

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (the ministry) reconsideration decision of April 15, 2013, which found that the appellant did not meet three of five statutory requirements of section 2 of the *Employment and Assistance for Persons With Disabilities Act* (EAPWDA) for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that in the opinion of a medical practitioner the appellant's impairment is likely to continue for at least two years. However, the ministry was not satisfied that:

- the evidence establishes that the appellant has a severe physical or mental impairment;
- the appellant's daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; or that
- as a result of those restrictions, the appellant requires the significant help or supervision of another person, an assistive device, or the services of an assistance animal.

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 information before the ministry at the time of reconsideration included the following:

- The appellant's application for designation as a PWD. The application included a physician's report (PR) signed by the appellant's physician, and an assessor's report (AR) completed and signed by a family practice resident working in the physician's office. Both the PR and AR were signed by the respective professionals on November 15, 2012. It is apparent that the family practice resident substantially completed both the PR and the AR, but the appellant's physician completed part of the PR and signed the PR.
- The appellant's self-report, signed by her on November 27, 2012.
- The appellant's Request for Reconsideration, dated March 1, 2013.
- The appellant's undated written submission to the ministry's reconsideration officer.
- A supplementary medical opinion (the SMO) consisting of a form prepared by the appellant's advocate and signed by the family practice resident – on behalf of the appellant's physician – on March 14, 2013.
- A medical imaging report dated September 28, 2012, reporting the results of an examination of the appellant's left hip conducted on September 27, 2012 (the Hip X-ray Report).
- A medical imaging report dated July 31, 2012, reporting the results of an examination of the appellant's lumbar spine conducted that day (the Spinal X-ray Report).

Admissibility of New Information

During the appeal hearing the appellant and her witness – her -old son - provided oral testimony that included additional detail with respect to the appellant's diagnosed impairments, the impacts they have on her ability to perform DLA, and the assistance she requires. The ministry stated no position on admissibility of the new information. The panel has admitted this oral testimony as being in support of information and records that were before the ministry at the time of reconsideration, in accordance with s. 22(4) of the *Employment and Assistance Act*.

The ministry relied on its reconsideration decision and submitted no new information.

Physical Impairment

- In the PR the appellant's physician of 3 years diagnosed fibromyalgia, mild congenital acetabular dysplasia [misplaced or misshapen hip joint], and chronic low back pain.
- The Hip X-ray Report described the appellant's left hip as having "...a very mild degree of congenital acetabular dysplasia."
- The Spinal X-ray Report summarized its findings as "early disc narrowing".
- The SMO includes the statement "THIS IS TO CONFIRM, in my medical opinion that [the appellant] suffers from severe conditions including..."
- In terms of functional skills, the PR and AR indicate that the appellant can walk 1 to 2 blocks unaided on a flat surface. In her oral evidence on appeal the appellant said that she never

leaves home without her "trolley" – a type of wheeled cart which she uses for support, and that her walking is restricted due to chronic hip and back pain.

- The PR and the AR indicate the appellant can climb 8 to 10 stairs unaided.
- In the SMO the appellant is reported to be able to climb only 3 stairs before she has to stop for a rest. The 3-stair restriction occurs on days of "high levels of pain which occur 4-5 days per week."
- In her oral testimony the appellant said that on good days she can climb 8 to 10 stairs, but good days are rare – only about 1 good day per month - and even then she has to use a handrail. She stated that on most days she can only climb 5 stairs.
- In the PR the appellant is described as being able to lift only 5 to 15 pounds. The AR and SMO report lifting capacity of 5 to 10 pounds.
- The PR describes the appellant as being able to remain seated for less than 1 hour. In the SMO sitting is reported as being restricted to 15 minutes.
- The SMO referred to "vision loss". In her oral testimony the appellant explained that she requires reading glasses.
- In her oral testimony the appellant said that she was born with hip dysplasia and stated that her weight and height are not relevant to that condition. She said that she is in pain most days, and that her pain is exacerbated by her fibromyalgia.

Mental Impairment

- In the PR the appellant's physician diagnosed generalized anxiety disorder. In the SMO a diagnosis of depression has been added. In narrative in the AR the assessor wrote that the generalized anxiety disorder causes the appellant to worry excessively and inappropriately on most days, which affects her sleep and exacerbates her pain.
- The PR indicates the appellant has significant deficits with 3 of 11 aspects of cognitive and emotional function: emotional disturbance (e.g. depression, anxiety), motivation, and impulse control. She has no difficulties with communication.
- The AR describes moderate impacts to 3 out of 14 categories of cognitive and emotional functioning: bodily functions (e.g. sleep disturbance), emotion, and motivation. The remaining 11 categories – including impulse control - are shown as suffering no impact.
- In her self-report and in her oral testimony the appellant said that she frequently suffers from depressed moods, crying spells, and 3 to 5 hours of broken sleep per night which leads to chronic fatigue.
- The appellant's son testified that his mother cries a lot with depression and pain.
- In her oral testimony the appellant said that her depression has been worse recently and she has initiated an evaluation process regarding her mental health. She stated that she will participate in an anxiety treatment group in the future. She confirmed that she is not currently being treated for a mental health condition.

