Federal Court of Appeal | Cour d'appel fédérale

Date: 20240105

Dockets: A-178-20
A-16-21

Citation: 2024 FCA 4

CORAM: **DE MONTIGNY C.J.**
LOCKE J.A.
ROUSSEL J.A.

BETWEEN:

PAULINE MILNER

Applicant

and

ATTORNEY GENERAL OF CANADA

Respondent

Heard at Fredericton, New Brunswick, on October 24, 2023.

Judgment delivered at Ottawa, Ontario, on January 5, 2024.

REASONS FOR JUDGMENT BY: DE MONTIGNY C.J.

CONCURRED IN BY: LOCKE J.A.
ROUSSEL J.A.

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REASONS FOR JUDGMENT

DE MONTIGNY C.J.

[1] These two applications for judicial review (files A-16-21 and A-178-20) are the culmination of Ms. Milner's long battle to receive a Canada Pension Plan (CPP) disability pension. She first applied for CPP benefits in 2013, and has since attempted to convince the General Division (GD) and the Appeal Division (AD) of the Social Security Tribunal (SST) to

overturn the initial decision to deny her disability application made by Service Canada on July 16, 2013.

[2] In file A-178-20, Ms. Milner challenges the decision of the AD confirming the earlier decision of the GD to the effect that she failed to present new material facts that would justify reopening its 2018 determination that she had not become disabled by the end of her minimum qualifying period (MQP). In file A-16-21, Ms. Milner asks this Court to quash the decision of the AD confirming the decision of the GD on the merits, alleging that both divisions of the SST committed various errors when they decided that she was not entitled to the CPP disability pension.

[3] After having carefully reviewed and considered both parties' records, as well as their written and oral submissions, I have come to the conclusion that the AD did not commit an error in applying subsection 58(1) of the *Department of Employment and Social Development Act*, S.C. 2005, c. 34 (DESDA), and that both applications should be dismissed. While I sincerely empathize with Ms. Milner's situation, I cannot find in her favour in the absence of errors that are sufficiently central and significant to render the decisions under review unreasonable. Ms. Milner obviously disagrees with the AD's assessment of the GD's findings, and this is perfectly understandable, but it is insufficient for this Court to intervene in its role as a reviewing court.

I. Facts

[4] Ms. Milner is a former insurance agent and mediator. She applied for CPP benefits on January 31, 2013, claiming that she was no longer able to work as of January 2003 due to

peripheral vascular disease (PVD), ischemic colitis, lower back arthritis, neuropathic pain and premature ventricular contractions of her heart (Questionnaire for Disability Benefits, Respondent's Record (A-178-20), at p. 818). The Minister denied her application twice – initially, and on reconsideration (Respondent's Record (A-178-20), at pp. 789-795 and 800-805).

[5] Ms. Milner appealed the Minister's reconsideration decision to the GD. After conducting a hearing by written questions and answers, the GD dismissed her appeal (Respondent's Record (A-178-20), at p. 726). However, the AD allowed the appeal on February 22, 2018 and returned the matter to the GD for a new hearing on the merits, due to a violation of procedural fairness resulting from the failure to conduct an oral hearing (Respondent's Record (A-178-20), at p. 515).

[6] On August 22, 2018, a different member of the GD dismissed Ms. Milner's appeal after holding a hearing by way of videoconference. The GD determined that Ms. Milner had not established that she suffered from a severe disability on or before the end of her MQP, which was December 31, 2003, based on her contributions to the CPP. The GD also found that many of Ms. Milner's conditions arose after her MQP, that the medical evidence and her testimony did not establish a disability that was severe as of December 31, 2003, and that her personal characteristics did not adversely affect her employability at the time of her MQP (Respondent's Record (A-178-20), at p. 411).

[7] Although Ms. Milner was in a "fair amount of pain" and exhibited symptoms before the MQP (such as leg, back, shoulder and temporomandibular joint pain, an injured left thumb, and

grief), the GD dismissed their significance on the basis that there was insufficient medical evidence, particularly from Ms. Milner's family physician, which was the only evidence that was contemporaneous with the MQP, to prove their severity. The GD also relied on Ms. Milner's family physician's evidence to infer that these symptoms before the end of her MQP were not significant contributors to her main disability.

