

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of October 8, 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; and 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:

- A physician's report ("PR") and assessor's report ("AR") both completed by the appellant's physician on April 24, 2013.
- The appellant's handwritten self-report dated April 24, 2013 with typewritten appendix.
- The appellant's written reconsideration submission.

Admissibility of New Information

In her oral testimony the appellant provided new information regarding her impairments and the nature and frequency of the assistance she receives with her DLA. This information provides additional detail with respect to issues addressed in the original PWD application forms. Accordingly, the panel has admitted this new information 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 physician – who has known the appellant for 7 years - diagnosed the appellant with chronic pain syndrome (fibromyalgia) which has not responded to standard therapy.
- In terms of functional skills, the physician noted the appellant can walk 4+ blocks unaided on a flat surface, climb 5+ steps unaided, and can lift 15 to 35 pounds. She can remain seated for less than 1 hour.
- In the AR the physician reported that the appellant requires periodic assistance with walking indoors and outdoors, climbing stairs, standing, lifting, and carrying/holding.
- In her self-report the appellant wrote that in addition to fibromyalgia and clinical depression, she suffers from migraines from fluorescent lights, dizzy spells due to vestibular issues, crippling arthritis, multiple chemical and environmental sensitivities and multiple digestive dysfunctions (irritable bowel, hypoglycemia, food intolerances). She also wrote that she has been in 8 car accidents and that the fibromyalgia, arthritis and motor vehicle accident injuries "set one another off, often resulting in bed-ridden bouts."
- In the appendix to her self-report the appellant stated that she has a number of comorbid issues related to the fibromyalgia, some of which are blurred vision, nausea, reduced motor skills, sleep disruption, bone and muscle pain, and electric shock sensations.
- In her oral testimony the appellant said that she is in pain every day. She said that one of her worst symptoms is what she called "lava in veins", which she described as the feeling that her bone marrow is hot lava, causing pain throughout her entire body. She indicated that these sessions are so severe that her cognitive functions are impaired, and stated that the severity depends on the weather.

Mental Impairment

- In the PR the physician diagnosed the appellant with depression and borderline personality disorder, both of which he described as "chronic". He also referred to emotional dysregulation

and chaotic self-defeating thinking.

- In terms of functional skills, the physician has indicated in the PR that the appellant has cognitive difficulties with communication. He also noted significant deficits with emotional disturbance, motivation and attention/sustained concentration.
- The physician noted that the appellant is under the care of a psychiatrist and that she will likely require mood stabilizers for many years.
- In the AR the physician indicated that the appellant's ability to communicate is good in 4 of 4 aspects: speaking, reading, writing, and hearing.
- Section B.4 of the AR provides for a more detailed assessment of cognitive and emotional functioning than does the PR. It identifies 14 cognitive and emotional functions, and columns in which the assessor can indicate whether the applicant's mental impairment causes no impact, minimal impact, moderate impact or major impact on each of the 14 functions. In most of the functions the physician has marked more than one level of impact.
- Four of the cognitive and emotional functions have some kind of mark in the "major impact" column: *bodily functions, consciousness, emotion, and motor activity*. Each of these functions also has a mark in one or more of the moderate impact, minimal impact, or no impact columns.
- The physician wrote that the appellant "...is not currently employable due to her ongoing mental illness in any capacity reliably."
- In the appendix to her self-report the appellant stated that a skills assessment conducted subsequent to dismissal from her job in July 2012 indicated that the appellant's areas of strength are in communication and business.
- In her oral testimony the appellant said that she experiences cycles of depression on nearly a daily basis.

