right and left feet and ankles and right and left knee and hips, from the period October 16, 1997 to March 27, 2013.

[17] The Applicant did not make any submissions regarding any specific documents. Some of them, including Dr. Connelly's reports up to October 21, 1999, Dr. Petrie's report, and two diagnostic reports were before the Pension Appeals Board.

APPLICANT'S SUBMISSIONS

[18] The Applicant submits that his family physician caused the delay in filing the evidence in support of his "new facts" Application. He submits that the evidence is "new" as the Pension Appeals Board had not previously seen it, and it was not discoverable, as his physician had not been forthcoming with the records. He further submits that once the new evidence is taken into account in the overall review of the evidence, it becomes apparent that his disability is severe and prolonged.

RESPONDENT'S SUBMISSIONS

[19] The Respondent submits that the Applicant's "new facts" Application of November 2013 is out of time and cannot proceed, as it is deemed and was in fact made more than one (1) year after the decision of the Pension Appeals Board had been communicated to him. The Respondent submits that alternatively, the evidence filed in support of the "new facts" Application does not establish new facts, nor does it support a determination that his condition was severe and prolonged at the MQP of December 1998, and continuously thereafter.

LEGISLATION

Legislation Prior to April 1, 2013

[20] Prior to April 1, 2013, the *Canada Pension Plan* provided for reconsideration of a decision on the basis of new facts. Subsection 84(2) of the *Canada Pension Plan* as it read immediately prior to April 1, 2013 stipulated that:

> The Minister, a Review Tribunal or the Pension Appeals Board may, notwithstanding subsection 1, on new facts, rescind or amend a decision under this Act given by him, the Tribunal or the Board, as the case may be.

Legislation after April 1, 2013

[21] Section 229 of the *Jobs, Growth and Long-Term Prosperity Act 2012* ("JGLTPA") repealed subsection 84(2) of the *Canada Pension Plan*, such that if no decision had been

rendered in respect of a request under that section prior to April 1, 2013, it is deemed to be an application made on April 1, 2013 under section 66 of the DESDA.

[22] Subsection 261(1) of the JGLTP stipulates that:

> **261.** (1) If no decision has been made before April 1, 2013, in respect of a request made under subsection 84(2) of the *Canada Pension Plan*, as it read immediately before the coming into force of section 229, it is deemed to be an application made on April 1, 2013 under section 66 of the *Department of Human Resources and Skills Development Act* and is deemed to relate to a decision made, as the case may be, by
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> (a) the General Division of the Social Security Tribunal, in the case of a decision made by a Review Tribunal; or
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> (b) the Appeal Division of the Social Security Tribunal, in the case of a decision made by the Pension Appeals Board.

[23] Section 66 of the DESDA allows for rescission or amendment of a decision:

> **66.** (1) The Tribunal may rescind or amend a decision given by it in respect of any particular application if
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> (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
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> (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**.
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> (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**.
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> (3) Each person who is the subject of a decision may make only one application to rescind or amend that decision.
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> (4) A decision is rescinded or amended by the same Division that made it.
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> (My emphasis)

ANALYSIS

Is the "New Facts" Application Barred by a Statutory Limitation?

[24] The February 2002 decision of the Pension Appeals Board was communicated to the Applicant in or about February 2002. The Applicant filed his "new facts" Application under subsection 84(2) of the *Canada Pension Plan* with the Pension Appeals Board on January 22, 2007, close to five years after having received the Pension Appeals Board decision of February 27, 2002. The Pension Appeals Board made a decision on the "new facts" Application on February 20, 2007, proposing to defer it, enabling the Applicant to file a new application under subsection 84(2) of the *Canada Pension Plan.* However, the Applicant took no further steps in the matter until November 18, 2013, when he filed a new application to rescind or amend the 2002 decision of the Pension Appeals Board. Close to six years had elapsed since the Pension Appeals Board had deferred its decision on the "new facts" application in February 2007, and close to twelve years from the time that the Pension Appeals Board rendered its decision on the merits of the matter.

[25] Subsection 66(2) of the DESDA requires an Applicant with an application to rescind or amend a decision to make it within one year after the day on which a decision was communicated to that party. Subsection 261(1) of the JGLTPA provides that where an application made pursuant to subsection 84(2) of the *Canada Pension Plan* had not been decided prior to April 1, 2013, it is deemed to have been made on April 1, 2013.

