

## 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 16, 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.

The ministry also determined that the appellant is not in any of the classes of persons set out in section 2.1 of the *Employment and Assistance for Persons with Disabilities Regulation* who may be eligible for PWD designation on alternative grounds.

## 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 and section 2.1

## PART E – Summary of Facts

With the consent of both parties, the hearing was conducted as a written hearing, pursuant to section 22(3)(b) of the Employment and Assistance Act.

On November 15, 2016, the ministry received the appellant's PWD application comprised of a Medical Report (MR) and an Assessor Report (AR), both completed by a general practitioner on October 14, 2016, and the appellant's Self-report (SR), dated September 28, 2016.

The appellant's request for PWD designation was denied on February 2, 2017. On March 6, 2017, the ministry received the appellant's Request for Reconsideration. On March 16, 2017, the ministry issued its reconsideration decision, which again denied the appellant's request for PWD designation.

On April 5, 2017, the tribunal received the appellant's Notice of Appeal (NOA). No additional evidence was provided on appeal, though the NOA includes argument, which is set out in Part F of this decision.

### Summary of relevant evidence

#### Diagnoses

In the MR, where asked to provide a specific diagnosis, the GP writes:

- Arthritis, spinal stenosis ("multi-level spinal stenosis with moderate-severe foraminal stenosis); and,
- Developmental delay.

#### Physical Impairment

The GP provides the following information in the PWD application:

- Work 2 days/week is manageable. Any more and she has increased back pain, stiffness and mobility issues.
- Back issues are periodic and definitely affected by the amount of work she is doing.
- No prostheses or aids are required.
- The appellant is able to walk 4+ blocks unaided on a flat surface, climb 2 to 5 steps unaided, lift 5 to 15 lbs. (can't lift heavy objects), and remain seated with no limitation.
- Walking indoors and outdoors, climbing stairs, standing, and carrying/holding are managed independently.
- Lifting requires periodic assistance from another person (especially heavier objects).

In her SR, the appellant writes that she has had her disability (a bulging disc in her 4 and 5 vertebrae) for 4 to 5 years. It comes and goes but recently has been bothering her a lot. It affects her life by not being able to move. Sometimes the pain shoots down into her legs. It affects her work; she is on her feet and it hurts her back when she is standing for a long period of time, so she only works part-time.

In her reconsideration submission, the appellant writes that since she applied for PWD designation, she has gotten worse. She is unable to lift anything at all without it affecting her back and legs. She cannot climb stairs without holding onto the hand rail or another person, or without being in pain. She

is unable to walk more than a few steps without it bothering her and she cannot sit for more than half an hour without it bothering her back and legs.

### Mental Impairment

The GP provides the following information in the PWD application:

- Functioning cognitively with help in place – i.e. direct payment of rental.
- Has required assistance with money management, lost housing and phone due to bill non-payment.
- Significant deficit with cognitive and emotional function in 1 of 11 specified areas – executive.
- No cognitive, motor, sensory, or other difficulties with communication are identified in the MR. In the AR, good ability with speaking, reading, and hearing is reported. Writing ability is unknown.
- Moderate impact on daily functioning in 1 of 14 listed areas – executive. A minimal impact for emotion and other emotional or mental problems. No impact in all other areas.
- In the MR, social functioning is reported as being continuously restricted – difficulty knowing who to ask for help or recognizing what assistance she needs. No diagnosis has been made but has some developmental delay.
- In the AR, three listed aspects of social functioning are reported to require periodic support/supervision: interacts appropriately with others (some issues interacting with neighbours in the past); ability to deal appropriately with unexpected demands; and, ability to secure assistance from others. The remaining two aspects, appropriate social decisions and ability to develop and maintain relationships (especially with established relationships), are managed independently.
- Help with social functioning is described as ministry and local community support re: rent, finances. Is dependent on this periodic help, depending on circumstances.
- Good functioning with immediate social networks. Marginal functioning with extended social networks.

The appellant's own submissions do not address mental impairment.

