

## 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 March 8, 2017, which held that the appellant did not meet 3 of the 5 statutory requirements of section 2 of the *Employment and Assistance for Persons with Disabilities Act* for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that a medical practitioner has confirmed that the appellant's impairment is likely to continue for at least 2 years.

However, the ministry was not satisfied 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
- as a result of those restrictions, in the opinion of a prescribed professional, the appellant requires an assistive device, the significant help or supervision of another person, or the services of an assistance animal to perform 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

A ministry observer was in attendance at the hearing with the consent of the appellant.

On October 19, 2016, the ministry received the appellant's PWD application comprised of a Physician Report (PR) and an Assessor Report (AR), both completed by the appellant's general practitioner on September 19, 2016, and the appellant's Self-report (SR), dated October 2, 2016. The appellant also provided a January 20, 2014 consultation letter from a physician at a pain clinic to the GP.

The appellant's request for PWD designation was denied on January 12, 2017. On February 28, 2017, the ministry received the appellant's Request for Reconsideration to which a February 24, 2017 letter from the GP was attached.

No additional documentary evidence was provided on appeal. At the hearing, the appellant and her mother provided oral testimony which either reiterated information previously provided or provided additional corroborating details. Accordingly, the panel admitted the oral testimony of the appellant and her mother under section 22(4) of the Employment and Assistance Act as testimony in support of the information and records before the ministry at reconsideration.

At the hearing, the ministry relied on its reconsideration decision. The ministry also stated that the appellant's own information cannot be taken into consideration when determining PWD eligibility, as the ministry relies on the information from the prescribed professionals.

### Summary of relevant evidence

#### Diagnoses

In the PR, the GP diagnoses the appellant with congenital C6-7 fusion/chronic neck pain (onset 2013), depression (on/off for years), and anxiety (worse recently). The letter from the pain clinic physician confirms the cause of the neck pain. At reconsideration, the GP reports that the appellant has symptoms consistent with a diagnosis of Fibromyalgia and a likelihood of Chronic Fatigue. She has physical and mental impairments that result in a severely limited ability to function independently.

#### Physical Impairment

The GP provides the following information in the PWD application.

- Neck pain has become severe the past 1-2 years, and has become debilitating. Constant pain impairs physical functioning.
- No prostheses or aids are required.
- The appellant is able to walk 4+ blocks unaided on a flat surface, climb 5+ steps unaided, lift 5 to 15 lbs., and remain seated for 1 to 2 hours.
- Walking indoors and outdoors, climbing stairs and standing are managed independently.
- Lifting and carrying/holding require periodic assistance from another person (needs help with heavier items).

In his subsequent letter, the GP reports that physical exam reveals significant tenderness to multiple soft tissue sites with light pressure, consistent with a diagnosis of Fibromyalgia and that the appellant likely also has associated Chronic Fatigue. In terms of physical impairment, overall function is very

poor. Without help from her children and parents, her ability to function independently would be severely impaired. Function outside of the home is also significantly impaired. She is unable to be gainfully employed.

In her SR, the appellant writes that she has daily chronic pain. The fusion of vertebrae in her neck pulls all the muscles in her neck, shoulder and back, causing her immobility. The pain is debilitating and controls her entire life. Some days it makes her nauseous, depressed, lay up in bed, unable to do housework, and unable to drive safely. Trials of medications and physical treatments have given little to no relief. She cannot stand for long periods of time, cannot lift anything or sit for too long due to getting seized up. She has a lack of mobility, with some days being worse, and her nausea comes and goes.

In her reconsideration submission, the appellant writes that she could easily sleep all day. Her body and muscles always feel exhausted and strained. When she moves, walks, goes upstairs, or strains her body in any way, her body pays for it with increasing pain. She constantly has a headache, which can turn into a migraine some days

At the hearing, the appellant's mother stated that she has had to help the appellant quite a bit in last year and a half. She and husband go over to the appellant's every day. They also help the appellant pay her bills. The appellant is on a lot of high pain medications and often needs to stay at home sleeping.

At the hearing, the appellant described a typical day. She wakes up feeling like she's been beaten with a bat. She gets her children ready, takes them to school, and goes to her parents to rest. If her youngest child is not in preschool, the appellant's father looks after the child while the appellant rests. After collecting her children from school, the appellant rests at home and her mom brings over dinner while the appellant rests. She has pain every day and sometimes cannot even leave the house. Sometimes she needs to bathe 3 times to try to relieve her pain. She has to rest after 2 stairs. She must lay down a lot, as she cannot sit or stand for long periods of time. Her medication makes her nauseous. She cannot be in the workforce due to her medical conditions.

### *Mental Impairment*

The GP provides the following information in the PWD application.