[26] There are potentially two applications to consider: the one filed in January 2007, and the second one filed in November 2013.

[27] The Pension Appeals Board made a decision on the first application filed in January 2007, but the only "new evidence" before it was three pages of a doctor's notes. The Pension Appeals Board did not conclusively decide the issues, as it proposed to defer the matter and provide the Applicant with the opportunity to file a new application under section 84(2), with the expectation that he would then comply with *Kent*. That leaves the question as to whether the November 2013 application represents a new application altogether, as contemplated by the Pension Appeals Board, a "re-opening" of the February 2007 decision

of the Pension Appeals Board, or even a reconsideration of the "new facts" application filed in January 2007.

[28] I do not have any authority to "re-open" a decision of the Pension Appeals Board. In any event, the Pension Appeals Board in 2007 provided the Applicant with an opportunity to file a new application. The complicating wrinkle is that there was no time requirement by which the Pension Appeals Board might have intended the Applicant to file any additional materials. From a practical perspective, it would have made it much less complicated had the Pension Appeals Board proposed to provide the Applicant with an opportunity to file additional materials under subsection 84(2) of the *Canada Pension Plan* by a set deadline, while adjourning generally the January 2007 application, rather than giving him an opportunity to file a new application altogether. It would seem that the invitation to the Applicant to file a new application closed the door to re-opening or re-visiting the February 2007 decision of the Pension Appeals Board.

[29] The "new facts" application made in November 2013 is out of time, having been filed months after section 66(2) of the DESDA came into force and almost 12 years after the decision of the Pension Appeals Board in 2002.

[30] Hence, it seems that the only way to "save" the evidence filed in and since November 2013 is (1) if I do not treat the November 2013 records as a "new facts" application and (2) if I consider the November 2013 records as additional materials filed in support of the January 2007 "new facts" application.

[31] However, it appears *prima facie* that the deeming provisions of subsection 261(1) of the JGLTPA have the effect of barring even applications that were filed more than a year prior to the DESDA coming into force. The Applicant's "new facts" application filed in January 2007, deemed to have been filed on April 1, 2013, may now be barred by subsection 66(2) of the DESDA. There does seem to be some injustice to this (even if there had been a decision from the Pension Appeals Board in February 2007) given that when the "new facts" application was filed in January 2007, there was no applicable time limit as to when it could be filed.

[32] Arguably, the February 2007 decision of the Pension Appeals Board did not conclusively resolve the issues and may have left the January 2007 application with some life. The Applicant apparently believed so, as his letter filed in November 2013 made reference to subsection 84(2) of the *Canada Pension Plan*, when that section had been repealed.

[33] Given the deeming provisions which clearly apply to outstanding applications made prior to April 1, 2013, if I were to consider the evidence filed in and since November 2013 as additional materials filed in support of the January 2007 "new facts" application, I would thereby have to either suspend the one-year limitation date under subsection 66(2) of the DESDA as it applies to pre-April 2013 applications such as the Applicant's, or accept that the subsection does not have retroactive treatment. Practically, the impact is indistinguishable, but there is no authority which I am aware of which would allow me to suspend the limitation period.

[34] I addressed whether subsection 66(2) of the DESDA has retrospective application, in *H.H.K. v. Minister of Human Resources and Skills Development*, (October 20, 2014), CP29287 (AD-SST) (unreported). While the facts in that case can be distinguished, the issues are similar, in that while the applicant had filed a "new facts" application prior to April 1, 2013, the Pension Appeals Board had not made a decision on that application. The "new facts" application had been filed more than one year after the day on which the decision had been communicated to the applicant. In *H.H.K.*, I concluded that subsection 66(2) did not displace the presumption of statutory interpretation that a statute should not be given retroactive effect. I also found the reasons given by the Ontario Court of Appeal in *Green v. CIBC*, 2014 ONCA 90 to be compelling. I wrote,

> [50] . . . In *Timminco*[1], the Court of Appeal held that the statutory claim was statute-barred as leave to commence the action had not been obtained within the three-year limitation period and the applicable statute there (section 28 of the *Class Proceedings Act*, 1992, SO 1992, c. 6) did not suspend the running of the limitation period until leave had been obtained. In the *Green*[2] trilogy of cases, the Court of Appeal found that *Timminco* had unintended consequences, largely as it removed from plaintiffs the ability to control compliance with the

