

PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Social Innovation (the Ministry) dated September 19, 2013 denying the appellant's application for designation as a person with disabilities (PWD). The Ministry determined that the appellant did not meet three of the five criteria required for PWD designation as set out in the *Employment and Assistance for Persons with Disabilities Act*, section 2. The appellant has met the criteria of being 18 years or older and a medical practitioner has confirmed her impairment is likely to continue for at least 2 years. Specifically, the Ministry determined that, based on the information provided, the following criteria were not met:

- the appellant does not have a severe mental or physical impairment;
- the appellant's impairment does not, in the opinion of a prescribed professional, significantly restrict her ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and
- the appellant does not require the significant help or supervision of another person to perform the DLA.

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, containing the following three parts:
 - The appellant's Self Report completed in or about August 2013 (the date the appellant provided is her birth date);
 - The Physician Report (PR) dated August 9, 2013 completed by the appellant's nephrologist (kidney specialist, erroneously identified as a neurologist in the reconsideration decision) who has treated her for 2 years and indicated had seen her 2-10 times in the previous 12 months; and
 - The Assessor Report (AR) dated August 9, 2013 completed by the appellant's social worker who indicated she has known the appellant for 2 years and had seen the appellant 2-10 times in the previous 12 months.
2. The appellant's Request for Reconsideration, dated September 6, 2013, in which she wrote: "I have many health issues – diabetes, kidney disease, high blood pressure and was [assessed] by [the hospital's] neuropsychologist that show my IQ at 66. Even though I can walk and talk doesn't mean I don't have daily problems. I don't get any support from family other than renting a room. I do require lots of help – social worker, nurse, community counselor help me manage my meds and [appointments]. All these things together make my life stressful and difficult."

The appellant completed her notice of appeal on September 30, 2013, and wrote, "I have been made eligible for Community Living BC ["CLBC"] services. I have included my letter from CLBC of eligibility and the CLBC Assessor Report form. I meet the DSM-IV-TR criteria for mental retardation." With her notice of appeal, the appellant submitted a copy of a one-page letter dated August 23, 2013 from CLBC, as well as a copy of a CLBC Assessment Summary – Assessor Report Form dated July 4, 2013 (together, the "Additional Information").

In the Ministry's written submission on appeal dated October 29, 2013, the Ministry's representative indicates that she had read the appellant's submission in the appellant's notice of appeal, as well as the Additional Information. The Ministry did not object to the admission of the Additional Information. The panel admits as evidence the appellant's submission and the Additional Information as written testimony in support of the information and records that were before the minister when the decision being appealed was made pursuant to subs. 22(4)(b) of the *Employment and Assistance Act*.

The following is a summary of the evidence from the PR and AR, together with the evidence provided in the Additional Information, regarding the appellant's impairments as they relate to the PWD criteria at issue. The panel has also included reference to the appellant's self report in the PWD application.

Severity of impairments (criteria set out in subs. 2(2) EAPWDA)

In the PR, the appellant's nephrologist reports that the appellant has diabetes and chronic kidney disease, but does not indicate a date of onset. In the comments indicating the severity of the appellant's impairments and describing how the appellant's medical condition impairs her, the resident wrote: "advanced chronic kidney disease with CFR 28 (normal ≥ 60) associated fatigue, lethargy and lassitude." The nephrologist wrote that the appellant had not been prescribed any

medication that would interfere with her ability to perform DLA, but commented that the anticipated duration of the appellant's treatments is "lifelong until/unless she were to receive a transplant." He indicated that the appellant does not need any prostheses or aids for her impairments.

In her self report, the appellant describes her disability, "because of my kidney disease I am tired all the time and I sleep a lot. For this reason it's really hard for me to hold down a full time job or to take courses. I have tried to take a course and drop out because of my health. My diabetes has not been controlled well and it causes big problems. I have depression because of the above health problem and family stress. My chronic kidney disease makes me have low energy and sleep a lot. Because I can't do very much I am sad and depressed."

In the PR under functional skills, the nephrologist indicated that the appellant can walk 4+ blocks unaided on a flat surface, can climb 5+ steps unaided, has no limitation on lifting, and no limitation on remaining seated for any length of time. The nephrologist indicated that there are no difficulties with communication. In the section asking if there are any significant deficits with cognitive and emotional functioning in the PR, the nephrologist checked "unknown" and wrote, "see assessment in next section." The nephrologist checked "no" in answer to the question in the PR, "does the impairment directly restrict the person's ability to perform [DLA]?"

In the AR, the appellant's social worker wrote the following in describing the appellant's mental or physical impairments that impact her ability to manage DLA, "[the appellant] has chronic kidney disease which causes her to be fatigued continually and needing to sleep a lot. She has diabetes which is not under good control. As well, she has impaired intellectual functioning, FSI of = 66." The social worker referred to a neuropsychological assessment on July 2013 showing the appellant to have "intellectual impairment that is likely life long" (as discussed further in the section on ability to perform DLA).

