

PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development (the ministry) dated 20 February 2013 denying the appellant designation as a person with disabilities (PWD). The ministry determined that the appellant did not meet all of the required criteria for PWD designation set out in the Employment and Assistance for Persons with Disabilities Act, section 2. Specifically the ministry determined that the information provided did not establish that the appellant has a severe mental or physical impairment that in the opinion of a prescribed professional

(i) directly and significantly restricts the person's ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and,

(ii) as a result of those restrictions, the person requires help to perform those activities.

The ministry did determine that the appellant satisfied the other 2 criteria: she has reached 18 years of age; and her impairment in the opinion of a medical practitioner is likely to continue for at least 2 years.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act (EAPWDA) – section 2
Employment and Assistance for Persons with Disabilities Regulation (EAPWDR) – section 2

PART E – Summary of Facts

The evidence before the ministry at reconsideration consisted of the following:

1. The appellant's PWD Designation Application dated 16 October 2012.
The Application contained:
 - The appellant's Self Report (SR).
 - A Physician Report (PR) dated 24 October 2012, completed by the appellant's physician, a specialist in gastroenterology (her physician), who has known the appellant since September 2012 and seen her 2 - 10 times in that period.
 - An Assessor Report (AR) dated 24 October, completed by the same physician.
 - Numerous medical records and reports, including recent test results from BC labs and specialist's letters, records and lab reports from another province.
2. The appellant's Request for Reconsideration, dated 14 February 2013, including a letter from her and a letter from her physician noting an incorrect reading of her diagnosis in the ministry's original decision.

The appellant's Notice of Appeal was dated 27 February 2013, arguing that she suffers from a severe chronic disease – ulcerative colitis.

In the PR, the GP diagnoses the appellant with ulcerative colitis – severe, with the comment "Too ill to work."

The panel will summarize the evidence from the PR and the AR, as it relates to the PWD criteria at issue.

Severity of impairment

Health history/severity

PR:

The physician writes:

1. diarrhea >15x/day, >4x/night
2. abdominal and anal pain
3. extreme fatigue
4. sleep disturbance

The physician indicates the appellant has not been prescribed medications which interfere with her ability to perform DLA, [comments unreadable].

The physician indicates that the appellant does not require any prosthesis or aids for her impairment. The physician confirms that the appellant's impairment will continue for 2 years or more, commenting that it will be longer than 2 years, could be for life.

AR:

The physician lists shortness of breath, weakness, dizziness, exhaustion, abdominal pain, and diarrhea as impacting her ability to perform DLA.

Physical impairment

Functional skills

PR:

The physician reports that the appellant is able to walk 1 to 2 blocks unaided, climb 5+ steps, lift 5 to 15 lbs., and remain seated for less than 1 hour. She has no difficulties with communications.

Mental impairment

PR: No mental health condition diagnosed

Ability to communicate

PR: No difficulties reported

Cognitive and emotional deficits

PR: The physician reports a significant deficit in motivation, commenting that depression is secondary to the appellant's severe ulcerative colitis.

Cognitive and emotional functioning impacts on daily functioning

AR: None reported

Ability to perform DLA

Mobility and physical ability

AR: The physician assesses the appellant requiring continuous assistance from another person or unable for lifting and carrying and holding; independent for walking indoors, walking outdoors, climbing stairs and standing.

Other DLA

AR: The physician assesses the appellant independent in all aspects of personal care and basic housekeeping. He assesses her as independent in all aspects of shopping, except for carrying purchases home where continuous assistance from another person or unable is assessed. He assesses the appellant independent in all aspects of meal preparation, paying rent and bills, and medications. With respect to transportation, she is assessed as independent for getting in and out of vehicle; "not applicable" assessments are given for using public transit and using transit schedules and arranging transportation, with the comment that she does not use public transit due to her symptoms and diarrhea.

The physician makes the general comment that "[the appellant] is independent in most daily living activities unless she is having a flare up."

Social functioning:

AR: The physician provides no assessment with respect to the support/supervision required for social functioning, and no assessment as to relationship impacts on immediate and extended social networks

Help required to perform DLA

AR: The physician gives no information as to help required or provided for DLA, commenting "N/A unless during a flare up."