[8] Further, the GD dismissed the significance of the symptoms before the end of her MQP on the basis that the evidence was insufficient, subjective and unreliable. For example, the GD found general inconsistencies with dates and found that Ms. Milner stopped her work positions at the YMCA and at an insurance company for reasons other than medical. Finally, the GD found that Ms. Milner's personal characteristics did not adversely affect her employability during the MQP.

[9] While appealing the August 2018 decision, Ms. Milner filed an application to rescind or amend that decision in August of 2019. She filed with her application 6 documents which she argued established new material facts: (a) a hospital emergency record describing her injuries from a motor vehicle accident in January 2003; (b) a family doctor report from July 2019; (c) prescription records from October 2008 to November 2016; (d) blood test results from 1988 to 2018; (e) a gastroscopy report from October 2018 suggesting a prior infection; and (f) an undated mental health narrative, in which she explained that she was unable to discover the above-mentioned medical documents in time for the hearing because she was suffering from mental health issues at the time leading up to the hearing.

[10] On October 26, 2019, the GD refused to rescind or amend its earlier decision, because in its view, Ms. Milner did not establish new material facts within the meaning of paragraph 66(1)(*b*) of the DESDA, as it read at the relevant time (Respondent's Record (A-178-20), at p. 278). The GD found that none of the evidence submitted was new information that was not discoverable at the time of the hearing and material in that it could be reasonably expected to affect the outcome of Ms. Milner's claim.

[11] Ms. Milner then sought leave to appeal this new GD decision, which the AD granted on the basis that she raised at least two arguments having a reasonable chance of success on appeal (Respondent's Record (A-178-20), at p. 248). Specifically, the AD found that Ms. Milner had an arguable case that the GD erred (a) when it found that information about her childhood *H. Pylori* infection could not have reasonably affected the outcome, and (b) when it suggested that the cost of holding another hearing on the merits was a factor in its decision not to admit new information.

[12] At the merits stage, the AD dismissed Ms. Milner's appeal on June 10, 2020, being of the view that there was no basis to intervene because the GD did not commit a reviewable error within the meaning of subsection 58(1) of DESDA (Respondent's Record (A-178-20), at p. 17).

[13] With respect to Ms. Milner's submission that she was not well enough to obtain medical records documenting her mental health issues at the time of the July 2018 GD hearing, the AD found that Ms. Milner and her lawyer were aware of additional potentially relevant medical records but chose not to request additional time to obtain them. While Ms. Milner may have been

unaware that a postponement was possible, her counsel was presumed to be competent and must have known that such requests are routinely made in adjudicative forums. The AD found that the GD did not act unfairly by relying on Ms. Milner's counsel's willingness to proceed with the hearing, even if she now claims that her lawyer made that decision against her informed consent. Nor did the GD err by not taking at face value Ms. Milner's claim that her mental health issues prevented her from realizing the extent of her problems.

[14] The AD also found that the GD did not err when it determined that Ms. Milner's prescription records and blood test results, which predated the GD hearing, were discoverable and could have been adduced before the hearing. It also concluded that the emergency room report from 2003 documenting a visit two weeks after a motor vehicle accident and the family doctor report dated 2019 summarizing her earlier medical history were discoverable and contained information that was already before the GD when it determined that she was not disabled at the relevant time. It was reasonable to expect that Ms. Milner would have at least some idea of the treatment she received and where to obtain information; if she did not have the knowledge or capacity to obtain it herself, she had a lawyer who was presumably hired to help her gather the evidence in support of her case.

[15] The AD further found that the GD did not err in concluding that the report from Ms. Milner's gastroenterologist, which stated that she was "likely" infected with *H. Pylori* from childhood, was not material because it saw no evidence that the bacteria caused any disabling symptoms during the MQP. The AD stressed that new facts are material only if they can be reasonably expected to affect the outcome of a decision. Even if the GD may have failed to

recognize the link between *H. Pylori* and PVD, it could nevertheless focus on the fact that Ms. Milner had not shown that her PVD symptoms prevented her from working before the end of the MQP.

[16] Finally, the AD found that the GD struck the appropriate balance between efficiency and fairness in deciding to bifurcate the new facts hearing. Far from suggesting that the GD's decision to defer the arguments on the merits to a second hearing was driven by cost considerations, the AD found that the GD was instead concerned with working out the most logical and efficient way to proceed.