DLA

- In the PR the physician indicated that the appellant's ability to perform 3 of the 10 prescribed DLA is unrestricted: *manage personal finances, manage personal medication, and social functioning*. In response to a question asking for an explanation about impacts to *social functioning*, the physician responded "N/A".
- He indicated that 1 of the 10 prescribed DLA is restricted continuously: *basic housework*
- He also indicated that 5 of the 10 prescribed DLA are restricted periodically: *personal self care, meal preparation, daily shopping, mobility indoors and outdoors, and use of transportation*.
- The physician stated that the appellant's mood stabilizing medication interferes with her ability to perform DLA.
- In response to a question asking the physician to explain what he meant by "periodic", the physician wrote "dependent on the weather – if it is cold, her symptoms are worse."
- The AR provides additional detail with respect to DLA restrictions, by breaking the DLA down into discrete tasks. The physician has indicated the appellant is independent in all aspects of 2 DLA: *manage personal finances and manage personal medication*.
- In 1 DLA (*basic housekeeping*) the physician indicated the appellant is either continuously or periodically restricted in all aspects.
- In each of the remaining DLA the physician indicated the appellant is independent with respect to some tasks and periodically restricted in others. Regarding the DLA *personal care*, the physician stated the appellant requires periodic assistance with the tasks of dressing, grooming, bathing, transfers in/out of bed, and transfers on/off of chair.

- Regarding the DLA *daily shopping*, the physician stated the appellant is independent with respect to reading prices and labels, making appropriate choices, and paying for purchases, but requires periodic assistance in going to and from stores and carrying purchases home.
- Regarding the DLA *meal preparation* the physician reported the appellant as being independent with respect to meal planning and safe storage of food, but requiring periodic assistance with food preparation and cooking.
- Regarding the DLA *use of transportation*, the physician indicated the appellant is independent with respect to getting in and out of a vehicle and using transit schedules, but needs periodic assistance using public transit.
- Regarding the DLA *social functioning*, the physician stated the appellant independently makes appropriate social decisions, develops and maintains relationships, and interacts appropriately with others, but that she requires periodic support/supervision in dealing appropriately with unexpected demands and in securing assistance from others. He indicated her functioning with her immediate social network is marginal to good, and with her extended social network is marginal.
- In her oral testimony the appellant said that she periodically needs help with all aspects of *mobility*, but not every day. She has things placed around the home so she can "roll" out of bed, and can lean on counters and furniture. Outside the house, she said she can walk four blocks maximum round-trip, and then has to sleep for 25 minutes to recharge.
- Regarding her *use of transportation*, the appellant said that she drives her own vehicle but that she "rarely drive[s]." She stated that she drives her children and one other child to and from school each day, and uses the vehicle to go shopping. She said that on days when her symptoms are worse she can't drive her children to school and they stay home. In response to a question from the panel about how often that happens, the appellant responded that it is almost a day a week.
- Regarding *personal self-care*, the appellant said that sometimes her children wash her hair, and sometimes they help do up her coat.
- Regarding *meal preparation*, the appellant said that she can cut 1 carrot, after which she cannot move her fingers anymore. She said that then her children have to do the rest, and that her children do the housework on a regular basis.
- Regarding *daily shopping*, the appellant said that her children almost always go with her. She said she rarely goes alone because she has dizzy spells. She usually shops once a week for about 20 minutes.

Help

- In the PR the physician indicated the appellant requires no prostheses or aids for her impairment. He stated that the appellant's children make their own food and that the appellant needs help with housework.
- In the AR the physician indicated that the appellant routinely uses a cane to help compensate for her impairment, and that she does not have an assistance animal. He also indicated that assistance is provided to the appellant by "family" and "friends".
- In the appendix to her self-report the appellant stated that she needs help from her mother and children to maintain the household, and that a friend helps with 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, as presented by her advocate, is that her fibromyalgia (due to its pain and associated physical manifestations) constitutes a severe physical impairment. She emphasized the physician's evidence that her impairments are "chronic" and that she is unlikely to dramatically improve in the future.

The appellant also referred to the decision in *Hudson v. Employment and Assistance Appeal Tribunal*, 2009 BCSC 1461 to argue that any ambiguity in the legislation must be resolved in favour of the appellant.

The ministry's position, as set out in its reconsideration decision, is that in consideration of the

appellant's physical functional skills and lack of specificity from the physician as to how often the appellant requires help with them, the information provided does not evidence a severe physical impairment.

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 in context the nature of the impairment and its impact on the appellant's ability to manage her DLA as evidenced by functional skill limitations, the restrictions to DLA, and the degree of independence in performing DLA. The PR form describes this approach well when it defines the word "impairment" 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 determination of severity of impairment 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 act reasonably and 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, the professional evidence has to be weighed and assessed like any other evidence. The ministry cannot simply 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.