In her SR, the appellant writes:

"I have severe ulcerative colitis. I have been hospitalized numerous times, being admitted for as long as six weeks with lasting symptoms even after discharge. I had emergency blood transfusions and iron infusions due to loss of blood and critically low iron. I am extremely tired all the time, with very little energy to spare. I am unable to get a full night's rest due to the amount of bowel movements throughout the night. I experience shortness of breath, aches and pains in my bones and joints, severe weight loss, anemia, dizziness, dehydration, severe abdominal pain, bleeding and loss of blood with each bowel movement, headaches and depression. I have 10 to 12 bowel movements a day..... When in a flare up I am unable to tend to my own needs and can barely get out of bed. I am unable to eat because of the excruciating abdominal pains and have lost 30 pounds in a month. I am still 25 pounds under my average weight, since July 2011. I have 10 to 20 bowel movements a day when in a flare up. My bowels on a good day are extremely demanding and when need to be relieved it is almost instantaneous -- this is very embarrassing, frustrating and almost impossible to go anywhere. I haven't been able to go for a walk with my son in over a year because of this symptom... I also experience anxiety every time I eat.

When I was first diagnosed five years ago I lived in [BC city]. My mom flew in from [another province] and stayed for eight months to care for me and my son. I couldn't do anything but go to the washroom. I was living in fear, pain and depression. I lost everything -- my health, my job, my social life, my friends, my womanhood and motherhood and I had to move back to [another province].... I feel defeated, resentful and angry, I was stuck for four years with no hope for better health, [describing her medical experience there as a "nightmare."] Not being able to care for my son was the worst of all."

In her Request for Reconsideration, the appellant writes:

"I had been suffering with horrific symptoms on a daily basis even as I write this letter. In my application, I have explained in tremendous detail the symptoms I suffer. I have lost almost 6 years of my life due to this illness, with treatment after treatment and pain medication that does not even ease the ache of my body. Now I am injecting myself every two weeks with a new drug... in hopes that I can rest for a full night without waking up with severe pain in my guts that feel like I swallowed a thousand razors. I am also currently getting iron transfusions every month due to excessive blood loss. This means I am extremely anemic, weak and often experience dizzy spells and anxiety. I bleed from my intestines every day..... The pain I experience is so painful that at times I almost blackout, or vomit. If I strain my body in any way, I experience sharp intensive pain in my abdomen and as if that's not enough, I have very little control over my bowels because of the chronic diarrhea and excessive pain it causes..... This is what I have been living with. I am a single parent, who at one time worked a full-time job, completed college and was always interactive within the community. I want this back more than anything....

At the hearing, the appellant in her opening presentation and in answer to questions gave the following testimony:

- The appellant stated that her current flare up has lasted about two years, since her previous medication became ineffective. She has been on a new medication for three months but this

has not yet begun to work. During this period, she has not had one full night's sleep, being awakened during the night due to the need for bowel movements.

- Her condition is accompanied by pain, nausea, dizziness and exhaustion. She has days when she cannot get out of bed.
- She finds she must plan her days around meals. For instance, if she has to go shopping, she will not eat beforehand.
- Her son is 12 years old and because of what she has gone through, he is mature beyond his years. He helps out a great deal around the home, taking out the garbage, doing his laundry, and making his own breakfast and lunch. When she can, the appellant cooks dinner, but when she is too ill, he will make his own and something for her too.
- Because of her dizziness, she needs someone to go out of the home with her at all times, usually her son.
- Because of her condition, she has not been able to attend most of her son's school events and because she cannot take him, he is missing out on many other activities with his friends.
- She stated that in [other province], she qualified for disability benefits -- there, being unable to work was a criterion and the medical diagnosis of ulcerative colitis was sufficient to establish eligibility.

The balance of the appellant's participation at the hearing went to argument (see Part F below).

The ministry stood by its position at reconsideration.

The panel finds the appellant's testimony at the hearing is in support of information that was before the ministry on reconsideration. The evidence relating to her condition and the help provided by her son elaborates on the material provided in her SR and in her Request for Reconsideration. The panel therefore admits the new information as evidence pursuant to section 22(4) of the Employment and Assistance Act.

PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry reasonably determined that the appellant is ineligible for PWD designation because she did not meet all the requirements in section 2 of the EAPWDA. Specifically the Ministry determined that the information provided did not establish that the appellant has a severe mental or physical impairment that in the opinion of a prescribed professional

- (i) directly and significantly restricts her ability to perform daily living activities either continuously or periodically for extended periods; and,
- (ii) as a result of those restrictions she requires help to perform those activities.

The Ministry did determine that she met the 2 other criteria in EAPWDA section 2(2) set out below.