DLA

- In the PR the appellant's physician indicated that the appellant's ability to perform 6 of the 10 prescribed DLA is not directly restricted by her medical conditions. Those 6 unrestricted DLA are *personal self-care, management of medications, use of transportation, management of finances, social functioning, and decision making*.
- The appellant's physician reported periodic restrictions in 2 DLA (*meal preparation and moving*

about indoors and outdoors) and continuous restrictions in the remaining 2 DLA (*basic housework and daily shopping*).

- The family practice resident indicated in the AR that the appellant is substantially independent in 6 of the 10 prescribed DLA (*manage personal finances* (pay rent and bills); *manage medications*; *personal self-care*, *social functioning*, *use of transportation*, and *meal preparation*), though the appellant takes significantly longer with some aspects of meal preparation, and gets periodic assistance from her son with respect to meal preparation and putting on pants and shoes on particularly painful days.
- In terms of *social functioning*, the AR indicates the appellant has good functioning with her immediate social network, and marginal functioning with her extended social network, with limitations arising from lack of energy due to fulfilling family needs. She is independent in terms of making appropriate social decisions. In contrast, the appellant's self-report describes little participation or communication with family and major social isolation.
- With respect to the DLA of *moving about indoors and outdoors*, in the AR the family practice resident described the appellant as being independent with walking indoors, and as taking significantly longer than typical when walking outdoors.
- With respect to the DLA of *daily shopping*, the AR indicates the appellant needs continuous assistance getting to and from stores, and periodic assistance from her son in making proper choices, since she can tend to buy impulsively. Her son stands in line in the grocery store while the appellant sits to rest. She has difficulty reading small print on products.
- With respect to the DLA of *basic housekeeping*, the appellant gets periodic assistance from her son with lifting heavy laundry, and otherwise takes twice as long as typically required to perform housework.
- The SMO, signed by the family practice resident on behalf of the appellant's physician, contains the statement "I have checked the applicable boxes where I confirm that [the appellant] is directly and significantly restricted in her ability to perform her daily living activities and requires significant help to perform the activities, noted above."

Help

- The appellant's physician reported that the appellant uses assistive devices in the form of a cane and trolley. She does not have an assistance animal.
- In the AR the family practice resident noted that the appellant has limited outside support and receives most assistance from her son.
- The oral testimony of the appellant and her son were consistent in terms of the degree of help he provides with taking out the garbage, periodically helping with meal preparation, babysitting, carrying bags when shopping, going to the corner store as needed, standing in line-ups, and lifting heavy laundry.

PART F – Reasons for Panel Decision

The issue on this appeal is whether the ministry's decision to deny the appellant designation as a PWD was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. In particular, was the ministry reasonable in determining that the appellant does not have a severe physical or mental impairment, and that in the opinion of a prescribed professional the appellant's impairments do not directly and significantly restrict her from performing DLA either continuously or periodically for extended periods, and that as a result of those restrictions the appellant does not require help to perform DLA?

The relevant legislation is as follows:

EAPWDA:

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.

EAPWDR section 2(1):

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.

(2) For the purposes of the Act, "**prescribed professional**" means a person who is authorized under an enactment to practice the profession of

- (a) medical practitioner,
- (b) registered psychologist,
- (c) registered nurse or registered psychiatric nurse,
- (d) occupational therapist,
- (e) physical therapist,
- (f) social worker,
- (g) chiropractor, or
- (h) nurse practitioner.

Severe Physical Impairment

The appellant's position is that her fibromyalgia, back pain and hip dysplasia constitute a severe physical impairment. She emphasized the statement of the family practice resident and/or the physician in the SMO confirming that she suffers from "severe" conditions. Relying on the decision of the court in *Hudson v. Employment and Assistance Appeal Tribunal*, 2009 BCSC 146, the appellant argued that any ambiguity in the interpretation of the legislation must be resolved in her favour, and that the legislation must be interpreted with a benevolent purpose in mind.

The ministry's position is that significant weight must be placed on the Hip X-ray Report and the Spinal X-Ray Report which describe the hip dysplasia as "very mild" and the back pain as "early disc narrowing". The ministry also argued that the physician's assessment of the appellant's physical

functioning is more indicative of moderate impairment, rather than severe.