Regarding the issue of ambiguity, simply because different arguments can be advanced about the interpretation of a statutory provision does not render the provision ambiguous. The modern approach to statutory interpretation is to read the words of the provision in their entire context and in their ordinary sense harmoniously with the scheme of the legislation, the object of the legislation, and the intention of the legislature. A statutory provision can only be said to be ambiguous if, after the application of statutory interpretation principles, there are still two or more possible valid but conflicting meanings to the legislation. In the panel's view, the legislation relevant to this appeal is not ambiguous.

In the appellant's case the physician has diagnosed chronic pain syndrome (fibromyalgia) which has not responded to standard therapy. The physician's evidence in the PR indicates that the appellant's physical functional skills are at the higher end of the scale, but the appellant argues that these functions are done reliably only on rare days. The physician has not confirmed that the functional skills are limited in this manner. The panel notes that the appellant has indicated that her pain reaches a level that prevents her driving her children to and from school less than once per week.

As discussed in more detail in the subsequent section of this decision under the heading Significant Restrictions to DLA, the functional skills limitations resulting from her impairments do not appear to have translated into significant restrictions in the appellant's ability to manage her DLA independently. For these reasons, the panel has concluded that the ministry reasonably determined that there is insufficient evidence to establish that the appellant has a severe physical impairment.

Severe Mental Impairment

The appellant's position is that the physician has diagnosed the appellant with mental illness which has major impacts on her cognitive and emotional functioning and her ability to manage her DLA independently. She argues that this constitutes a severe mental impairment.

The ministry's position, as set out in its reconsideration decision, is simply that it is not satisfied that the information establishes a severe mental impairment.

Panel Decision

Section 2(1)(b) of the EAPWDR prescribes two DLA that are specific to mental impairment – make decisions about personal activities, care or finances (*decision making*), and relate to, communicate or interact with others effectively (*social functioning*). The evidence indicates that the appellant is not significantly restricted with respect to *decision making* in that she independently manages her finances (pay rent and bills) and her medications, and she makes appropriate social decisions. Based on the physician's evidence in the AR, she also independently manages the decision-making components of the DLA of *daily shopping* and *meal preparation* (meal planning and food storage). The physician also reported the appellant as being functional, albeit marginally so, with respect to *social functioning*.

In terms of mental functional skills, the evidence indicates that despite some cognitive impact on communication, the appellant's communications skills are good in all respects. The physician's evidence with respect to cognitive and emotional functioning is not consistent. In the PR he has indicated that the appellant has significant deficits in terms of emotional disturbance, motivation and attention/sustained concentration. In the AR, however, where more detail can be provided to assist in the determination of the effect of these deficits, the physician has marked a number of boxes which have the ministry and the appellant interpreting the evidence in different ways. The onus is on the appellant to demonstrate that she satisfies the statutory criteria. The uncertain and indecisive way in which the physician has detailed the impacts to cognitive and emotional functioning significantly detracts from the weight that can be given to this information.

When considered in context with the evidence that the appellant independently manages the two DLA specific to mental impairment, and that her impairment does not significantly restrict her ability to independently manage the other DLA (as discussed in detail below), the panel concludes that the ministry reasonably determined that the evidence falls short of demonstrating a severe mental impairment.

Significant Restrictions to DLA

The appellant's position is that the appellant's DLA are significantly restricted. The appellant stated that the physician's evidence is that basic housekeeping is continuously restricted, and that virtually every other DLA is periodically restricted. She argued that under the legislation, continuous and periodic restrictions are equally important.

The appellant also argued that the legislation does not require evidence of the frequency of impairment or restriction, but that in any event the evidence shows that the appellant is restricted by her impairments virtually every day.

Finally, the appellant also referred to *Hudson* in arguing that properly interpreted, the legislation only requires that 2 DLA be significantly restricted. She stated that in her case the evidence that most DLA are restricted satisfies this legislative criterion.

The ministry's position, as set out in its reconsideration decision, is that the information does not demonstrate a severe mental or physical impairment that in the opinion of a prescribed professional significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods. Therefore, argued the ministry, the legislative criteria have not been met.

Panel Decision

The legislation – s. 2(2)(b)(i) of the EAPWDA – requires the minister to substantially assess direct and significant restrictions of DLA in consideration of the opinion of a prescribed professional, in this case the appellant's physician. This doesn't mean that other evidence shouldn't 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".

