Date: 20091110

Docket: A-550-08

Citation: 2009 FCA 322

CORAM: **SHARLOW J.A.**
RYER J.A.
TRUDEL J.A.

BETWEEN:

MICHAEL P. HIGGINS

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at St. John's, Newfoundland and Labrador, on September 17, 2009.

Judgment delivered at Ottawa, Ontario, on November 10, 2009.

REASONS FOR JUDGMENT BY: TRUDEL J.A.

CONCURRED IN BY: RYER J.A.

DISSENTING REASONS BY: SHARLOW J.A.

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REASONS FOR JUDGMENT

TRUDEL J.A.

[1] This is an application for judicial review of a decision of the Pension Appeals Board (the Board), dated September 30, 2008, which allowed the appeal of the Minister of Human Resources and Skills Development Canada from a decision of a Review Tribunal, dated December 15, 2005, which granted Mr. Michael P. Higgins disability pension benefits pursuant to paragraph 42(2)(*a*) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (the *Plan*), based on the minimum qualifying period (MQP) date of December 31, 1997.

[2] For the reasons that follow, I find that this Court's intervention is not warranted. I would therefore dismiss the application for judicial review without costs.

The Issue

[3] The issue before this Court is whether the Board made a reasonable decision when it found that the evidence before it did not meet the "new facts" test to establish the applicant's occupational capacity as at the MQP date.

Relevant Legislation

[4] According to the combined operation of paragraph 44(1)(*b*) and subsection 44(2) of the *Plan*, a person is entitled to a disability pension if the person has a disability on the last day of the MQP as defined in subsection 44(2).

[5] The definition of "disability" is found in paragraph 42(2)(*a*) of the *Plan*, which provides that a person "shall be considered to be disabled only if he is determined in prescribed manner to have a severe and prolonged mental or physical disability …". For the purposes of this application for judicial review, a "disability is severe only if by reason thereof the person in respect of whom the determination is made is incapable regularly of pursuing any substantially gainful occupation …" (emphasis added) (*Plan* at subparagraph 42(2)(*a*)(i)).

[6] It is undisputed that if Mr. Higgins' disability did not meet the statutory definition of disability on December 31, 1997, the end of his MQP, he cannot qualify for a disability pension.

[7] In the event that a person's situation does not meet the definition of "disability" and his application for a disability pension is denied, the *Plan* provides for the reconsideration of a decision on the basis of new facts. Thus, it is useful to bear in mind the language of subsection 84(2) of the *Plan*:

Canada Pension Plan (R.S., 1985, c. C-8)	*Régime de pensions du Canada* (L.R., 1985, ch. C-8)
84. (2) 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.	84. (2) Indépendamment du paragraphe (1), le ministre, un tribunal de révision ou la Commission d'appel des pensions peut, en se fondant sur des faits nouveaux, annuler ou modifier une décision qu'il a lui-même rendue ou qu'elle a elle-même rendue conformément à la présente loi.
(emphasis added)	(je souligne)

The "New Facts" Test

[8] This Court has clearly enunciated the 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 *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] F.C.J. No. 393 (*MacRae*), at paragraph 16; see also *Kent v. Canada (Attorney General)*, [2004] F.C.J. No. 2083, at paragraphs 33-35; *Canada (Minister of Human Resources Development) v. Macdonald*, [2002] F.C.J. No. 197, at paragraph 2; *Mazzotta v. Canada (Attorney General)*, [2007] F.C.J. No. 1209, at paragraph 45).

[9] In the context of this case, a "new fact" is a fact that existed at the time of the 1999 Review Tribunal but could not have been discovered at that time by Mr. Higgins with due diligence, and could reasonably be expected to establish his work capacity, or lack thereof, as it existed on December 31, 1997, rendering him eligible for a disability pension as of that date.

Relevant Facts and Procedural History

[10] Mr. Higgins was born in 1961. He has a grade 9 education. The only work he has ever done is that of a labourer.