Panel Decision

The diagnosis of a medical condition is not itself determinative of a severe impairment. One person with, say, diabetes may be significantly restricted from being able to manage DLA independently, while another person with diabetes may be entirely unrestricted. Accordingly, to assess the severity of an impairment one must consider the nature of the impairment and its impact on the appellant's functional skills, the restrictions to DLA, and the degree of independence in performing DLA. The ministry describes this approach well when it defines the word "impairment" in the PR form as being "*a loss or abnormality of psychological, anatomical or physiological structure or function causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration.*" Of course, this definition is not set out in legislation and is not binding on the panel, but in the panel's view it quite appropriately describes the legislative intent.

The legislation makes it clear that the determination of severity is at the discretion of the ministry – the ministry must be "satisfied" that the statutory criteria for granting PWD designation are fulfilled. In making its determination the ministry must consider all the relevant evidence, including that of the appellant. While the legislation is clear that the fundamental basis for the analysis is the evidence from prescribed professionals, in exercising its decision-making power the ministry cannot blindly defer to the opinion of the professionals with respect to whether the statutory requirements are met as that approach would amount to an improper fettering of discretion. The professional evidence has to be weighed and assessed like any other evidence.

In this case the evidence of the PR and the AR are reasonably consistent with each other, which should be the case since they were both substantially completed by the family practice resident. The SMO, on the other hand, is a pre-typed form prepared by the appellant's advocate, which requires the appellant's physician (or in this case, the family practice resident who works in the physician's office) to tick a number of boxes and to sign at the end of the form. There is no space on the form for the professional to enter any narrative or to provide any context or nuance to the "opinions" expressed in the form. In the SMO, all boxes have been ticked and the form has been signed by the family practice resident "on behalf of [the physician]." Other than this phrase, there is nothing to indicate that the physician did endorse or turn his mind to the "opinions" expressed in the SMO. Given these limitations, and the fact that there is no explanation given in the SMO for any information that conflicts with the PR or the AR, the panel has given little weight to the evidence provided in the SMO.

The functional skills identified in the PR indicate that while the appellant is limited in walking outdoors independently, the rest of her functional skills are more in keeping with a moderate degree of impairment. This aligns with the Hip X-ray Report and the PR which are consistent in describing the degree of hip dysplasia as being "mild" or "very mild", and the Spinal X-Ray Report which describes the disc narrowing as "early". The physician has provided no information as to any exacerbating effect the fibromyalgia may have on the hip and back pain, other than to note that its effects are periodic and unpredictable.

The evidence indicates that the appellant has a number of medical conditions. However, as discussed in more detail below, the medical conditions do not translate into significant restrictions in the appellant's ability to perform DLA independently. Accordingly, the panel finds that the ministry reasonably concluded that the appellant does not have a severe physical impairment.

Severe Mental Impairment

The appellant's position is that she feels there is enough information from the physician to show that she does have severe anxiety and depression which diminish her ability to function.

The ministry's position, as set out in the reconsideration decision, is that there are no major impacts identified in the AR, and that little weight can be placed on the information in the SMO since there is no way to be sure that the physician endorsed the document and there is no explanation for the inconsistencies between it and the PR and AR.

Panel Decision

The physician noted in the PR that the appellant suffers from significant deficits in 3 of 11 aspects of cognitive and emotional function. However, the evidence does not show that these deficits translate into significant impacts on the appellant's ability to manage her DLA. In section B4 of the AR the family practice resident has indicated no major impacts to cognitive and emotional functioning, and moderate impacts in 3 areas. In the remaining 11 areas there are no impacts.

The evidence indicates that the appellant has good communications skills and is independent with respect to the 2 DLA that are specific to severe mental impairment – *social functioning* and *decision making*. The appellant is described as good functioning and marginally functioning with respect to her immediate and extended social networks respectively. The AR indicates the appellant is independent with respect to making social decisions. She independently manages her financial decisions and her medications. The appellant has provided some evidence that she needs input from her son to prevent her from buying on impulse when shopping, but the professional evidence in the AR indicates that the appellant's impulse control is not impacted. The appellant confirmed that she is not currently being treated for a mental health condition and that the professional assessment of her mental health is at an early stage. For the reasons discussed above, where the evidence in the SMO conflicts with the evidence in the PR and AR, the panel has given less weight to the SMO.

Considered as a whole, the evidence indicates that the appellant's generalized anxiety disorder and depression may be aggravating factors impacting the appellant's ability to manage DLA independently, but the panel finds that the ministry reasonably concluded that the evidence falls short of demonstrating that the appellant suffers from a severe mental impairment.