- Constant pain impairs concentration/focus.
- Becoming depressed due to pain/poor functioning.
- Also is anxious. Social anxiety interacting with people/public and anxious about her future.
- Significant deficits with cognitive and emotional function in 3 of 12 specified areas – memory, emotional disturbance, and attention or sustained concentration.
- No cognitive, motor, sensory, or other difficulties with communication. Good ability with speaking, reading, writing, and hearing.
- Major impact on daily functioning in 1 of 14 listed areas – emotion. A moderate impact for attention/concentration and memory. Minimal or no impact in all other areas.
- Social functioning is impaired due to depression/anxiety. Four listed aspects of social functioning require periodic support/supervision (appropriate social decisions, ability to develop and maintain relationships, interact appropriately with others, ability to secure assistance from others). The remaining aspect, ability to deal appropriately with unexpected demands, requires continuous support/supervision (Feeling overwhelmed in her current situation. Afraid for future). Living with parents currently [In her written submissions and at the hearing, the appellant clarified that she does not live with her parents, though she had in the past].

- Assistance with social functioning is described as “Financial Aid,”
- Marginal functioning with immediate and extended social networks.

In his subsequent letter, the GP writes that it is becoming more and more difficult for the appellant to interact in the community. Her concentration, motivation and goal orientated activity are becoming progressively impaired.

The information from the pain clinic physician does not describe the appellant’s physical functioning.

In her SR, the appellant writes that knowing that her pain will worsen as she ages, causes even more depression and anxiety. If it were not for her children, she would have no motivation to do anything. At reconsideration, the appellant writes that her depression and anxiety can get so bad she does not want to even leave her house.

At the hearing, the appellant confirmed information she previously provided, and stated that she has lost friendships because of her physical condition. She also stated that medications for pain and depression affect her memory.

### DLA

In the PWD application, the GP reports:

- No medications or treatments have been prescribed that interfere with the ability to perform DLA.
- Unable to maintain employment due to neck pain, anxiety/depression. Managing to do basic care for herself and her children. Not able to manage much more than that.

Move about indoor/outdoors

- Walking indoors and outdoors, climbing stairs and standing are managed independently.
- Lifting and carrying/holding require periodic assistance from another person (needs help with heavier items).

Personal care

- All listed tasks are managed independently - dressing, grooming, bathing, toileting, feeding self, regulate diet, and transfers in/out of bed and on/off chair.

Basic Housekeeping

- Laundry and basic housekeeping take significantly longer than typical to perform (some days unable due to pain. Gets them done at own pace during the week).

Shopping

- Going to and from stores, reading prices and labels, making appropriate choices, and paying for purchases are managed independently.
- Carrying purchases home requires periodic assistance from another person.

Meals

- Meal planning and safe storage of food are managed independently.
- Food preparation and cooking require periodic assistance from another person and take significantly longer (Often needs help or takes longer due to neck pain).

### Paying Rent and Bills

- All listed tasks – banking, budgeting, and pay rent and bills are managed independently.

### Medications

- All listed tasks are managed independently – filling/refilling prescriptions, taking as directed and safe handling and storage.

### Transportation

- All listed tasks are managed independently - getting in and out of a vehicle, using public transit and using transit schedules/arranging transportation.

### Social Functioning

- Social functioning is impaired due to depression/anxiety. Four listed aspects of social functioning require periodic support/supervision (appropriate social decisions, ability to develop and maintain relationships, interact appropriately with others, ability to secure assistance from others. The remaining aspect, ability to deal appropriately with unexpected demands requires continuous support/supervision (feeling overwhelmed in her current situation. Afraid for future. Living with parents currently). Assistance is described as “Financial Aid,”
- Marginal functioning with immediate and extended social networks.

In his subsequent letter, the GP describes the aforementioned impairment of laundry, housekeeping, food preparation, and cooking as “can only manage approximately 5 minutes of doing the above tasks, then needs to rest.” A load of laundry can take the whole day. Her children share in the chores and do a significant amount of household duties.

In her SR, the appellant writes that she is able to manage her children and housework without being too overwhelmed because she can work at her own pace. She also has help from her mom when needed. On days of extreme pain, her parents help anyway they can, as well as the children’s father.

At reconsideration, the appellant reports that after 5 minutes of sweeping, mopping, standing etc. her body starts aching in pain and she needs to rest. Her children help a lot with housework. She usually ends up not being able to sleep well when she has had a difficult day, which leads to another day of exhaustion. She makes quick and easy meals for her family as it is difficult to stand for long periods of time, or has to take many breaks when preparing a large meal.

At the hearing, the appellant stated that her mother helps her get in and out of the tub and get dressed. Sometimes her children have to help her get dressed. She must psyche herself up for any task. Her mother accompanies her when she goes outside. Her mother helps with meals, and both her mother and older children help with household chores as she can only do housework in 5-10 minute intervals before needing to rest.

### Need for Help

The GP reports that assistance is provided by family.