[11] In December of 1996, when Mr. Higgins was 35 years old, he was hospitalized for a heart condition diagnosed as infective endocarditis and aortic regurgitation. He was attended by Dr. Y.P. Shetty, an internist, who referred him to Dr. Barry Rose, a cardiologist. Dr. Rose saw Mr. Higgins in March of 1997 and determined that he required cardiac catheterization with a view to a valve replacement. That surgery was done in May of 1997 by Dr. A. Addetia. Mr. Higgins was also attended by Dr. M.T. Cohen, a family physician who first saw him on March 4, 1997.

[12] In March of 1997, Mr. Higgins submitted an application for a disability pension. The Minister rejected Mr. Higgins' application initially and on reconsideration. On October 16, 1997, Mr. Higgins appealed to the Review Tribunal. His appeal letter reads in relevant part as follows:

> […] On the advice of my medical doctor, heart surgeon and also the heart specialist, I am not able to go anywhere alone and have to have another person present at all times, whether it's in a car or for a walk or to the store and this fact alone limits the kind of jobs I would be able to get. I must have a blood test taken once per week and have strictly adhered to all measures my doctors have advised me on and have made significant lifestyle changes as instructed and still find myself tired and breathless even after the slightest everyday functions and have to rest often during the day. I certainly cannot at this time, on the advice of my doctors, consider employment of any kind.
>
> My entire career has been based on labor work and I have been advised against this type of work. The denial letter stated that my condition will not continue to prevent me from work as my file shows that I will soon be able to do work suitable to my condition on a regular basis. Is that saying that I will be capable of finding employment that does not involve any stress or physical work, that will allow me to sit down most of the day and rest when I need to, or allow me to leave when I need to go for a weekly blood tests.
>
> I am a labourer and have been doing this kind of work all my life and certainly do not know of any employers who offer sedentary employment as I have described above or "the work suitable to my condition" as was stated it in the letter I received. After having major heart surgery which is quite serious and as advised by my medical specialists, I will not be able to work at any strenuous or stressful job, and even my normal everyday functions are also limited and cannot be performed as in the past. I do not like having to stay off work but am forced to do so at this time. To go against the medical advice given me would put me at serious risk for more serious damage which could certainly be life threatening. […]
>
> (emphasis added)

[13] Mr. Higgins' appeal to the Review Tribunal was heard on December 16, 1998. In a decision dated February 24, 1999, the Review Tribunal dismissed his appeal, for the reasons that read in relevant part as follows:

> […] The evidence presented today demonstrates that Mr. Higgins had heart valve replacement surgery in 1997. Since that date he has been stabilized on the blood thinning drug warfarin and he has had satisfactory results on a treadmill test. Mr. Higgins told the Tribunal that he has not had any follow-up visits with any of the specialists that were involved in his cardiac care and that he now sees only his family doctor, Dr. Cohen. He indicated that he sees Dr. Cohen approximately once per month but that these visits are not related to any complaints regarding his heart condition. There is reference in the Hearing Case File to a follow-up EKG but Mr. Higgins says that he doctors have never called him in to have this test done and that he has never discussed it with his family doctor.
>
> The doctors appear to be unanimous in their view that Mr. Higgins will not be able to return to the physically stressful work of a labourer on a construction site or on an industrial site. Mr. Higgins' heart condition in no way prevents him from pursuing some other form of gainful work. The Tribunal acknowledges that Mr. Higgins has some limitations because of his lack of formal education. This Tribunal can only find Mr. Higgins disabled based on his physical or mental disability; not on his lack of training. If Mr. Higgins finished grade twelve, then there would be jobs that he could do. The Appellant acknowledged today that he could work on a highway crew as a flag person as long as it was not physically stressful.

[14] Mr. Higgins did not seek leave to appeal this 1999 decision to the Board.

[15] The following year, Mr. Higgins was seasonally employed as a chainsaw operator between December of 2000 and February of 2001, at which time he was laid off. In June of that year, he suffered a heart attack.

[16] In January 2002, Mr. Higgins began a course at a technical college. He obtained a diploma as a millwright 18 months later. On January 28, 2004, he suffered a stroke and has been unable to work since.