[1] *Sharma v. Timminco*, 2012 ONCA 107, 109 OR (3d) 569, leave to appeal to SCC refused, [2012] SCCA No. 157.
[2] *Green v. CIBC*, 2014 ONCA 90.

limitation period. Indeed, the Court of Appeal in the *Green* trilogy of cases stated at paragraph 27 that, "The fact that a plaintiff cannot unilaterally control whether its claim is brought within the applicable limitation period is a unique circumstance, and one which is foreign to the concept of a limitation provision." *Timminco* also served to undercut the viability of the section upon which the statutory cause of action could be found, and the effectiveness of using the class action procedure. The Court of Appeal also found that *Timminco* could have the indirect effect of forcing judges or the judicial administration to give undue priority to these particular actions and motions over other equally deserving litigation, in order to try to ensure limitation compliance.

[51] In the *Green* trilogy, the Court of Appeal referred to the *Celestica*[3] decision. There, Perell J. refused to strike the claim as statute-barred, by applying the doctrine of special circumstances. In dismissing the appeal in *Celestica,* the Court of Appeal confirmed the conclusion that the action in *Celestica* is not statute-barred. However, it did not explicitly refer to the doctrine of special circumstances in its reasons. Unlike its dismissal of the appeal in *Silver v. Imax,* where it stated that it was unnecessary to apply the doctrine of *nunc pro tunc,* the Court however did not state either that it was unnecessary for the Superior Court to have applied the doctrine of special circumstances.

[52] Ultimately, the Court of Appeal overturned itself in *Timminco* and also allowed *Green v. CIBC.* It did so after considering *Timminco* in the context of the history and purpose of the *Class Proceedings Act* and of the new statutory action. . . .

[53] In the *S.M.*[4] decision, my colleague was prepared to find that, based on the facts before her and in following Perell J. in *Celestica*, the doctrine of special circumstances "potentially applies to applications time-barred by subsection 66(2) of the DESD Act".

[54] Although we arrive at the same result, namely, that the statutory limitation can be extended, or that the subsection does not have retrospective application, I must respectfully diverge somewhat from the reasoning adopted by my colleague from the decision of Perell, J. that the doctrine of special circumstances may apply.

[55] Although the Ontario Court of Appeal did not reject the doctrine of special circumstances, I am not necessarily persuaded that the Ontario Court of Appeal embraced the doctrine of special circumstances, otherwise it would have applied the doctrine in its reasons. Although the *Green* trilogy of cases is in the context of class proceedings and securities litigation, I find that the general

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[3] *Millwright Regional Council of Ontario Pension Trust Fund (Trustees of) v. Celestica Inc.* (2012), 113 O.R. 264.
[4] *S.M. v. Minister of Human Resources and Skills Development*, (August 28, 2014), CP27286 (AD-SST) (unreported).

> principles set out therein as they relate to the limitation issue are applicable to the matter before me. To me, not only would it be foreign for a litigant or claimant to be unable to control whether his claim is brought within the applicable limitation period, but having done so, to then have his claim removed altogether. This is distinguishable from *Tabingo*[5], as there, the intent was clear; significantly, the statutory language is specific as to the dates of the applications which were to be terminated under the IRPA[6]. So, notwithstanding the *prima facie* retrospective nature of subsection 66(2) of the DESD Act, based on the principles set out in the *Green* trilogy, I find that subsection 66(2) does not have retrospective application.
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> [56] Had I adopted the doctrine of special circumstances, I would have looked to determine if there were any special circumstances which would have warranted the exercise of any discretion to extend the limitation period for filing of the Application, or not to retroactively apply subsection 66(2) of the DESD Act. I would have considered but not limited myself to factors such as the nature of the "new documents", the length of time following discovery and production of the "new documents", whether there is a plausible explanation for the delay that has not been challenged by the Respondent, and whether there is any identifiable prejudice to the Respondent or other parties. I would have also taken into account the fact that the Applicant took fully more than 11.5 months from the time that the Applicant filed her "new facts" Application in January 2013 to the time that she filed any supporting "new facts" documentation in mid-December 2013. This would have been approximately 8.5 months after the Application was deemed to have been made on April 1, 2013. With these considerations, I might have been much less inclined to presume that subsection 66(2) of the DESD Act ought not to be given retroactive effect.