[17] As for the appeal of the August 2018 GD decision on the merits (File A-16-21), the AD dismissed the appeal on December 16, 2020 (Respondent's Record (A-16-21), at p. 17). The AD first determined that the GD did not breach procedural fairness when it held a videoconference hearing, in accordance with her stated preference for a videoconference hearing. It further found that she was not treated unfairly on the basis that an in-person hearing could have allowed the GD to notice that she was feeling unwell; she was represented by an experienced lawyer who could have asked for a delay or an adjournment.

[18] The AD also found no error with the GD's assessment of the testimonies from Ms. Milner's aunt and from her former employer. It determined that it was not its role to second-guess the GD's assessment in the absence of an error, and that the GD's findings were supported by the evidence before it. The AD also found that the GD did not err by giving some weight to Ms. Milner's volunteer work. Even if she had given up most of her volunteer activities by the

end of her MQP, the GD correctly inferred a degree of functionality, among other factors, from Ms. Milner's "fairly robust volunteer schedule" during a time where she "claims to have been increasingly debilitated" (AD (A-16-21), Respondent's Record (A-16-21), at pp. 25-27, at paras. 31-35).

[19] As for Ms. Milner's painkiller consumption, the AD further found no error with the GD's findings that there was no medical evidence that she was taking painkillers for generalized pain before the end of her MQP. Contrary to Ms. Milner's submissions, the AD saw no indication that the GD mischaracterized her doctor's notes or selectively considered the material before it. The AD similarly found that it could not overturn the decision of the GD simply because Ms. Milner disagrees with the weight given to her grief following her cousin's death. To the extent that the GD did not base its decision on a factual error, it was entitled to consider evidence as it saw fit. Finally, the AD found that the GD did not err in relying on Ms. Milner's family doctor's notes or drawing inferences from these notes, and saw no indication that it made illogical or unsupportable presumptions along the way.

II. Issues

[20] In her written and oral submissions, Ms. Milner raises many of the same arguments that she made before the AD. They mostly relate to alleged errors of fact and to the weight given to the evidence. In file A-178-20, she also makes new procedural fairness arguments. More particularly, she claims that she was treated unfairly first because the same member decided all three AD decisions, and second because the Minister's representative was allowed to ask her questions about privileged conversations she had with her lawyer.

[21] Before grappling with Ms. Milner's various arguments, I shall first deal with the applicable standard of review. In a case such as this one, it is often the most determinative factor of the analysis. I will then turn to the merits of the two decisions under review, and to the AD's alleged breaches of procedural fairness.

III. Analysis

A. *The standard of review*

[22] The first thing to be emphasized is that the role of this Court, on judicial review, is not to assess the decision of the GD. The focus of our enquiry is the decision of the AD. In performing this role, the jurisdiction of the AD must also be kept in mind. Pursuant to subsection 58(1) of the DESDA, the AD is neither a reviewing court in the judicial sense of the word, nor is it conducting a *de novo* hearing: *Glover v. Canada (Attorney General)*, 2017 FC 363 at para. 19; *Marcia v. Canada (Attorney General)*, 2016 FC 1367 at para. 34; *Canada (Attorney General) v. Jean*, 2015 FCA 242 at para. 19. Specifically, the AD can only intervene if it finds that the GD (1) acted unfairly, (2) erred in law (whether or not the error appears on the face of the record), or (3) "based its decision on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it".

[23] It is by now well established that AD decisions are reviewable on the standard of reasonableness: see, for example, *Atkinson v. Canada (Attorney General)*, 2014 FCA 187 at paras. 24-32; *Garvey v. Canada (Attorney General)*, 2018 FCA 118 at para. 1 [*Garvey*]; *Sjogren v. Canada (Attorney General)*, 2019 FCA 157 at para. 6; *Parks v. Canada (Attorney General)*,