## PART F – Reasons for Panel Decision

### **Issue on Appeal**

The issue on 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:

- a severe physical or mental impairment was not established;
- the appellant's DLA are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and
- as a result of those restrictions, in the opinion of a prescribed professional, the appellant does not require an assistive device, the significant help or supervision of another person, or the services of an assistance animal to perform DLA?

### **Relevant Legislation**

#### **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 or nurse 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.

(4) The minister may rescind a designation under subsection (2).

## EAPWDR

### Definitions for Act

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

(a) authorized under an enactment to practise the profession of

- (i) medical practitioner,
- (ii) registered psychologist,
- (iii) registered nurse or registered psychiatric nurse,
- (iv) occupational therapist,
- (v) physical therapist,
- (vi) social worker,
- (vii) chiropractor, or
- (viii) nurse practitioner, or

(b) acting in the course of the person's employment as a school psychologist by

- (i) an authority, as that term is defined in section 1 (1) of the [Independent School Act](#), or
- (ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the [School Act](#),  
if qualifications in psychology are a condition of such employment.

(3) The definition of "parent" in section 1 (1) applies for the purposes of the definition of "dependent child" in section 1 (1) of the Act.

### Alternative grounds for designation under section 2 of Act

**2.1** The following classes of persons are prescribed for the purposes of section 2 (2) [*persons with disabilities*] of the Act:

- (a) a person who is enrolled in Plan P (Palliative Care) under the Drug Plans Regulation, B.C. Reg. 73/2015;
- (b) a person who has at any time been determined to be eligible to be the subject of payments made through the Ministry of Children and Family Development's At Home Program;
- (c) a person who has at any time been determined by Community Living British Columbia to be eligible to receive community living support under the [Community Living Authority Act](#);
- (d) a person whose family has at any time been determined by Community Living British Columbia to be eligible to receive community living support under the [Community Living Authority Act](#) to assist that family in caring for the person;
- (e) a person who is considered to be disabled under section 42 (2) of the [Canada Pension Plan](#) (Canada).

## **Panel Decision**

### **Severe Physical or Mental Impairment**

The legislation provides that the determination of severity of impairment is at the discretion of the minister, taking into account all of the evidence including that of the appellant. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a prescribed professional respecting the nature of the impairment and its impact on daily functioning. While the legislation does not define "impairment", the PR and AR define "impairment" as a "loss or abnormality of psychological, anatomical or physiological structure or functioning causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration." While this is not a legislative definition, and is therefore not binding on the panel, in the panel's opinion, it reflects the legislative intent and provides an appropriate analytical framework for assessing the degree of impairment resulting from a medical condition.

When considering the evidence provided respecting the severity of impairment, the ministry must exercise its decision-making discretion reasonably by weighing and assessing all of the relevant evidence and cannot simply defer to the opinion of a prescribed professional as that would be an improper fettering of its decision-making authority.

### **Mental Impairment**

The appellant argues that the depression and anxiety caused by her worsening physical condition and concerns for her future can be so bad that she does not even want to leave her house. Additionally, her medications are affecting her memory. In the PWD application, the appellant's GP confirms that the appellant's cognitive and emotional functioning is impacted in the areas of memory, emotion, and concentration. However, as the ministry argues, the GP indicates that there are no significant deficits in the majority of areas of cognitive and emotional functioning, and there is a major impact on daily functioning in only one area, with a moderate impact in two areas, and minimal or no impact in 8 areas. At reconsideration, the GP reports that concentration, motivation and goal orientated activity are becoming progressively impaired, but as the ministry notes, there is no description of the degree of impairment. The panel finds that the ministry reasonably considered the cumulative impact on cognitive and emotional functioning as not being indicative of a severe



impairment of mental functioning.

Respecting social functioning, the appellant reports that she has lost friendships and the GP confirms that the appellant has marginal functioning with social networks and that it is becoming more and more difficult for the appellant to interact in the community. The information addressing specific aspects of social functioning is that while the appellant requires continuous support/supervision from another person with one area – dealing with unexpected demands – the remaining four areas require periodic support/supervision of an unspecified frequency or duration, and the help needed with social functioning is described as financial aid. While the information establishes that the appellant's social functioning is impaired, the panel finds that the ministry has reasonably viewed the information as not establishing a severe impairment of the appellant's ability to relate to, communicate or interact with others effectively. Additionally, as the ministry argues, financial aid is not indicative of the need for support due to restrictions with social functioning.

The panel finds that the ministry reasonably determined that based on the information, including the appellant's self-reports, a severe impairment of mental functioning has not been established.