Restrictions to DLA

The appellant argued that she is significantly restricted in virtually all DLA most of the time. She stated that she is severely limited by back and hip pain, and she is depressed and cries a lot. She relies on help from her son for most DLA.

The ministry's position - as set out in its reconsideration decision - is that the appellant's functional skills with respect to walking, stair climbing, standing, and lifting/carrying, demonstrate a moderate restriction rather than a significant restriction.

Panel Decision

This case presents the unusual situation where the PR has been partially completed by the appellant's physician, and partially completed by the assessor (family practice resident) who works in the physician's office, with the PR as a whole then being endorsed by the physician. The AR, on the other hand, was apparently completed entirely by the family practice resident. Despite some inconsistencies between the PR and the AR, they are reasonably consistent in terms of describing the restrictions to DLA. The PR shows the appellant as being unrestricted in 6 of the 10 prescribed DLA: *personal self-care, management of medications, use of transportation, social functioning, and decision making*. The AR provides space for more detailed information about restrictions to DLA, and the family practice resident has indicated where the appellant either takes longer than typical with some aspects of some of these DLA, or that she gets help with some of these aspects from time to time. However, the overwhelming weight of the evidence, including that contained in the appellant's self-report, indicates that the appellant substantially performs these DLA independently most of the time and is not significantly restricted in them.

In the PR the physician has indicated that the appellant is directly restricted in terms of 4 of the 10 prescribed DLA – *basic housework* and *daily shopping* – both continuously restricted – and *meal preparation* and *moving about indoors and outdoors* – both periodically restricted. In the AR it is indicated that the appellant receives help from her family to lift laundry that weighs more than the appellant's lifting capacity of 5 to 10 pounds, that the appellant is restricted in her ability to bend over to do housework, and that otherwise it takes the appellant twice as long as typical to perform housework. The restrictions noted in the AR for *daily shopping* are that the appellant has to lean on her shopping cart, has difficulty reading fine print, is prone to impulse buying, can't stand in line for more than 15 minutes, and is limited to lifting 5-10 pounds. The panel acknowledges that these restrictions are no doubt frustrating, and also acknowledges the help provided by the appellant's son; however the evidence indicates that the appellant does substantially perform these DLA independently.

With respect to *meal preparation*, the AR shows the appellant as independent with respect to meal planning and food storage, but she has to pace herself when preparing and cooking food and she periodically receives assistance from her son. Those periods appear to be primarily when the appellant is unable to get out of bed. The family practice resident appears to have deferred to the appellant's self-report in terms of linking periodicity with flare-ups of fibromyalgia, but there is no evidence provided of the frequency or duration of these periods.

Regarding *moving about indoors and outdoors*, the AR shows the appellant as independent with respect to moving about indoors though she often has to lean on walls or counters for support. Outdoors the appellant alternately relies on a cane or her trolley for support. She is nonetheless able to walk 1 or 2 blocks unaided.

For the reasons stated earlier, the panel has given little weight to the evidence in the SMO regarding restrictions to DLA.

Based on the above analysis, the panel finds that the ministry reasonably concluded that the evidence does not demonstrate that the appellant's ability to perform DLA is directly and significantly restricted continuously or periodically for extended periods.

Help with DLA

The appellant's position is that as a result of her restrictions she requires significant help from her son for most DLA most of the time.

The ministry's position is that as it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required from other persons. The ministry argues that the help provided to the appellant by her son is consistent with the routine household chores that would normally be expected of a child his age.

Panel Decision

The evidence indicates that the appellant receives assistance from her son with some aspects of many DLA. However, in the panel's view, the evidence viewed as a whole indicates that it is the appellant who substantially performs the DLA. The evidence simply doesn't show that the assistance the appellant receives from her son constitutes "the significant help or supervision of another person" that is required by s. 2(3)(b)(ii) of the EAPWDA. The appellant's part time use of a cane and her trolley for walking outside the home is not on its own sufficient to fulfill this legislative criterion. The appellant does not use an assistance animal.

The panel finds that the ministry reasonably concluded that as it has not been established that DLA are significantly restricted, it could not be determined that the appellant requires help with DLA as defined by s. 2(3)(b) of the EAPWDA.

Conclusion

The panel acknowledges that the appellant is suffering from medical conditions that affect her ability to function. However, having reviewed and considered all of the evidence and the relevant legislation, the panel finds that the ministry's decision declaring the appellant ineligible for PWD designation is reasonably supported by the evidence and is a reasonable application of the legislation in the circumstances of the appellant. The panel therefore confirms the ministry's decision.