2020 FCA 91 at para. 8 [*Parks*]; *Stavropoulos v. Canada (Attorney General)*, 2020 FCA 109 at para. 11; *Riccio v. Canada (Attorney General)*, 2021 FCA 108 at para. 5; *Mudie v. Canada (Attorney General)*, 2021 FCA 239 at para. 18, leave to appeal to the Supreme Court refused, 2022 CanLII 74314 (S.C.C.); *Balkanyi v. Canada (Attorney General)*, 2021 FCA 164 at paras. 12 and 13; *Canada (Attorney General) v. Ibrahim*, 2023 FCA 204 at para. 13. The question to be decided, therefore, is not whether Ms. Milner was entitled to a disability pension, but whether the AD's decision to confirm the GD's decision on the basis of no unfairness, error in law or erroneous finding of fact made in a perverse or capricious manner, and the reasons for so deciding, are reasonable. As the Supreme Court stated in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 at paras. 83 and 84 [*Vavilov*], the task of a reviewing court is not to decide the issue according to its own yardstick, but to approach the reasons provided by the administrative decision-maker with "respectful attention", with a view to understanding both the chain of analysis and the conclusion. Needless to say, the threshold is high to show that a decision is unreasonable.

[24] As for questions of procedural fairness, they must be reviewed on the correctness standard: *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 at para. 43; *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69 at para. 54. Accordingly, this Court owes no deference to the AD and must determine whether the AD itself breached Ms. Milner's right to procedural fairness. On the other hand, this Court must also decide whether the AD acted reasonably in refusing to find that the GD acted unfairly.

B. *Are the AD decisions reasonable?*

(1) A-178-20

[25] Pursuant to paragraph 66(1)(*b*) of the DESDA, as it read at the relevant time, the SST could rescind or amend a decision if it was presented with a new material fact that was not discoverable at the time of the hearing with the exercise of reasonable diligence. This is a narrow exception to the principle that SST decisions are binding and final, subject only to statutory appeal or judicial review: *Canada (Attorney General) v. Jagpal*, 2008 FCA 38 at para. 27. A new fact will be "material" if it could reasonably be expected to have affected the outcome of the hearing: *Kent v. Canada (Attorney General)*, 2004 FCA 420 at para. 34 [*Kent*]. This is a question of mixed fact and law (see *Mazzotta v. Canada (Attorney General)*, 2007 FCA 297 at para. 37 [*Mazzotta*]), and in the present case, a fact will be material if it is related to Ms. Milner's capacity as of December 31, 2003 (the end of her MQP). As for discoverability, Ms. Milner must show that the new fact could not have been discovered "with the exercise of reasonable diligence" at the time of the hearing. This has been characterized as a question of fact (*Mazzotta*, at para. 37), or as a highly fact-driven question of mixed fact and law (*Carepa v. Canada (Minister of Social Development)*, 2006 FC 1319 at paras. 17 and 18, citing *Taylor v. Canada (Minister of Human Resources Development)*, 2005 FCA 293 at para. 12 [*Taylor*]). In a case like this one, discoverability will usually involve knowledge of the document, steps taken to discover it, and the justification as to why it was not produced at the hearing.

[26] After having carefully considered Ms. Milner's oral and written submissions, I am unable to find in her favour. Ms. Milner's submissions amount, by and large, to mere disagreements

with the AD's assessment of the GD's decision. This is not sufficient for a reviewing court to intervene. Before setting aside a decision on the basis that it is unreasonable, the reviewing court must be satisfied that the alleged flaws or shortcomings are not merely peripheral to the merits of the decision but rather, sufficiently significant to strip it of the requisite degree of justification, intelligibility and transparency: *Vavilov* at para. 100. This is a high threshold to meet, especially in the context of such an exceptional recourse as that set out in paragraph 66(1)(*b*) of the DESDA.

[27] I have summarized in considerable detail the decisions of the GD and the AD in this file to show that Ms. Milner's arguments have already been carefully considered and dealt with. It is not for this Court to make its own assessment of the GD's decision, nor to reconsider the AD's decision against its own conclusions: *Parks* at para. 8. As this Court stated in *Kent* at para. 35, the test for determining the existence of new facts must be applied in a flexible manner, such that it allows for the balancing of the Minister's legitimate interest in the finality of decisions and the need to encourage claimants to put their best foot forward, and the equally legitimate interest of claimants in having their claims assessed fairly and reasonably.

[28] Ms. Milner claims that the AD erred in many respects in concluding that the GD did not commit any errors in finding that she failed to present new material facts that would justify reopening its August 2018 decision. I will now briefly deal with these alleged errors.