[17] In 2004, Mr. Higgins submitted a new application for disability benefits. That application was denied both initially and on reconsideration. In January of 2005, Mr. Higgins appealed to the

Review Tribunal. In September of 2005, he also applied for reconsideration of the 1999 Review Tribunal decision based on new facts evidenced by the following four documents that are at issue before this Court:

1. A letter from Mr. Higgins' wife Sharon dated September 3, 2005 that serves as a history of their relationship and an outline of Mr. Higgins' medical problems. She claims that several of her husband's doctors, including Dr. Cohen, had told them after the valve surgery that "heart attacks and stroke are known complications of valve replacements" (applicant's record at page 24).

2. A handwritten note dated May 25, 2005 from Dr. Cohen, his family doctor, which states: "His Cerebrovascular Accident is directly related to the infective endocarditis and valve replacement. CVA is a known complication of this medical illness" (applicant's record at page 21).

3. A letter dated June 2, 2005 from Chris Fudge, a friend of the applicant, which indicates that he worked with Mr. Higgins in Alberta in 2001 and 2002 and found that he was not well. As he needed help to keep up with the rest of the crew, Mr. Fudge wrote that "we" help him out by "pulling the extra weight" (applicant's record at page 22).

4. A letter from Kirk Goobie and Kevin Hayden stamped as received by the Office of the Commissioner of Review Tribunals on September 16, 2005, that explains that

> they attended technical college with Mr. Higgins from January 2002 to May 2003. They state that Mr. Higgins had serious difficulty performing "tasks with pumps, motors and any type of lifting" and that they often had to suggest that he stop working or actually do the work for him (applicant's record at page 23).

[18] At a hearing on October 11, 2005, the Review Tribunal considered both Mr. Higgins' appeal from the Minister's denial of his second application, and his application for reconsideration of the 1999 Review Tribunal decision. In a decision dated December 15, 2005, the Review Tribunal dismissed his appeal, but granted the application for reconsideration based on new facts, and reversed the 1999 Review Tribunal decision.

[19] The Minister was granted leave to appeal this decision to the Board. In a decision dated March 29, 2007, the majority of the Board confirmed the decision of the 2005 Review Tribunal. The Minister applied to this Court for judicial review of the 2007 Board decision. This Court then, on consent of the parties, allowed the application and referred the matter back to the Board for a rehearing, which took place on August 11, 2008.

The 2008 Decision of the Pension Appeals Board

[20] Under subsection 84(2) of the *Plan*, the Board is "obliged to determine *de novo* the merits of an appeal, on the basis of all the available evidence, including the facts accepted by the Tribunal as *new facts*" (*Kent v. Canada (Attorney General)*, [2006] F.C.J. No. 1746, at paragraph 7; see also

Canada (Minister of Human Resources Development) v. Landry, [2005] F.C.J. No. 778, at paragraph 10).

[21] In its decision dated September 30, 2008, the Board determined that the 2005 Review Tribunal had erred in concluding that there were "new facts" justifying the reconsideration of the 1999 Review Tribunal decision, and for that reason allowed the Minister's appeal.

[22] Despite its conclusion on the "new facts" issue, the Board also addressed the issue of disability and stated that the evidence on the applicant's disabling condition as at the MQP "does not establish on a balance of probabilities, that [the applicant] was unable regularly to pursue substantially gainful employment after his valve replacement surgery and, in particular from December 2000 to February 2001 and that he was also able to attend school and be retrained as a millwright for over a year starting in January 2002" (reasons for judgment of the Board, at paragraph 10).

[23] The Board found that the letters of Chris Fudge, Kirk Goobie and Kevin Hayden were not "new fact" evidence as "they do not contain evidence which was in existence at the time of the Respondent's MQP. They do not contain any new information which was relevant to his condition on December 31, 1997" (reasons for judgment of the Board, at paragraph 7).

[24] With respect to the letter of Ms. Higgins, the Board concluded that it did not constitute "new fact" evidence because:

> […] it does not meet the discovery test in the sense that while the consequences of the Respondent's condition following his valve replacement could, according to his medical advisors, possibly result in future heart attack or a stroke, that was a theory or possibility which was contemplated at his MQP date but did not occur until several years later.

Therefore, the possible connection between infective endocarditis and valve replacement to a future heart attack or stroke was known at the end of Mr. Higgins' MQP by his physicians, and apparently by himself and his wife as well (reasons for judgment of the Board, at paragraph 8).

