

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 21, 2017, which held that the appellant did not meet 4 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 but was not satisfied that:

- a medical practitioner confirmed that the appellant has an impairment that is likely to continue for at least 2 years;
- 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
- as a result of those restrictions, 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

On December 15, 2016, the ministry received the appellant's PWD application comprised of a Medical Report (MR) completed by a general practitioner (GP) on October 17, 2016, an Assessor Report (AR) completed by a social worker (SW) on December 8, 2016, and the appellant's Self-report (SR) dated September 20, 2016.

The appellant's request for PWD designation was denied on February 23, 2017. On March 7, 2017, the ministry received the appellant's Request for Reconsideration.

On March 30, 2017, the tribunal received the appellant's Notice of Appeal, in which the appellant reiterated information previously provided. No additional submissions were provided by the parties on appeal.

Summary of relevant evidence

Diagnoses and Degree and Course of Impairment

In the MR, the GP diagnoses the appellant with:

- Back pain (onset January 2013);
- Schizophrenia vs drug related psychosis vs schizotypal (onset January 1993); and
- Possible COPD – tests pending (onset October 2016).

When asked if the impairment is likely to continue for two years or more from today, the GP placed a question mark in the "No" box and wrote "Unclear patient new to me today."

Physical Impairment

The GP provides the following information:

- On exam the appellant is sore over both iliac crests. She has normal gait with normal L-spine ROM straight leg raise.
- No prostheses or aids are required.
- The appellant is able to walk 2 to 4 blocks unaided on a flat surface, climb 5+ steps unaided, and can remain seated with no limitation. She can do no lifting.

The SW provides the following information:

- Walking indoors and outdoors, climbing stairs and standing are managed independently. The appellant states that these activities take 3-4 times longer due to back pain and fatigue.
- Lifting and carrying/holding are managed independently. No comments are provided.

In her written submissions, including the Notice of Appeal, the appellant reports having been kicked in the back. This occurred about 8-10 years ago and was so hard that her knees buckled. As a result, for the last 4 years the appellant has been experiencing a lot of severe pain in her hips, back and legs. In the SR, the appellant describes her disability as "my back."

Mental Impairment

The GP provides the following information:

- Old chart notes possible history of schizophrenia vs drug induced psychosis related to marijuana use but the appellant has refused psychiatric [illegible] since 2006. Continues to smoke marijuana.
- Significant deficit with cognitive and emotional function in 1 of 11 specified areas – executive (refuses psychiatric reassessment). A question mark is in the box for psychotic symptoms.
- No cognitive, motor, sensory, or other difficulties with communication.
- Social functioning is restricted (likely mental illness, little social contact).

The SW provides the following information:

- The appellant's ability for speaking, reading, writing, and hearing is good.
- No minimal, moderate or major impacts on daily functioning are indicated for the 14 listed areas of cognitive and emotional functioning. Client states she has no cognitive or emotional functioning concerns. "From my limited involvement with client, I cannot expand on these concerns." The SW places question marks are placed alongside the following listed areas of cognitive and emotional functioning: bodily functions, consciousness, impulse control, executive, and psychotic symptoms.
- "Client seems very socially isolated, although she stated she has no problems with friendships."
- Marginal functioning with immediate and extended social networks. Suspect that client suffers with social concerns but does not acknowledge at all.

DLA

In the PWD application, the GP reports:

- No medications or treatments have been prescribed that interfere with the ability to perform DLA.
- Unknown if the appellant's impairment restricts her ability to perform DLA. Where asked to describe degree of restriction, the GP comments that it is difficult to say, first clinic encounter. Suspects she may qualify for PWD based on likely mental health issues but difficult to assess.
- As noted above, social functioning is restricted. The GP does not identify the restriction as periodic or continuous. Lives on her own. Likely mental illness. Little social contact.
- All other DLA are reported as not being restricted.

The SW reports that the appellant lives independently and does all DLA independently. If she had assistance though, she may rely on another.

Move about indoor/outdoors

- Walking indoors and outdoors, climbing stairs and standing are managed independently, reported to take 3-4 times longer.
- Lifting and carrying/holding managed independently.

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 requires periodic assistance from another person (no laundry facilities, must go to someone else's house to complete).
- Basic housekeeping is managed independently.

Shopping

- All listed tasks are managed independently - going to and from stores (no vehicle – relies on others to support her with this), reading prices and labels, making appropriate choices, paying for purchases, and carrying purchases home.

Meals

- All listed tasks are managed independently - meal planning, food preparation, cooking, and safe storage of food.

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. Help with driving into town. Uses public transit when available.

Social Functioning

- As above.
- Marginal functioning with immediate and extended social networks.

Need for Help

The GP describes the assistance needed with DLA as “undetermined” as it was his first clinic encounter with the appellant. The SW reports that the appellant has no laundry facilities, drive or have a vehicle. Friends help with laundry and driving into town.