[29] Ms. Milner first submits that her family doctor's report dated July 15, 2019 did not exist at the time of the initial hearing and should have been allowed as a new fact as it supplements the

record with allegedly new findings with respect to her health predicaments that would have predated the end of her MQP. The AD agreed with the GD that the report's content could have been discovered at the time of the initial hearing before the GD, and that the file already contained many other reports that covered similar information as the family doctor's post-hearing letter. This finding is consistent with previous decisions of this Court, according to which medical reports that merely reiterate what is already known or has been diagnosed will not be considered evidence of new facts: see, for example, *Taylor* at para. 13; *Canada (Attorney General) v. MacRAE*, 2008 FCA 82 at para. 17.

[30] As for Ms. Milner's blood test results and prescription records, the GD had found that it was discoverable at the time of the hearing. The AD could reasonably find that there was no basis to intervene in that decision. These reports were clearly discoverable since Ms. Milner must have been aware that she had undergone investigations and taken medications. As noted by the AD, even if she might not have had the knowledge or capacity to obtain that information, she was represented by counsel whose role was to help her obtain and produce relevant documents in advance of the hearing before the GD. The same is true of Ms. Milner's 2003 emergency room records; not only were these reports discoverable at the time of the initial GD hearing because Ms. Milner and her lawyer knew about the accident, but the information about the motor vehicle accident and her resulting injuries were already before the GD.

[31] With regard to the letter from Ms. Milner's gastroenterologist dated November 20, 2018, which provides that she tested positive for *H. Pylori* and that she likely acquired this infection in childhood, the AD could reasonably conclude that there was no reason to interfere with the GD's

finding that this information was not material. It is an applicant's capacity to work due to disability that determines whether a disability is severe under the CPP, not the diagnosis of a disease *per se*: see *Klabouch v. Canada (Social Development)*, 2008 FCA 33 at para. 14. As noted by the AD, even if we accept that Ms. Milner was infected with *H. Pylori* as a child and that *H. Pylori* is associated with PVD, a positive test for *H. Pylori* says nothing about whether PVD produces disabling symptoms and, if so, whether disabling symptoms were present on or before December 31, 2003. Ms. Milner has not convinced me that this finding was unreasonable.

[32] Ms. Milner also challenged the AD's finding that the GD did not err in its treatment of her mental health narrative, which she submitted in advance of the second GD hearing. In that statement, Ms. Milner provided her written testimony of her personal experiences with grief and addiction between January 2003 and the second GD hearing, explaining that she was not well enough to obtain medical records documenting her mental health issues. The testimony also stated that she asked her lawyer to postpone the hearing, but her lawyer advised against it. The GD determined that counsel could have requested an adjournment to adduce the missing medical records, and the AD reasonably found no error in that decision. Not only had counsel made requests for medical documents that were not received by the GD at the time of the initial hearing, but counsel is presumed to be competent and to know that she could have requested an adjournment.

[33] Finally, Ms. Milner argues that the GD erred in determining that it would hold a separate hearing on the merits of her CPP claim only if it found that she established a new material fact, and that the AD unreasonably found no basis to intervene in that decision. Once again, I am of

the view that this argument is without merit. It is clear that a decision to reconsider a prior decision based on new material facts involves two distinct decisions: *Kent* at para. 18. First, a decision-maker must determine whether there are new material facts; if not, the original decision will stand. It is only if new material facts are established that the decision-maker will go on to reassess the applicant's pension entitlement on the basis of the new material facts and of the existing record. There would be no point in assessing the potential impact of an applicant's new evidence if it was later to be found that this new evidence does not meet the test for materiality or discoverability. While the GD member alluded to the cost of a second hearing, it is clear that his primary concern was to proceed in the most logical and efficient way.

[34] Before this Court, Ms. Milner raises two new arguments of procedural fairness. First, she claims that she was treated unfairly on the basis that the same member decided all three appeal decisions. She also raises this argument in her application for judicial review in Court file number A-16-21. Second, she contends that she was treated unfairly because the GD member allowed the Minister's representative to ask her questions about privileged conversations she had with her lawyer. The GD member did advise her that these conversations were privileged and that she did not need to disclose that information, but only after she provided two preliminary answers and she was put in the difficult position to either answer the questions or be seen to avoid the questions.