[35] If I were to undergo a similar analysis here, in determining whether there might be any circumstances to warrant the exercise of any discretion to overcome the statutory bar set out in subsection 66(2), I would not be prepared to employ the doctrine of special circumstances. In February 2007, the Pension Appeals Board had set out the test for the Applicant and invited him to file a new application under subsection 84(2). Although the Pension Appeals Board did not stipulate any timeframe when the Applicant ought to file a new application and notwithstanding the fact that there was no statutory time limit then, in my opinion, it would be unreasonable by any measure to suppose that the Pension Appeals Board contemplated that an application or any additional new materials would be filed after several years. There is a risk of prejudice to the Respondent caused by the lengthy delay.

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[5] *Tabingo v. Minister of Citizenship and Immigration*, 2013 FC 377.
[6] *Immigration and Refugee Protection Act*, SC 2001, c. 27.

[36] I have however already determined that subsection 66(2) ought not to be given retroactive effect for the reasons set out above, i.e. there is a presumption of statutory interpretation that a statute should not be given retroactive effect. As such, I turn now to determine whether the records filed in and since November 2013 constitute "new material facts" as defined by paragraph 66(1)(b) of the DESDA.

Is the New Evidence Material and was it Discoverable?

[37] Paragraph 66(1)(b) of the DESDA requires an applicant to demonstrate that the new fact is material and that it could not have been discovered at the time of the hearing with the exercise of reasonable diligence. In this case, the hearing refers to the one before the Pension Appeals Board which took place on February 26, 2002.

[38] The Respondent submits that the new facts test is essentially the same test as under subsection 84(2) of the *Canada Pension Plan.* The Respondent submits that in order for evidence to be admissible as a "new fact", the evidence must meet a two-part test:

(1) it must establish a fact 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").

The Respondent relies on *Kent, Canada (Attorney General) v. MacRae,* 2008 FCA 82 at paragraph 16, *Higgins v. Canada (Attorney General),* 2009 FCA 322 (CA) at paragraph 36, and *Mazzotta v. Canada (Attorney General),*2007 FCA, 297 at paragraph 45.

[39] The Respondent further submits that the evidence must have existed at the time of the original hearing, otherwise, any inquiry as to whether an applicant had exercised reasonable diligence would become notional. The Respondent cites for instance evidence arising after the original hearing could be routinely found not to have been discoverable at the time of the hearing.

[40] The Respondent further submits that an applicant must provide evidence as to what steps, if any, were taken to find the new evidence and that he must also explain why the new evidence could not have been provided at the time of the original hearing: *Carepa v. Canada (Minister of Social Development),* 2006 FC 1319 at paragraph 26.

[41] A cursory review of the materials filed in and around November 2013 also reveals that the materials are largely those of third parties, as opposed to having been prepared by Dr. Gorman.

[42] There is a reasonable explanation why the Applicant was unable to previously provide a copy of Dr. Gorman's file. Despite his efforts and persistence, his family physician had not been forthcoming with producing the medical file. I accept that the Pension Appeals Board did not see Dr. Gorman's medical file. However, that does not conclude the investigation, given that the file consists not only of his handwritten notes, but also various diagnostic examinations and consultation reports of various specialists. Some of these records had been before the Pension Appeals Board in 2002. While it may have been more laborious for him to pursue, the Applicant likely could have sought production of the diagnostic examinations and consultation reports directly from the third party providers. For instance, the Applicant likely could have obtained the medical records of Dr. Connelly directly from him or his office. Dr. Connelly's file likely would have contained copies of the various diagnostic examinations, given that it was Dr. Connelly who ordered many of them.

[43] I am of the view that the bulk of the evidence does not meet the first part of this test, as I find that the records not only existed, but were discoverable or likely discoverable, had the Applicant exercised due diligence. Had the Applicant been unable to obtain some of these records directly from other sources, he could have addressed this point and provided some evidence of his efforts to obtain the records. He has not demonstrated that he undertook any efforts to obtain these third party records, other than through Dr. Gorman. Those efforts alone, in my view, are insufficient. As the Respondent submits, an applicant must provide evidence as to what, if any, steps were taken to find the new evidence and explain why the new evidence could not have been provided at the time of the original hearing: *Carepa v. Canada (Minister of Social Development),* 2006 FC 1319.