### DLA

In the MR, the GP reports:

- No medications or treatments have been prescribed that interfere with the ability to perform DLA.
- Whether the impairment directly restricts the appellant's ability to perform DLA is unknown; however, the GP also provides the following information.
  - Mobility outside the home is periodically restricted (“When back flares, unable to work or walk distance. Walking is mode of transportation used.”)
  - Management of finances (could not pay rent on time, financial management re bills, budgeting, and understanding timeframe; has required assistance with money management) and social functioning are continuously restricted.
  - Comments in the MR and AR respecting social functioning are described above under Mental Impairment.

- Personal self-care, meal preparation, management of medications, basic housework, daily shopping, mobility inside the home, and use of transportation are not restricted.

In the AR, the GP reports that the appellant and her partner depend on each other functionally. Information respecting specific DLA is as follows:

#### Move about indoor/outdoors

- As described above under Physical Impairment.

#### 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

- All listed tasks are managed independently - laundry and basic housekeeping.

#### Shopping

- Going to and from stores, paying for purchases, carrying purchases home are managed independently.
- No information is provided for reading prices and labels and making appropriate choices.

#### 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 require continuous assistance (deals in cash).

#### Medications

- Filling/refilling prescriptions is managed independently. Taking as directed and safe handling and storage are unknown (not on medications).

#### Transportation

- Getting in and out of a vehicle and using public transit are managed independently. Using transit schedules/arranging transportation requires periodic assistance from another person.

#### Social Functioning

- As described above under Mental Impairment.

#### Need for Help

The GP reports that the appellant is dependent on help from patient navigator and other social services and that the appellant and her partner depend on each other functionally.

## 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 the appellant is not a person described in section 2.1 of the EAPWDR and that the requirements of section 2(2) of the EAPWDA were not met because:

- 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**

As the appellant has not provided any information or argument respecting eligibility for PWD designation under section 2.1 of the EAPWDR, the panel finds that the ministry reasonably determined that it has not been established that the appellant falls within the prescribed classes of persons under that section. The panel's discussion below is limited to eligibility for PWD designation under section 2 of the EAPWDA and section 2 of the EAPWDR.

## **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 severe mental impairment. The ministry argues that a severe mental impairment is not established by the GP's assessment of specific areas of cognitive

and emotional functioning. In the MR, of the 11 listed areas of cognitive and emotional functioning, a significant deficit is assessed only for executive functioning, which in the AR is reported as having a moderate impact on daily functioning. Neither moderate nor major impacts on daily functioning are reported for the remaining 13 listed areas of cognitive and emotional functioning. The panel finds the ministry reasonable in concluding that this information does not establish a severe impairment of mental functioning.

Respecting social functioning, the ministry argues that the assessment of assistance required is not supported by a diagnosis of a medical condition. In the MR and AR, the GP comments that there is no specific diagnosis but that developmental delay is definitely present. The panel notes that developmental disability is listed under diagnostic code 5.4 in the MR of the PWD designation application and that the GP identified code 5.4. The panel notes that although the GP was not able to specifically diagnose the developmental disability, it would be reasonable to consider "developmental delay" in and of itself a diagnosis. In the MR, the GP identifies social functioning as being continuously restricted, described as difficulties obtaining assistance. These difficulties are confirmed in the AR and the need for periodic support/supervision from another person is identified for this aspect of social functioning, as well as for dealing appropriately with unexpected demands and interacting appropriately with others (some issues interacting with neighbours in the past). However, there is no description of how often the appellant requires this assistance and the appellant is reported as independently managing the remaining two aspects of social functioning and as having good functioning with her immediate social networks. Additionally, while the appellant's ability to communicate via writing is unknown to the GP, no cognitive difficulties with communication are identified by the GP in the MR.

Based on the above analysis, the panel finds that the ministry was reasonable to determine that while the appellant may experience deficits to her cognitive, emotional and social functioning as a result of a developmental delay, the information does not establish a severe impairment of mental functioning.

### Physical Impairment

In her NOA, the appellant argues that her reasons for providing her reconsideration letter were not looked at by the ministry. The panel understands the appellant to mean that the appellant's description of her worsening functioning since the time the PWD application was completed, as described in her reconsideration submission, was not given due consideration. The ministry acknowledges the information provided at reconsideration by the appellant, noting that it has not been confirmed by a medical practitioner.