The following section of the EAPWDA applies to this appeal:

2 (1) In this section:

"assistive device" means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform;

"daily living activity" has the prescribed meaning;

"prescribed professional" has the prescribed meaning.

(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person has a severe mental or physical impairment that

- (a) in the opinion of a medical practitioner is likely to continue for at least 2 years, and
- (b) in the opinion of a prescribed professional
 - (i) directly and significantly restricts the person's ability to perform daily living activities either
 - (A) continuously, or
 - (B) periodically for extended periods, and
 - (ii) as a result of those restrictions, the person requires help to perform those activities.

(3) For the purposes of subsection (2),

- (a) a person who has a severe mental impairment includes a person with a mental disorder, and
- (b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires
 - (i) an assistive device,
 - (ii) the significant help or supervision of another person, or
 - (iii) the services of an assistance animal.

The following section of the EAPWDR applies to this appeal:

2 (1) For the purposes of the Act and this regulation, "daily living activities",

(a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:

- (i) prepare own meals;
- (ii) manage personal finances;
- (iii) shop for personal needs;
- (iv) use public or personal transportation facilities;
- (v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
- (vi) move about indoors and outdoors;
- (vii) perform personal hygiene and self care;

- (viii) manage personal medication, and
- (b) in relation to a person who has a severe mental impairment, includes the following activities:
- (i) make decisions about personal activities, care or finances;
 - (ii) relate to, communicate or interact with others effectively.

The panel will consider each party's position regarding the reasonableness of the Ministry's decision under the applicable PWD criteria at issue in this appeal.

Severity of impairment

For PWD designation, the legislation requires that a severe mental or physical impairment be established. The determination of the severity of impairment is at the discretion of the minister, taking into account all the evidence, including that of the appellant. However, the starting point must be medical evidence, with the legislation requiring that a medical practitioner (in this case, the appellant's physician) identify the impairment and confirm that impairment will continue for at least two years.

In the discussion below concerning the information provided regarding the severity of the appellant's impairments, the panel has drawn upon the ministry's definition of "impairment." This definition consists of "cause" and "impact" components: "impairment is a loss or abnormality of psychological, anatomical or physiological structure or function [the cause] causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration [impact]." The cause is usually set out as a disease, condition, syndrome or even by a symptom (e.g. pain). A severe impairment requires the identified cause to have a severe impact on daily functioning.

Physical impairment

In the reconsideration decision, the ministry, after noting the evidence available at that time, concludes that the functional skill limitations described by the physician (able to walk 1 to 2 blocks unaided, etc.) are more in keeping with a moderate degree of impairment. Although the ministry acknowledges that the appellant's impairments may impact her physical functioning due to her severe ulcerative colitis, based on the information provided by the physician, the ministry found that there was not enough evidence to establish a severe physical impairment.

The position of the appellant is that she has been diagnosed with a severe form of ulcerative colitis. The restrictions arising from this condition are well known and understood and the diagnosis itself is enough to establish a severe physical impairment.

The evidence is that the appellant has been diagnosed by her physician with severe ulcerative colitis. Her physician has commented "Too ill to work." While employability is not a criterion for PWD designation, the panel considers her inability to work as an indicator of the extent to which she is restricted in her ability to function effectively. More significant in the physician's comment is the use of the words "Too ill..." Taken with the physician's report about the frequency of diarrhea, as well as his statements regarding other physical restrictions such as shortness of breath, weakness, dizziness, exhaustion, and abdominal pain, this indicates to the panel that the assessment of the appellant's physical impairment must take into account the "big picture," and not be limited to only the functional skill limitations upon which the ministry relied in its determination.

On reviewing the evidence, including the testimony of the appellant, the panel notes several areas where her medical condition restricts her ability to function effectively or for a reasonable duration. For instance, the frequency and urgency of her bowel minutes (>15x/day) can be expected to restrict any activity, such as shopping or use public transportation, that involves venturing outside the home for any length of time. The diarrhea at night (>4x/night) causes sleep disturbance and resulting exhaustion, resulting in her being frequently bed-ridden during the day. The appellant has testified that because of her dizziness, she is reluctant to go outside without being accompanied by someone, usually her son. Her bleeding and resulting anemia causes weakness that can reasonably be expected to restrict her ability to perform household tasks. Given these restrictions on the appellant's daily functioning, the panel finds that the ministry was not reasonable in determining that a severe physical impairment had not been established.