[25] Similarly, the Board also found that Dr. Cohen's note did not constitute "new fact" evidence as the information contained in it was known by the parties at the time of the original Review Tribunal hearing (reasons for judgment of the Board, at paragraph 9).

[26] The 2008 decision of the Board had the effect of restoring the 1999 Review Tribunal decision denying Mr. Higgins' application for a disability pension. Mr. Higgins is now seeking judicial review of the 2008 decision of the Board on the basis that its conclusions are unreasonable.

Position of the Parties

[27] The applicant submits that the Board erred in its application of both the discoverability and materiality branches of the "new facts" test under subsection 84(2) of the *Plan* (applicant's written representations, at paragraphs 29-30).

[28] The applicant also contends that the four documents constituting the alleged new facts were properly accepted as such by the October 11, 2005 Review Tribunal hearing as "none of this evidence was discoverable at the time of the original Review Tribunal hearing in December 1998 […]" (applicant's written representations at paragraph 36).

[29] Mr. Higgins argues that his wife's letter provides some evidence in relation to the applicant's ongoing condition between the date of the first Review Tribunal hearing and his heart attack and stroke (applicant's written representations at paragraph 35). He submits that Chris Fudge's letter gives insight into the applicant's deteriorating condition between the Review Tribunal hearing and the applicant's heart attack and stroke, and claims that the letter from Kirk Goobie and Kevin Hayden provides evidence as to the applicant's inability to properly participate in a course of studies following the Review Tribunal hearing (applicant's written representations at paragraph 35).

[30] Mr. Higgins also claims that Dr. Cohen's note is evidence that the applicant's stroke relates directly to the fact that he had infective endocarditis and heart valve replacement and, furthermore, contains a clear statement that a stroke is a known complication of the applicant's previous problems (applicant's written representations at paragraph 34).

[31] The respondent, on the other hand, submits that the decision of the Pension Appeals Board to refuse to accept these documents as "new fact" evidence was reasonable as it was one of the possible, acceptable outcomes based on the facts and law (respondent's memorandum of fact and law, at paragraph 76).

[32] The respondent argues that "to be considered as new facts under subsection 84(2) of the [*Plan*], new evidence must not have been previously discoverable with reasonable diligence at the time of the original hearing and must be material," and notes that the "Federal Court has stated that the test for new facts implies that the information existed at the time of the original hearing" (respondent's memorandum of fact and law, at paragraph 54). The respondent submits that the Board correctly identified the "new facts" test and that it was reasonable in its application of the test to the facts at issue (respondent's memorandum of fact and law, at paragraphs 77 and 79).

[33] The respondent submits that none of the letters from friends, co-workers and family contains any new information that is relevant to the applicant's condition at the end of his MQP in December of 1997, nor do they contain evidence that was in existence at the time of the Review Tribunal proceeding. For these reasons, the respondent contends that all three letters fail the discoverability test (respondent's memorandum of fact and law, at paragraphs 72-73).

[34] The respondent also argues that the information in Dr. Cohen's note fails to meet the discoverability test, as the occurrence of the stroke and the effects thereof on the applicant's condition were not in existence at the time of the Review Tribunal hearing (respondent's memorandum of fact and law, at paragraph 70). Moreover, the respondent submits that the risks associated with the applicant's heart condition were well-known prior to the hearing.

Standard of Review

[35] The task of this Court is to review the 2008 decision of the Pension Appeals Board. The determination of whether there are "new facts" within the meaning of subsection 84(2) of the *Plan* is reviewable on a standard of reasonableness (*Taylor v. Canada (Minister of Human Resources Development)*, 2005 FCA 293 at paragraph 12). According to paragraph 47 of *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, this standard is "concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."

Analysis

[36] Principally, the question before this Court hinges on the first branch of the two-part "new facts" test – that of discoverability. As noted above, this Court clearly stated the test in *MacRae*, *supra*, as a two-fold exercise that incorporates both a discoverability and materiality branch. With regard to the discoverability branch, the alleged new fact evidence "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" (*MacRae*, *supra*, at paragraph 16) (my emphasis).