[35] I agree with the respondent that an alleged breach of procedural fairness must be raised at the earliest practicable opportunity: *Hennessey v. Canada*, 2016 FCA 180 at para. 21; *Benitez v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 461 at para. 220, aff'd 2007 FCA

199, leave to appeal to the Supreme Court refused, 2007 CanLII 55337 (S.C.C.); *Mohammadian v. Canada (Minister of Citizenship and Immigration)*, [2000] 3 F.C. 371 at para. 25 (Fed. T.D.). Ms. Milner knew that the same member presided over her case three times, yet did not raise any concern or object that it was improper for the member to preside until her appeals were dismissed. Similarly, she knew that she had been asked questions about conversations she had with her lawyer during the last GD hearing, yet she did not raise that argument before the AD. Moreover, she was advised by the GD member that the questions about her conversations with her lawyer were privileged, but nevertheless answered the questions and told the member that she did not mind discussing those conversations. It is therefore too late to argue that her right to procedural fairness has been breached.

(2) A-16-21

[36] The CPP is a compulsory contributory and earnings-related scheme. Three criteria must be satisfied to qualify for a CPP disability pension, pursuant to subsection 42(2), paragraph 44(1)(*b*), and subsection 44(2) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8 (CPP Act). An applicant must meet the contributory requirements, be found disabled within the meaning of the CPP Act, and continue to be disabled. In the case at bar, it is the second condition that is at play. It is not in dispute that Ms. Milner meets the contributory requirements, and that the latest date by which she must be found disabled to be entitled to a CPP is December 31, 2003 (MQP).

[37] To be “disabled”, Ms. Milner must prove through medical evidence and with due regard to the “real world context” that she was more likely than not to have a disability that was severe and prolonged on or before the end of her MQP: see *Warren v. Canada (Attorney General)*, 2008

FCA 377 at para. 4; *Canada (Attorney General) v. Angell*, 2020 FC 1093 at para. 40; *Bungay v. Canada (Attorney General)*, 2011 FCA 47 at para. 8; *Villani v. Canada (Attorney General)*, 2001 FCA 248 at paras. 32 and 38 [*Villani*]. A disability is severe if it causes Ms. Milner "to be incapable regularly of pursuing any substantially gainful occupation": CPP Act, subparagraph 42(2)(*a*)(i); *Villani* at paras. 44 and 50. Where there is evidence of some capacity for work, disability claimants must show that efforts to obtain and maintain employment have been unsuccessful because of their health conditions. A disability is prolonged if it is "likely to be long, continued and of indefinite duration or likely to result in death": CPP Act, subparagraph 42(2)(*a*)(ii); *Litke v. Canada (Human Resources and Social Development)*, 2008 FCA 366 at para. 5.

[38] Ms. Milner submits that the AD made several errors of fact. She claims, for example, that too much weight was given to her volunteer activities, without taking into account that she eventually had to give them up by the end of her MQP due to her pain. The GD did indeed find that Ms. Milner appeared to have been doing a significant amount of volunteer work in the years 2000 to 2002. However, as reasonably noted by the AD, the GD did not base its decision solely on Ms. Milner's volunteer involvement, but also on evidence that many of her medical conditions arose after the MQP, the absence of compelling signs of disability in her family doctor's notes from 2003 to 2004, and inconsistencies that raised questions about the reliability of her testimony. Moreover, the AD could reasonably find that the GD was entitled to consider Ms. Milner's volunteer work when assessing whether she retained work capacity; while volunteer work cannot be the sole basis to deny benefits, it can be used to infer functionality when considered in combination with other factors. The evidence that Ms. Milner was engaged

in volunteer work while she was working for an insurance brokerage in 2001 was considered relevant to assessing her work capacity by the GD, since it contradicted testimony that her job ended because she was medically unable to complete brokerage courses on top of her full-time work. The AD was entitled to find no error in that factual assessment.

[39] Ms. Milner also complains about the weight given to her biological aunt's and former employer's testimonies. Her aunt's testimony was to the effect that, like her niece, she suffers from PVD and that it took a long time before she was properly diagnosed. As for her former employer, he testified that she often missed work and ultimately, was unable to get through the courses required to become a licensed broker. The GD did not place much weight on Ms. Milner's aunt's testimony, because the issue has never been whether and when she had PVD, but rather when she became impaired to the point where she could no longer regularly perform substantially gainful employment. As for her former employer's testimony, the GD did not deny that Ms. Milner was experiencing pain at the time but found that there were likely other reasons than impairment to explain why she did not become a broker.