The legislation also requires that a severe impairment directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods. The term "directly" means that there must be a causal link between the severe impairment and the restriction. The direct restriction must also be significant. Finally, there is a component related to time or duration. The direct and significant restriction may be either continuous or periodic. If it is periodic it must be for an extended time. Inherently, any analysis of periodicity must also include consideration of the frequency. All other things being equal, a restriction that only arises once a year is less likely to be significant than one which occurs several times a week. Accordingly, in circumstances where the evidence indicates that a restriction arises periodically, it is entirely appropriate for the ministry to require evidence of the duration and frequency of the restriction in order to be "satisfied" that this legislative criterion is met.

The legislative language gives no indication that continuous restrictions and periodic restrictions for an extended period are to be weighted differently.

In the appellant's case, with respect to periodicity, the physician has noted in both the PR and the AR that the appellant's restrictions are weather-dependent. This is consistent with the appellant's evidence that she feels worse on days when the weather is bad. However, the evidence indicates that the frequency and duration affect different DLA differently. For example, the appellant stated that she is restricted virtually every day from performing the DLA of *basic housework* and *meal preparation*. However, her *use of transportation* is restricted – at least in terms of driving her children to and from school – less than once per week. The evidence indicates that the appellant manages most aspects of this DLA independently. There is no explanation as to why the appellant periodically requires assistance to use public transportation, or how often this restriction arises.

The evidence demonstrates that the 4 DLA of *manage personal finances*, *manage personal medications*, *social functioning*, and *decision making* are performed independently and are not

significantly restricted.

With respect to *mobility indoors and outdoors*, the evidence indicates that though it causes the appellant some discomfort, she gets around her own home without assistance, and that she can walk 4 blocks outdoors unaided.

Regarding *personal care*, the evidence indicates that the appellant's children occasionally help the appellant by washing her hair or buttoning her coat.

With respect to *daily shopping*, the evidence indicates that the appellant independently manages most aspects. The physician indicated she periodically needs help going to and from stores but there's no indication how often this occurs, and no indication as to what causes this to occur since the appellant drives her own vehicle. The appellant said that she takes her children shopping with her because of dizzy spells. The panel notes that dizzy spells are not a medical condition that has been confirmed by the physician.

Finally, regarding *basic housekeeping and meal preparation*, the evidence is that the appellant has her children do most aspects of these DLA.

The appellant argues that the *Hudson* decision stands for the proposition that if the appellant establishes that 2 DLA are significantly restricted, either continuously or periodically for extended periods, she will have satisfied this statutory criterion. In the panel's view, it is not appropriate to interpret *Hudson* as establishing 2 DLA as a "magic number" that automatically fulfills the legislative requirements. The evidence of significant restrictions must be assessed as a whole and in context with the legislative objects and intent. The appellant has stated that she relies on her children (and occasionally her mother or a friend) to do *basic housework*. She also relies on her children to do most – but not all - aspects of *meal preparation*. The appellant independently manages all or most aspects of all the remaining DLA.

In the panel's view, considering the evidence as a whole, the ministry reasonably determined that the appellant's ability to manage her DLA independently is not significantly restricted either continuously or periodically for extended periods.

Help with DLA

The appellant's position is that the physician has indicated that the appellant's impairments restrict virtually all of her DLA, therefore the ministry has to conclude that she is in need of assistance to perform her DLA. The appellant pointed to the evidence that she relies on help from her children and her mother.

The ministry's position is that since it has not been established that the appellant's DLA are significantly restricted, it cannot be determined that significant help is required from other persons.

Panel Decision

In the panel's view, it would be difficult to conclude that the help provided to the appellant by her children and mother with respect to housework and cooking constitutes "the significant help or

supervision of another person" that is required by s. 2(3)(b)(ii) of the EAPWDA. The appellant's periodic use of a cane for walking outside the home is not sufficient to fulfill this legislative criterion.

The appellant does not use an assistance animal.

For these reasons, the panel finds that the ministry reasonably concluded 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's medical conditions 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 a reasonable application of the legislation in the circumstances of the appellant. The panel therefore confirms the ministry's decision.