[44] The Applicant also submits that the "new facts" show that his condition is progressive and prolonged. He states that Dr. Gorman had neglected to mention in his reports that the Applicant's condition is progressive and prolonged. The Pension Appeals Board had other evidence before it and was not restricted to considering the opinion of Dr. Gorman alone. The Pension Appeals Board noted that it based its decision on not only the family physician's opinion, but also those of other medical specialists, as well as the evidence from the Applicant.

[45] If the Applicant intended that the prolonged and progressive nature of his medical disability relates to his feet, there was evidence – in the form of the CPP Medical Report dated April 17, 1998 of Dr. Gorman and the medical report dated October 21, 1999 of Dr. Connelly -- before the Pension Appeals Board to suggest that the Applicant's condition was prolonged, when Dr. Gorman described it as "chronic" and Dr. Connelly wrote that the disability is permanent. I point these out to show that the "new material facts" now being advanced by the Applicant cannot be considered "new" as they previously existed and were before the Pension Appeals Board.

[46] The Applicant submits that the osteoarthritis in his hips is prolonged and progressive, as evidenced by the hip replacement surgery he underwent in April 2011 and February 2014 for his right and left hip, respectively. I have reviewed the "new material facts" and do not see where any of his physicians have referred to his hips at the time of his MQP in December 1998. He received investigations and treatment then primarily for his feet and psoriasis. Indeed, complaints regarding his hip do not surface in the records until sometime well after his MQP. Dr. Connelly wrote in his report dated February 21, 2007 that he had last seen the Applicant in 1999; there was no mention of any hip pain in Dr. Connelly's consultation reports prior to February 2007 that I am readily able to see. In my view, the disability had to have not only been symptomatic by the MQP, but also had to have been severe by then. The fact that the disability arising out of the osteoarthritis in his hips might now be considered prolonged is insufficient to meet the materiality part of the test. There is no evidence to suggest that the osteoarthritis in his hips had even become symptomatic or were severe at the Applicant's MQP. Given these considerations regarding the Applicant's feet and hips, I do not find any credence to any submissions that the new

facts could reasonably be expected to affect the outcome of the decision of the Pension Appeals Board.

[47] The Applicant relies on the records to show that he had been on medication as early as July 21, 1997. This is in direct contradiction to the evidence before the Pension Appeals Board in February 2002. The Pension Appeals Board wrote at paragraph 10, "[The Applicant] acknowledged that at the time of his application for a disability pension, April 7, 1998, he was not on any medication." The Pension Appeals Board noted that there were no medications or treatments listed by the Applicant in one of the exhibits before it. I do not see in any of the medical records filed by the Applicant where it indicates what medications he may have been taking as early as 1997 or 1998. In his submissions of June 20, 2014, the Applicant listed a number of medications which he claims he has been taking since 1997, to the present. These include Vioxx, Robaxacet, Novaprofen, Celebrex, Naproxen, Cortisone, Endocets and Teva-semide. However, even the February 2007 consultation report of Dr. Connelly and the recent CPP Medical Report dated May 16, 2013 from Dr. Rahman seems to undermine his submissions, as the medications listed in Dr. Connelly's report indicate that he was taking only Celebrex then, and the May 2013 report indicates that he was taking only Naproxen. Even so, even if I were to accept that the records state that the Applicant has been taking various pain relief and other medications since 1997 or 1998, this fact alone would not change the outcome of the hearing before the Pension Appeals Board. The fact that the Applicant takes pain relief medication is generally not a reliable measurement of the severity of one's medical disability. In my view, the fact that the Applicant might have been on a number of different medications since at least 1997 would not have changed the outcome of the hearing before the Pension Appeals Board.

[48] Overall, the Applicant also has not shown how the evidence meets the second part of the test, that the "new facts" are material in the sense that they could reasonably be expected to affect the outcome of the prior hearing.

[49] Apart from the records of third parties, Dr. Gorman's medical file also contains various handwritten notes. In this regard, I share the same observations which had been raised by the Pension Appeals Board in the decision of February 20, 2007, namely, that,

where the handwritten medical notes are concerned, they are written in the "usual unintelligible fashion of a medical practitioner". The handwritten notes are of very limited utility in that regard.

[50] The Applicant has not satisfied me that he has met both the "discoverability" and "materiality" aspects of the test for new facts.

Severe and Prolonged Disability

[51] Since I have decided that the New Facts Application does not establish the existence of new facts, I need not assess whether the Applicant's disability was severe and prolonged at his MQP.

CONCLUSION

[52] The Application is dismissed.

Janet Lew
Member, Appeal Division