[40] In my view, the AD could reasonably refuse to interfere with the GD's assessment of the evidence. Paragraph 58(1)(*c*) of the DESDA provides that only factual errors made in a perverse or capricious manner or without regard to the evidence on which a decision is based constitute errors of fact. This is a high threshold. As this Court stated in *Garvey* at paragraph 6, a finding will be perverse, capricious or made without regard to the evidence if it squarely contradicts or is unsupported by the evidence. In the case at bar, Ms. Milner's arguments before the AD amounted to mere disagreement with the GD's assessment of the testimonies given by her aunt

and former employer. The GD's factual findings were supported by the evidence, and the fact that the AD or, for that matter, this Court, may have decided the case differently is no ground to interfere with the GD's decision: see *Cameron v. Canada (Attorney General)*, 2018 FCA 100 at para. 2; *Nelson v. Canada (Attorney General)*, 2019 FCA 222 at para. 17.

[41] The same is true with respect to Ms. Milner's argument that the GD did not give enough weight to her grief following her cousin's death, and erred in the inferences it drew from her family doctor's office notes. Once again, the AD determined that the GD was fully aware of and considered the evidence that was put forward by Ms. Milner with respect to her grief-related stress, and that it was not its proper role to revisit how the GD chose to weigh that evidence. Similarly, the AD found that the GD did not err in concluding, on the basis of Ms. Milner's family doctor's clinical notes, that she was not experiencing generalized pain (which formed the basis of her application for CPP benefits) or that she was not taking pain medication for generalized pain before the end of her MQP, and that Tylenol 3 was prescribed to address only localized pain until May 2004. There was no basis for the AD to set aside these conclusions, which were all supported by fulsome review of the evidence.

[42] Finally, Ms. Milner submits that the AD incorrectly found that the GD did not breach her right to procedural fairness by holding a videoconference hearing. More specifically, she argues that if the hearing had been in person, the GD could have noticed that she was not well. Once again, this argument is without merit. First of all, as noted by the AD, Ms. Milner never insisted on an in-person hearing before the GD; on the contrary, she indicated in writing that she preferred to proceed either by videoconference or by personal appearance. The AD therefore

correctly determined that the GD did nothing more than agree to one of Ms. Milner's stated preferences. Moreover, there is no indication that Ms. Milner insisted on an in-person hearing before the GD. Finally, the AD was correct in pointing out that she was represented by counsel before the GD; since lawyers are presumed to act in accordance with their client's instructions and best interests, the GD was justified to assume that she was ready to proceed in the absence of any request for a postponement or adjournment before or during the hearing.

IV. Conclusion

[43] For all the above reasons, I would dismiss these applications for judicial review, without costs. I realize that this is not the conclusion Ms. Milner hoped for. In light of the record that is before us, however, I am unable to find in her favour. As indicated above, I sympathize with her plight. However, I find that the decisions of the AD not to interfere with the GD's determinations that she failed to present new material facts and that she was not disabled within the meaning of the CPP by her MQP were reasonable.

"Yves de Montigny"
C.J.

"I agree.
George R. Locke J.A."

"I agree.
Sylvie E. Roussel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKETS:	A-178-20 AND A-16-21
STYLE OF CAUSE:	PAULINE MILNER v. ATTORNEY GENERAL OF CANADA
PLACE OF HEARING:	FREDERICTON, NEW BRUNSWICK
DATE OF HEARING:	OCTOBER 24, 2023
REASONS FOR JUDGMENT BY:	DE MONTIGNY C.J.
CONCURRED IN BY:	LOCKE J.A. ROUSSEL J.A.
DATED:	JANUARY 5, 2024

APPEARANCES:

Pauline Milner	FOR THE APPLICANT (ON HER OWN BEHALF) (IN PERSON)
Jordan Fine	FOR THE RESPONDENT (BY VIDEO CONFERENCE)

SOLICITORS OF RECORD:

Shalene Curtis-Micallef Deputy Attorney General of Canada	FOR THE RESPONDENT