As the ministry notes, the GP reports that the appellant does not require any assistive devices or aids and independently manages walking indoors and outdoors, climbing stairs (2-5 steps), standing, and carrying/holding. The GP assesses limitations in the appellant's ability to lift, which is limited to 5 to 15 lbs. and requires periodic assistance ("especially heavier items"). At reconsideration, the appellant reports that her condition has worsened as all lifting affects her back and legs, she cannot walk more than a few steps without it bothering her, and she cannot climb stairs (must hold onto rail or another person) without being in pain. However, the appellant does not further explain the somewhat vague description of being bothered or affected in order to assess the degree of impairment in terms of the distances she remains capable of walking, if she continues to routinely manage some lifting, or how many stairs she can manage despite pain. Additionally, as the ministry notes, that the appellant's impairment prevents her from being able to work full-time is not in and of itself relevant in assessing the severity of impairment, as it does not address the appellant's specific abilities or limitations in terms of physical functioning or impairment, and employability or ability to work is not a criterion upon



which PWD eligibility is determined.

Based on the above analysis, noting that the ministry did not expressly review the details of the appellant's own information, the panel finds that the ministry is reasonable in determining that the information establishes limitations to the appellant's physical functioning due to arthritis and spinal stenosis, but that the information provided by the GP and the appellant does not establish a severe physical impairment.

### 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 most DLA, but does indicate that as a result of a bulging disc in her back, the impact of which has worsened since she originally applied for PWD designation, she cannot lift without being in pain and cannot walk more than a few steps without it bothering her. As previously noted, the appellant argues that the ministry has not looked at the information she provided in her reconsideration submission. As the ministry notes, the information provided by the appellant respecting her physical limitations has not been confirmed by her GP, and respecting restrictions with DLA, the legislation requires that the ministry be satisfied based on the opinion of a prescribed professional. The only information provided from a prescribed professional is that of the appellant's GP in the MR and AR. As the ministry notes, the legislation requires that the restriction be both significant and either continuous or periodic for extended periods. The ministry argues that while the legislation does not specifically require an explanation of the frequency and duration of the restrictions, this information is valuable in determining the significance of the restrictions. As the ministry notes, while the GP reports that the appellant's mobility outside the home (part of the DLA "move about indoors and outdoors"), is periodically restricted when her back flares, the GP does not indicate how often these flare-ups occur and the panel finds that the ministry reasonably concluded that the periodic restriction has not been established as being for extended periods. No other restrictions with DLA, including personal care, basic housekeeping, shopping, meal preparation, and transportation, are attributed to the appellant's physical medical conditions.

Respecting one of the two DLA specific to mental impairment, "make decisions about personal activities, care or finances", a continuous restriction with management of finances is reported, with

the GP noting that the appellant “deals in cash” and does not understand timelines and therefore did not pay rent or phone bills on time. Additionally, the GP reports that the appellant requires periodic assistance using transit schedules and arranging transportation. The GP did not assess the appellant’s ability to make appropriate choices or read prices and label when shopping or the ability to take and safely handle medications.

The second DLA specific to mental impairment is defined in the legislation as “relate to, communicate or interact with others effectively” and is reflected in the PWD application as “social functioning” and “communication.” While the ministry does not specifically discuss “social functioning” when assessing DLA restrictions, for the same reasons the panel found that the information respecting social functioning does not establish a severe degree of impairment, as set out under the heading Mental Impairment, the panel also finds that a significant restriction in the ability to manage social functioning is not established.

Based on the assessments by the GP, the panel finds that the ministry was reasonable in determining that the information establishes that the appellant experiences challenges with the DLA managing finances, but that there is insufficient information to establish significant restrictions with other cognitive, emotional and social DLA tasks and that the appellant independently manages all physical DLA tasks, with some assistance with heavier lifting. Accordingly, the panel finds that the ministry reasonably determined that there is not enough information to establish that the appellant’s ability to perform her DLA is directly and significantly restricted either continuously or periodically for extended periods.

#### Help to perform DLA

The appellant does not specifically address assistance required with 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.