Mental impairment

The position of the ministry is that, while the physician identifies a significant deficit in the area of cognitive and emotional functioning regarding motivation, with the explanation that depression is secondary to the severe ulcerative colitis, no information is provided by the physician regarding the impact of the depression on her daily functioning. Therefore, based on the information provided by the physician, the ministry found that there is not enough evidence to establish a severe mental impairment.

The position of the appellant is that her severe ulcerative colitis has a profound effect on all aspects of her life, both physically and mentally. In addition to being depressed over what she has had to endure since the onset of her disease 6 years ago, she suffers anxiety around eating and the diarrhea that inevitably ensues, as well as more generally, especially regarding what would happen to her son if she ended up in hospital again.

As the physician has not diagnosed a specific mental health condition as an impairment, as he has not provided any information on the impacts of daily functioning of the cognitive and emotional deficit regarding motivation, and with no difficulties with social functioning reported, the panel finds the ministry reasonably determined that a severe mental impairment had not been established.

Significant restrictions in the ability to perform DLA.

The position of the ministry is that the physician has not provided enough evidence to establish that the appellant's impairments significantly restrict her ability to manage her DLA either continuously or periodically for extended periods.

The appellant's position is that she is directly and significantly restricted in a number of DLA, including mobility outside the home, shopping and the use of public transport.

The panel notes that, according to the legislation, the direct and significant restriction in the ability to perform DLA must be a result of a severe impairment, a criterion which the panel has determined has been established, and be in the opinion of a prescribed professional. This does not mean that other evidence should not be factored in, but the legislative language makes it clear that the prescribed professional's opinion is fundamental to the ministry's determination as to whether it is "satisfied" that this criterion is met.

The evidence is that the physician reported some restrictions to DLA: the appellant's ability to move about outside is limited to walking 1 to 2 blocks; for shopping she is reported to require continuous assistance from another person or is unable for carrying purchases home; and she does not use public transportation because of the diarrhea. The physician has not given any opinion on whether the appellant needs help to manage her DLA, except to comment: "[The appellant] is independent in most daily living activities unless she is having a flare up." (See also below under help required). On the basis of this very limited evidence provided by the physician, it is difficult for the panel to assess whether, in the opinion of a prescribed professional – in this case her physician -- her ability to manage DLA is "significantly" restricted, and whether these restrictions are either continuous or periodic for extended periods.

The panel notes that for these and other DLA, the appellant provided more information at the hearing: for example, because of her dizziness, she is reluctant to go outside without being accompanied by someone, usually her 12-year old son; for preparing meals, she relies on her son to prepare his own breakfast and lunch and sometimes his dinner as well as her own; and she relies on her son to do his own laundry and to help out with household chores. However, none of these restrictions to these DLA and the help required to manage them have been confirmed by a prescribed professional, nor is any information available as to how often or for how long these restrictions take place. Without a more thorough description provided by a prescribed professional of the appellant's restrictions in performing DLA, the panel finds that the ministry was reasonable in determining that this criterion had not been met.

Whether help to perform DLA is required

The position of the ministry is that, as it had been established that DLA are not significantly restricted, it can be determined that significant help is not required from other persons. The appellant does not require the services of an assistance animal.

The appellant's position is that she relies on ongoing help from her 12-year old son.

The panel notes that in the AR the physician stated: "[The appellant] is independent [i.e. does not require help] in most daily living activities unless she is having a flare up." He also wrote respecting help required: "N/A unless during a flare up." However, the physician has not provided any information as to the frequency and duration of flare-ups. The appellant testified that she has been in a flare-up for the past 2 years. And the physician has identified several restrictions, such as frequent daily diarrhea, extreme fatigue, dizziness and weakness, which the panel presumes are consistent with a flare-up and the appellant's current condition. The panel is not able to reconcile this inconsistency in the information regarding flare-ups and help required that has been provided in the physician's reports.

The panel notes that the legislation requires that in the opinion of a prescribed professional the need for help must arise from direct and significant restrictions in the ability to perform DLA that are either continuous or periodic for extended periods. The panel finds that the ministry reasonably determined that since it has not been established that DLA are directly and significantly restricted, it cannot be determined that help is required as provided under section 2(2)(b)(ii) of the EAPWDA.

Conclusion

Having reviewed and considered all of the evidence and the relevant legislation, the panel finds that the ministry's decision that the appellant was not eligible for PWD designation was reasonably supported by the evidence and therefore confirms the ministry's decision.