In the Additional Information, CLBC advised the appellant that she meets CLBC's eligibility criteria for support and services, with the explanation, "To be eligible for CLBC services, an adult aged 19 or over must have a developmental disability." In the CLBC assessment summary – assessor report form, the clinical psychologist who assessed the appellant has indicated that she "meets the DSM-IV-TR criteria for mental retardation." The psychologist has written the following comment,

It should be noted that her July 2008 evaluation by psychologist ... indicated that she had a borderline IQ at that time (not impaired) but she did demonstrate severe impairment on many academic measures suggesting significant learning disability. She also reported significant difficulty with school and in her social relationships. Significant family discord was also noted. She was [age deleted] years old at that time. She is now [age deleted] years old and demonstrated an impaired IQ and has been unable to complete high school or be employed. She also reported difficulty budgeting money and her treatment team are very concerned about her ability to manage her significant medical conditions. I feel that her genetic/congenital medical issues (i.e. congenital kidney disease, insulin dependent diabetes, hypertension, dyslipidemia) have resulted in a decline in her intellectual functioning and/or a failure to make expected intellectual age-related gains so that she now has intellectual impairment (i.e. mental retardation) compared to her age group. Although it is not clear at what age she actually moved from the borderline to the impaired range for her intellectual function, it is likely that this occurred before age 18.



Ability to perform DLA (criteria set out in subs. 2(2)(b) EAPWDA)

In the PR, the nephrologist checked "no" in answer to the question, "does the impairment directly restrict the person's ability to perform [DLA]?" and did not complete the table for that reason.

In the AR, the appellant's social worker indicated that the appellant's ability to communicate was "poor" for the areas of reading and writing, commenting, "difficulty spelling" and "slow to process when reading." The social worker indicated that the appellant is independent in all areas of mobility and physical ability, writing, "she can perform all of the above, but slower and tires during the performance. She needs to take breaks."

In the section of the AR describing the appellant's cognitive and emotional functioning, the social worker indicated that the appellant's impairments had a minimal impact on her attention/concentration. The social worker indicated that the appellant's impairments have a moderate impact on her insight and judgment, executive functions, and motivation. The social worker has written the following comment, "[The appellant] recently (July 2013) had neuropsychological assessment. The testing showed her to have intellectual impairment that is likely lifelong. Most of her index scores were in the borderline range. Her performance on industrial tests was low average to borderline ... These above results have impacted her in that she has poor concentration, inability to focus on tasks and has difficulty holding down a job. She also will have difficulty taking any classes."

Assistance required/provided (criteria set out in subs. 2(2)(b)(ii) EAPWDA)

In the section of the PR describing the assistance the appellant needs with DLA, the appellant's nephrologist did not complete any of the questions – these sections of the form are left blank.

In the AR, the social worker indicated that the appellant is independent in 7 of the 8 listed tasks of personal care, but indicated that the appellant needs continuous assistance from another person for regulating her diet, writing the comment, "needs cuing." The social worker indicated in the AR that the appellant is independent in all areas of the DLAs of basic housekeeping, shopping, meals, and transportation. The social worker indicated that the appellant was independent in 2 of the 3 tasks listed for the DLAs of paying rent and bills, and medications, but that the appellant requires periodic assistance in budgeting and taking her medications as directed. The social worker wrote, "Because of her difficulty focusing, concentrating and planning ahead her taking of her medication, eating properly, and controlling her diabetes has been a problem. She is impulsive and has attention difficulties." In the DLA of social functioning, the social worker has indicated that the appellant is independent and has good functioning in her immediate social network, and her extended social network.

In the AR, the social worker has indicated that the appellant's family, health authority professionals and community service agencies provide help to the appellant for performing her DLA, but did not indicate that the appellant requires any assistive devices.



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

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.

In its submission on this appeal, the Ministry wrote the following:

The original reconsideration decision was based on the information presented at the time of adjudication. After reading the appellant's submission combined with the new letter from Community Living British Columbia, the ministry would have approved PWD designation.

The panel's jurisdiction is limited to a review of the Ministry's reconsideration decision, even though the Ministry may have made a different decision at a later date. Accordingly, this panel must assess the Ministry's reconsideration decision and determine whether it was reasonable based on the evidence (which will include the Additional Information provided since the reconsideration decision) or a reasonable application of the legislation in the appellant's circumstances.

Severity of impairment

Mental impairment

The reconsideration decision states that, based on the diagnosed impairments and functional assessment provided by the appellant's nephrologist and her social worker, the Ministry finds that there is not enough evidence to establish a severe mental impairment. In the decision, the Ministry writes, "... employability or vocational ability is not a component of a PWD designation. Although the ministry acknowledges that your impairments impact your cognitive and emotional functioning you are able to independently or with periodic assistance manage all of your daily living activities and you can independently manage all of your social functioning." In her submissions in her notice of appeal, the appellant submits that because she has met the criteria for mental retardation, she has a severe mental impairment, and this is reflected in the fact she meets the criteria for CLBC support.