[37] It was open for the Board to conclude that the letters from the applicant's friends and co-workers did not contain any evidence of any fact that was in existence at the time of the 1999 Review Tribunal hearing. Indeed, a description of Mr. Higgins' condition in the years 2000 to 2003

does not meet the requirements of the discovery branch of the test. Accordingly, the Board's finding that this evidence failed to satisfy the "new facts" test was reasonable.

[38] Ms. Higgins' letter also fails the discoverability branch of the test in that it contained information on the risks associated with valve replacement surgery which were known at the time of the original hearing. This is supported by Mr. Higgins' appeal letter dated October 16, 1997, which acknowledged that going against medical advice would put him "at serious risk for more serious damage which could certainly be life threatening." In addition, her letter concerned the consequences of Mr. Higgins' heart condition, which were not in existence at the time of the hearing.

[39] I also find that the Board made a reasonable decision in determining that Dr. Cohen's note did not satisfy the "new facts" test. The note states that "Cerebrovascular Accident" or "CVA" is a known complication of infective endocarditis. It was therefore open to the Board to conclude that the note did not qualify as "new fact" evidence, as the information was known by the parties at the time of the original Review Tribunal hearing in 1999.

[40] As none of these documents satisfy the first branch of the "new facts" test, I need not address the second branch of the test relating to materiality.

[41] Upon careful consideration of the Board's decision, I am of the view that its conclusions in relation to all four documents were reasonable. The Board applied the correct test and considered all

of the relevant evidence; I am of the view that it was open to the Board to conclude as it did. Accordingly, the intervention of this Court is not warranted.

Conclusion

[42] Therefore, I would dismiss this application for judicial review without costs.

"Johanne Trudel"
J.A.

“I agree
C. Michael Ryer J.A.”

SHARLOW J.A. (dissenting reasons)

[43] I regret that I am unable to agree with my colleagues on the disposition of this application for judicial review.

[44] The object of the work of the Minister, the Review Tribunal and the Board is to ensure that claimants who are entitled to a disability pension receive it, and those who are not so entitled do not. The “new facts” provision should not be applied so strictly or mechanically as to preclude a claimant with a potentially valid claim from having his or her case heard on the merits. In particular, the determination of the due diligence requirement requires a fair consideration of the possibility that the claimant may be facing evolving circumstances. I repeat what I said in *Kent* at paragraphs 35-37:

> [35] In the context of an application to reconsider a decision relating to entitlement to benefits under the *Canada Pension Plan*, the test for the determination of new facts should be applied in a manner that is sufficiently flexible to balance, on the one hand, the Minister's legitimate interest in the finality of decisions and the need to encourage claimants to put all their cards on the table at the earliest reasonable opportunity, and on the other hand, the legitimate interest of claimants, who are usually self-represented, in having their claims assessed fairly, on the merits. In my view, these considerations generally require a broad and generous approach to the determination of due diligence and materiality. This is consistent with the words of Isaac C.J. at paragraph 27 of *Villani* (cited above):
>
> > [27] In Canada, courts have been especially careful to apply a liberal construction to so-called "social legislation". In *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at paragraph 36, the Supreme Court emphasized that benefits-conferring legislation ought to be interpreted in a broad and generous manner and

> that any doubt arising from the language of such legislation ought to be resolved in favour of the claimant.
>
> [36] For most disabling conditions, it is reasonable to expect the claimant to present a complete picture of his or her disability at the time of the first application, or on a first appeal to the Review Tribunal or the Pension Appeals Board. However, there are some disability claims, such as those based on physical and mental conditions that are not well understood by medical practitioners, that must be assessed against the background of an evolving understanding of a claimant's condition, treatment and prognosis. It is especially important in such cases to ensure that the new facts rule is not applied in an unduly rigid manner, depriving a claimant of a fair assessment of the claim on the merits.

[45] In the context of this case, a fact is a “new fact” if it could not have been discovered by Mr. Higgins with due diligence before the 1999 Review Tribunal hearing (discoverability), and it could reasonably be expected to establish that he was eligible for a disability pension on December 31, 1997 (materiality).