### Physical Impairment

The appellant argues that her chronic daily severe pain caused by the fusion of two neck vertebrae and fibromyalgia, together with chronic fatigue, severely impairs her physical functioning to the point where she is reliant on daily assistance from her mother and children. While both the appellant and her GP confirm ongoing limitations in the appellant's physical functioning, as the ministry argues, the appellant is assessed by the GP as being independent with the majority of listed areas of mobility and physical ability and is assessed at the higher range in terms of walking and climbing stairs. Additionally, as the ministry notes, while the appellant is assessed as having lifting limitations, she can lift 5 to 15 lbs., and the GP describes the periodic assistance required for lifting as being for heavier items. At reconsideration, the GP reports that the appellant's overall function is very poor and describes restrictions with housekeeping and meal preparation, but as the ministry notes, the GP does not describe limitations in terms of walking, climbing stairs or lifting. In the absence of these details, the panel finds the ministry reasonably considered that the assessment of those activities in the PWD application remains accurate. At reconsideration, the GP reports that function outside of the home is significantly impaired, and the appellant is unable to be gainfully employed, but as the ministry notes, there is no accompanying description of the nature of the impairments and employability or ability to work is not a criterion upon which PWD eligibility is determined.

Based on the available information, the panel finds that while the information from the appellant, her mother and her GP indicates ongoing and worsening limitations in her physical functioning, given the GP's assessment of the appellant's physical functional skills and mobility, the ministry reasonably determined that a severe physical impairment has not been established.

### Restrictions in the ability to perform DLA

The legislative requirement respecting DLA set out in section 2(2)(b) of the EAPWDA is that the minister be satisfied that as a result of a severe physical or mental impairment a person is, in the opinion of a prescribed professional, directly and significantly restricted in the ability to perform DLA either continuously or periodically for extended periods. Consequently, while other evidence may be considered for clarification or support, the ministry's determination as to whether or not it is satisfied, is dependent upon the evidence from prescribed professionals. DLA are defined in section 2(1) of the

EAPWDR and are listed in both the PR and the AR sections of the PWD application with the opportunity for the prescribed professional to check marked boxes and provide additional narrative. DLA, as defined in the legislation, do not include the ability to work.

The appellant argues that due to her physical and mental health conditions, she is only able to manage DLA tasks for 5-10 minutes before needing to rest and that there are some days she is laid up in bed. The information from the GP, a prescribed professional as defined in the legislation, confirms that the appellant takes longer with basic housekeeping and making meals and that some days she is unable to do housework and she often requires assistance with meals. The appellant is reported as independently managing all listed tasks of personal care, paying rent and bills, medications, and transportation. With the exception of lifting/carrying/holding and carrying purchases home (“needs help with heavier items”) for which periodic assistance is required, the appellant is also reported as independently managing the listed aspects/tasks of mobility and physical ability (relates to the DLA “move about outdoors and indoors”) and shopping. As the ministry notes, there is no description in the PWD application of how much longer housekeeping and meal activities take or the frequency or duration of periodic assistance required with these activities. However at reconsideration, the GP reports that the appellant needs to rest after approximately 5 minutes of doing these tasks, and that a load of laundry can take the whole day. As the ministry notes, at reconsideration, the GP does not describe restrictions with personal care, shopping, paying rent and bills, medications, or transportation.

Respecting the two DLA that relate exclusively to mental impairment, “relate to, communicate or interact with others effectively” and “make decisions about personal activities, care or finances”, the panel previously found that the ministry reasonably determined the limitations respecting social functioning did not indicate a severe degree of impairment. Additionally, the appellant is not reported as having difficulties making decisions respecting her personal activities, care or finances.

Based on the above analysis, the panel finds that the prescribed professional assesses the appellant as independent with the majority of DLA, which is consistent with the GP’s assessment of physical functional skills and daily cognitive and emotional functioning. The panel finds that the ministry has reasonably determined that although the appellant experiences restrictions with DLA related to housekeeping and cooking, there is not enough evidence to confirm that the appellant has a severe impairment that significantly restricts her ability to perform DLA continuously or periodically for extended periods.

#### Help to perform DLA

The appellant reports that she needs daily assistance from her parents and older children to manage her DLA.

The ministry’s position is that because it has not been established that DLA are significantly restricted, it cannot be determined that help is required.

Section 2(2)(b)(ii) of the EAPWDA requires that, *as a result of direct and significant restrictions in the ability to perform DLA*, a person requires help to perform those activities. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform DLA.

The establishment of direct and significant restrictions with DLA is a precondition of the need for help criterion. As the panel found that the ministry reasonably determined that direct and significant

restrictions in the appellant's ability to perform DLA have not been established, the panel also finds that the ministry reasonably concluded that it cannot be determined that the appellant requires help to perform DLA as required by section 2(2)(b)(ii) of the EAPWDA.

Conclusion

The panel finds that the ministry's reconsideration decision, which determined that the appellant was not eligible for PWD designation, was reasonably supported by the evidence and a reasonable application of the applicable enactment, and therefore confirms the decision. The appellant is not successful on appeal.