In the AR, the appellant's social worker referred in her comments to the appellant's intellectual impairment and that a neuropsychological assessment indicated that the appellant was functioning at low to borderline. The panel notes that information provided by the clinical psychologist in the CLBC assessment in the Additional Information indicates that the appellant has been diagnosed as meeting the DSM-IV-TR criteria for mental retardation. The psychologist also noted in the report that an earlier 2008 assessment of the appellant showed that she "demonstrated severe impairment on many academic measures" and that her intellectual functioning has deteriorated since that assessment and that the appellant's treatment team is "very concerned about her ability to manage her significant medical conditions" [as a result of her mental impairment]. The panel gives weight to the evidence of the CLBC psychologist that the appellant suffers from a recognizable cognitive impairment – that she has been diagnosed as meeting the criteria for mental retardation.

In these circumstances, even though (as discussed below under the heading Significant Restrictions to DLA) these impairments do not seem to have yet had significant impacts on the appellant's ability to perform DLA independently, the panel concludes that the ministry was not reasonable in finding that the appellant does not have a severe mental impairment.

Physical impairment

In the reconsideration decision, the ministry determined that, based on the information provided by the appellant's nephrologist and her assessor (her social worker), the ministry does not have enough information to establish that the appellant has a severe physical impairment. The reconsideration decision notes the information provided by the nephrologist in the PR – that the appellant is able to perform all of the functional skills (able to walk 4+ blocks unaided, climb 5+ steps unaided, no limitations in lifting and no limitations in remaining seated). The reconsideration decision also notes that in the AR, the appellant's social worker has indicated that the appellant can independently manage all of her mobility and physical functions, although slower and needing to take breaks. The appellant has said in her submissions on reconsideration that her many health issues (diabetes, kidney disease, and high blood pressure) cause her daily problems and make her life stressful and difficult.

The panel notes that there is no information in the Additional Information from CLBC regarding the appellant's physical impairments. Based on the information provided by the appellant's nephrologist and social worker in the PWD application that the appellant is able to perform all of her functional skills independently, albeit slower than normal, the panel therefore finds that the Ministry was reasonable in determining that a severe physical impairment had not been established through the information provided by the appellant's nephrologist in the PR and the appellant's social worker in the AR, as well as in the Additional Information, to satisfy the requirement of subs. 2(2) of the EAPWDA.

Significant restrictions in the ability to perform DLA.

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. As stated above, this panel has found that based on the information provided by the CLBC psychologist, the Ministry's determination that the appellant's mental impairment is not severe is not reasonably based on the evidence. The panel agrees that the Ministry's determination that there is no evidence to establish that the appellant's physical impairment is severe is reasonable.

In the reconsideration decision, the Ministry notes that in the PR, the appellant's nephrologist does not indicate that she is restricted in her ability to manage any of her DLA. The Ministry notes that in the AR, the appellant's social worker indicated that the appellant can independently manage the majority of her DLA – requiring periodic assistance with budgeting and taking medications as directed, and continuous assistance with regulating her diet. In the reconsideration decision, the Ministry wrote, "It would be reasonable to assume that due to your diabetes and kidney disease that your ability to manage your daily living abilities may be affected. However, the ministry must rely on the expertise of your physician and assessor in this matter." The Ministry determined that "there is not enough evidence to establish that your impairments directly and significantly restrict daily living activities continuously or periodically for extended periods." In her submissions on reconsideration, the appellant stated that although she "can walk and talk," this doesn't mean she doesn't have daily problems and she notes she relies on her social worker, nurse and community counselor to help her manage her medications and appointments. She also points to the fact she has met the CLBC eligibility criteria in her notice of appeal as evidence her impairments impact her DLA.

In the Additional Information, the CLBC clinical psychologist comments that the appellant "reported

[REDACTED]

difficulty budgeting money and her treatment team are very concerned about her ability to manage her significant medical conditions." There is no further comment about the impact of the appellant's mental impairment on her DLA.

As stated by the Ministry in its reconsideration decision, it would be reasonable to assume that due to the appellant's diabetes and kidney disease, coupled with her mental impairment, that her ability to manage her DLA would be affected. However, the panel notes that this information is not provided in the evidence of the appellant's nephrologist, who reports in the PR that the appellant's DLA are not restricted, or her social worker, who reports in the AR that the appellant is independent in all but 3 of 33 tasks of her DLA, or in the Additional Information. Accordingly, the panel finds that based on the information provided (which includes the Additional Information), the Ministry's determination that there was not enough evidence to establish that the appellant was significantly restricted in her ability to perform DLA as required under subs. 2(2)(b) was reasonable.

Help with DLA

In its reconsideration, the Ministry determined that as it "has been established that [DLA] are not significantly restricted ... it can be determined that significant help is not required from other persons."

Given that this panel finds that the Ministry's determination that there was not enough information provided showing that the appellant's impairments significantly restrict her DLA either continuously or periodically for extended periods, the panel finds reasonable the Ministry's determination that because 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, including the Additional Information, and the relevant legislation, the panel finds that the Ministry's decision that the appellant was not eligible for PWD designation is reasonably supported by the evidence. The panel therefore confirms the Ministry's decision.