[46] It has been demonstrated that the new facts could reasonably be expected to affect the result of the 1999 Review Tribunal hearing, because they did so. Taking the new facts into account, the Review Tribunal in 2005 and the majority of the Board in 2007 reversed the decision of the 1999 Review Tribunal and concluded that Mr. Higgins was entitled to a disability pension. Those decisions did not stand, but for reasons unconnected to their assessment of the merits of Mr. Higgins’ claim. Unless it is assumed that both the 2005 Review Tribunal and the majority of the 2007 Board were unreasonable in that assessment, the only real question is the discoverability of the new facts. Therefore, the four documents in issue in this case are evidence of new facts if Mr. Higgins could not, with due diligence, have discovered those facts before the 1999 Review Tribunal hearing.

[47] As I read the decision of the 2008 Board, which is the decision before this Court, they concluded that the four documents in issue were capable of proving only that Mr. Higgins was unable after his surgery to do strenuous work, and that fact was known before the 1999 Review Tribunal hearing. It was on that same understanding of the evidence that the 2008 Board concluded that Mr. Higgins' claim could not succeed in any event.

[48] As I read the record, Mr. Higgins was attempting to establish that it was only after the 1999 Review Tribunal hearing that he discovered, contrary to the optimistic expectations of his doctors, that he was *never* capable regularly of pursuing a substantially gainful occupation. It seems to me that the 2008 Board failed to understand the theory of Mr. Higgins case, and so they were led to the unreasonable conclusion Mr. Higgins could with due diligence have discovered the new facts before the 1999 Review Tribunal hearing.

[49] To illustrate this point, it is necessary to consider only the letter from Ms. Higgins dated September 3, 2005. An important part of that letter, which is not mentioned at all by the 2008 Board, is Ms. Higgins' statement that, between the date of Mr. Higgins' surgery and the time he tried to work as a chainsaw operator in 2000 (a period that obviously includes the last day of his minimum qualifying period), he looked without success for work that he was capable of doing. In my view, Ms. Higgins was trying to explain, albeit inartfully, that after the surgery Mr. Higgins never improved to the point where he was able to do any work. The letters from Mr. Higgins' friends and co-workers provide some corroboration, in so far as they establish that Mr. Higgins

could not do the work of a chainsaw operator or a millwright, so that his attempts to do so should not, in effect, be held against him.

[50] In my view, no degree of due diligence on the part of Mr. Higgins prior to the 1999 Review Tribunal hearing would have led him to realize that his actual work capacity after the surgery was worse than the doctors thought at that time.

[51] The part of Ms. Higgins' September 3, 2005 letter that the 2008 Board emphasized was her statement to the effect that Mr. Higgins' diagnosis (infective endocarditis) and surgery was connected to a known risk of heart attacks and strokes. The 2008 Board finds that this risk was a fact known to Mr. Higgins at the time of the 1999 Review Tribunal hearing. In my view, this finding is not supported by the record. More importantly, it is not germane.

[52] In support of this finding, the 2008 Board cites the statement in Ms. Higgins' September 2005 letter that the doctors attending Mr. Higgins had told them that "heart attacks and strokes are known complications of valve replacements". This statement does not say or suggest *when* the doctors told Mr. and Ms. Higgins about the risk of stroke, and there is nothing in the record indicating that they were told of that risk prior to the 1999 Review Tribunal hearing. The fact that the *doctors* might have known of those risks all along is beside the point.

[53] In any event, it seems to me that Mr. Higgins' understanding, or lack of understanding, of his medical risks is also beside the point. His entitlement to a disability pension depends upon his

work capacity at the end of 1997. The key question is this: could Mr. Higgins have known in 1999 that his doctors in 1997 had overestimated his work capacity? In my view, the only reasonable conclusion is no. I conclude that Mr. Higgins is entitled to have the merits of his claim determined on the basis of all of the available evidence.

[54] For these reasons, I would allow this application for judicial review with costs, set aside the decision of the 2008 Board and refer this matter to a new panel of the Board for rehearing in accordance with these reasons, on the basis that the four documents in issue are evidence of “new facts” within the meaning of subsection 84(2) of the *Canada Pension Plan.*

"K. Sharlow"

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-550-08
STYLE OF CAUSE:	Michael P. Higgins v. Attorney General of Canada
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DISSENTING REASONS BY:	SHARLOW J.A.
DATED:	November 10, 2009

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