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 when concluding it was not satisfied that

- a medical practitioner had confirmed that the appellant has an impairment that is likely to continue for at least 2 years;
- a severe physical or mental impairment was established;
- 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 help, as it is defined in the legislation, 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

Duration of Impairment

Section 2(2)(a) of the EAPWDA requires that the ministry be satisfied that a person has a severe mental or physical impairment that “in the opinion of a medical practitioner or nurse practitioner is likely to continue for at least 2 years.” The GP, a medical practitioner, provides information respecting the onset dates for the appellant’s physical and mental health conditions, but when asked if the impairment is likely to continue for two years or more, responds with a question mark. Additionally, when asked what the estimated duration of impairment is, the GP responds “unclear” as the appellant is a new patient. Accordingly, the panel finds that the ministry has reasonably determined that a medical or nurse practitioner has not confirmed that the appellant’s impairment is likely to continue for at least 2 years.

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 MR 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 does not argue that she has a mental impairment. As the ministry notes, based on the information provided by the GP and the SW, the appellant may experience greater impacts to cognitive and emotional functioning than indicated in the PWD application. Both the GP and SW comment that their ability to assess the appellant's mental functioning is made difficult due to their limited experience with the appellant, and the GP notes that the appellant has refused psychiatric reassessment.

The information provided does identify impacts on the appellant's social functioning, as the GP reports "little social contact" and the SW assesses marginal functioning with social networks and that the appellant "seems very socially isolated, although she stated she has no problems with friendships." The panel finds that the ministry reasonably viewed this information as not establishing significant impairment of the appellant's social functioning. As the ministry notes, the GP does not identify the frequency of the restriction and finds it difficult to comment on the degree of restriction given his limited contact with the appellant and the SW does not address the listed aspects of social functioning and indicates that the appellant has friends from whom she receives assistance. Additionally, neither the GP nor the SW identifies cognitive difficulties with communication.

Information respecting the appellant's cognitive and emotional functioning provided by the GP is that the appellant has a significant deficit in only 1 of 11 identified areas. The SW questions impacts on daily functioning in a number of areas, but indicates that she cannot comment given her limited involvement with the appellant. The SW assesses the appellant as independently managing all listed cognitive and decision-making tasks of her DLA, which include making appropriate shopping choices, budgeting and using transit schedules/arranging transportation.

Based on the available information, the panel finds that the ministry reasonably determined that the information respecting the appellant's cognitive, emotional and social functioning does not establish a severe impairment of mental functioning.

Physical Impairment

The appellant argues that she experiences severe pain in her hips, back, and legs resulting from being kicked. She does not describe how the pain impacts her physical functioning. As the ministry notes, both the GP and the SW assess the appellant as independently managing walking and climbing stairs, with the GP reporting that walking is limited to 2 to 4 blocks and the SW commenting that the appellant reports these activities take 3-4 times longer than typical. The panel finds that the ministry has reasonably viewed this level of independent functioning in terms of walking and climbing stairs as not establishing a severe impairment of physical functioning. The GP reports that the appellant has no limitations in terms of remaining seated. Respecting the appellant's ability to lift, carry and hold, the information conflicts, with the GP reporting that the appellant can do no lifting and the SW reporting that the appellant is independent with no noted limitations. The GP does not provide any explanation or description of the lifting limitation and does not indicate any corresponding impact on the appellant's ability to manage DLA as the GP reports that the appellant is not restricted in her ability to manage housework, shopping, meal preparation, all of which involve lifting.

Based on the level of independent functioning for walking and climbing stairs, and the inconclusive information respecting the appellant's ability to lift, carry, and hold, the panel finds that the ministry reasonably determined that a severe physical impairment has not been established.

Restrictions in the ability to perform DLA

Section 2(2)(b)(i) of the EAPWDA requires that the minister be satisfied that in the opinion of a prescribed professional, a severe mental or physical impairment directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods. 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. 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 periodic, it must be for extended periods. 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 that occurs several times a week. Accordingly, in circumstances where the evidence indicates that a restriction arises periodically, it is 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.

DLA are defined in section 2(1) of the EAPWDR and are listed in both the MR 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 does not specifically address her ability to perform DLA, but does indicate that she suffers from severe pain in her back, hips and legs. Both the GP and the SW are prescribed professionals as defined in the legislation. The GP reports that it is "unknown" whether the appellant's impairment restricts the appellant's ability to perform DLA and the SW's comments reflect some uncertainty in her assessment of the appellant's ability to manage DLA. However, the GP reports that there is no restriction with the DLA of personal care, basic housekeeping, shopping, meals, management of finances, management of medications, and transportation, and the SW reports that these DLA are independently managed by the appellant. As the ministry notes, the SW identifies the need for assistance with laundry due to lack of laundry facilities, not physical or mental impairment.

As previously discussed, both the GP and the SW identify some limitations in the appellant's ability to manage the DLA move about outdoors and indoors, as the appellant takes longer to walk and climb stairs and is limited in the distance she can walk. However, as the ministry notes, the GP also reports that there are no restrictions in the appellant's mobility inside or outside the home and the SW reports that the appellant independently manages all listed aspects of mobility and physical ability.

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 ministry has reasonably determined that the independence with which the prescribed professional report that the appellant manages her DLA does not 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

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 appellant does not describe the assistance she requires with DLA and the ministry argues that because it has not been established that DLA are significantly restricted, it cannot be determined that help is required. Given that the establishment of direct and significant restrictions with DLA is a precondition of the need for help criterion and 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.