

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated April 12, 2017 which found that the appellant did not meet three of the five 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 her impairment is likely to continue for at least two years. However, the ministry was not satisfied 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 these restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, 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

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

The evidence before the ministry at the time of the reconsideration decision included the appellant's Persons With Disabilities (PWD) Application comprised of the appellant's information and self-report dated October 5, 2016, a medical report (MR) and an assessor report (AR) dated November 16, 2016 and completed by a general practitioner (GP) who has known the appellant for 2-3 years and saw the appellant 2-10 times in the past 12 months prior to completing the PWD application.

The evidence also included the appellant's Request for Reconsideration dated March 31, 2017 with an attached "Letter of Appeal" (LOA) dated March 17, 2017.

Diagnoses

In the PR, the GP diagnosed the appellant with Fibromyalgia (onset April 2014), Anemia (onset January 2013) and Pelvic pain (onset January 2014).

Physical Impairment

In the MR and AR, the GP reported:

- The appellant reported that she is too tired due to her anemia and she complains of chronic diffuse muscular pain. The pain from her fibromyalgia has been severe enough to affect her regular activities.
- Prescribed medication and/or treatments do not interfere with the ability to perform DLA.
- The appellant can walk 4+ blocks and climb 5+ steps unaided, lift 5 -15 lbs and remain seated for 2-3 hours.
- "The pain affects her plans and activities for the day".
- The appellant is independent with walking indoors and outdoors, climbing stairs and carrying/holding. She takes significantly longer with standing and lifting (cannot lift greater than 20lbs).

In her self-report and LOA, the appellant stated in part that:

- She suffers from anemia, fibromyalgia and pelvis pain.
- She experiences swelling of the hands and feet and burning in her hands.
- She is always tired and the fatigue is worse during her menstrual cycle.
- The pain is hard on her and she is allergic to codeine and morphine. Therefore finding pain relief is difficult.
- She hardly sleeps at night and has a hard time getting motivated to clean, get groceries or even just leave the house.
- Daily living has been more difficult in the past 5-6 months.
- She cannot hold a cup because she cannot grip and is weak.
- When walking 3-4 blocks her legs/ankles start to burn and knees feel like they may give out.
- Repetitive motions or standing for a long period are challenging so doing dishes, vacuuming or doing laundry are challenging.
- Even combing/styling/washing her hair is a real chore.
- Her legs give out, she is swollen and constantly aching, experiences great pain in her legs, ankles, shoulders, fingers, knees, elbows, neck, hips and lower back and frequent terrible headaches.
- The fibromyalgia is the most severe pain and has been progressing over the past 2 years. The pain is daily and does not go away or subside.
- She uses plastic everything because she is too weak to hold or grip.

- She must wait for her roommates to come home before trying to cook or she will eat something that does not require cooking.
- It's difficult to stretch, bend or lift her arms therefor grooming and personal hygiene is a real task. She also experiences pins and needles in her arms.
- Laundry is a real chore because it is located downstairs.
- She does not sleep more than 1-2 ours at a time due to legs, hips and shoulders getting numb.

Mental Impairment

In the MR and AR, the GP reported:

- The appellant has no difficulties with communication.
- The appellant has significant deficits with cognitive and emotional function in the areas of emotional disturbances, motivation and motor activity with the comment "occasionally low mood problems".
- In terms of communication, the appellant's reading, speaking, hearing and writing is good.
- In terms of cognitive and emotional functioning, the GP reported "N/A".
- In all listed tasks under 'pay rent and bills', and 'medications', it is reported that the appellant is independent and filling/refilling prescription which takes significantly longer with the comment "she frequently cannot drive".
- In terms of social functioning, the GP did not complete that section in the AR.

In her self-report and LOA, the appellant stated:

- She feels hopelessness, worthlessness, failure and even has thoughts of death.
- She is not motivated to do cleaning, get groceries or even just leave the house.
- She has been even distancing herself from friends and family.

Daily Living Activities (DLA)

In the MR and the AR, the GP reported:

- The appellant has not been prescribed any medication and/or treatment that interfere with his ability to perform DLA.
- The appellant is independent with all listed tasks of mobility and physical ability but takes significantly longer with lifting and standing.
- The appellant is independent with all listed tasks of DLA but takes significantly longer with grooming, bathing, basic housekeeping, carrying purchases home, filling/refilling prescriptions, getting in/out of a vehicle, using public transit and using transit schedules and arranging transportation.

In her self-report and LOA, the appellant described the impact her medical conditions have on her DLA.

Need for Help

With respect to the assistance provided by other people, the GP reported the appellant requires help for DLA by family and friends but did not comment on the details of that help. The GP indicated that the appellant does not use any assistive device or animal, and does not require a prostheses or aid for her impairment.

In her self-report and LOA, the appellant stated:

- "If this condition continues I know I will eventually need some additional help to do the DLA".
- Her landlord provides rides to her appointments, gets groceries and runs the few errands that the appellant needs.
- Her landlord checks on her frequently

- She has two roommates who are younger ladies attending school and they help her.
- When trying to cook anything she waits until someone else is home, otherwise she will just eat something that does not require cooking on the stove.
- She can't do the dishes as it is too difficult to grip in water and also even to stand at the sink
- She usually waits and makes sure someone is around before she grooms herself or does laundry

Additional information

In her Notice of Appeal (NOA) dated April 26, 2017, the appellant stated that her conditions are not improving and are getting worse. She is undergoing tests and trying different medications and treatments.

PART F – Reasons for Panel Decision

The issue on appeal is whether the ministry's reconsideration decision, which found that the appellant is not eligible for 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. The ministry found that the evidence does not establish that the appellant has a severe mental or physical impairment and that his DLA are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods. Also, as a result of those restrictions, it could not be determined that the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

The criteria for being designated as a PWD are set out in Section 2 of the EAPWDA as follows:

Persons with disabilities

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 is in a prescribed class of persons or 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).

The EAPWDR provides as follows:

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.

Part 1.1 — Persons with Disabilities

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).

Severe Physical Impairment

In the reconsideration decision, the ministry was not satisfied that the information provided establishes a severe physical or mental impairment. Determining a severe physical impairment requires weighing the evidence provided against the nature of the impairment and its reported functional skill limitations. A diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment. An "impairment" is a medical condition that results in restrictions to a person's ability to function independently or effectively or for a reasonable duration.

To assess the severity of an impairment, the ministry must consider the nature of the impairment and the extent of its impact on daily functioning.

The ministry found that the self-report provided by the appellant is compelling in nature but the description she provided of the degree of her impairment is not supported by her GP and as a result the ministry relies more heavily on the information provided by the GP in the PWD application.

The appellant's functional skills are indicated as can walk 4+ blocks unaided, climb 5+ steps unaided, remain seated 2-3 hours and lift 5-15lbs. In the AR, the GP indicated that the appellant is independent with walking indoors and outdoors, climbing stairs, carrying and holding, and takes significantly longer with the tasks of standing and lifting (greater than 20lbs). In the reconsideration decision the ministry argued that the information provided by the GP regarding the appellant's basic physical functioning and ability to manage activities requiring mobility and physical ability does not establish the presence of a severe physical impairment.

Given the GP's report in the PR and the AR of the appellant's good functional skills, independent physical functioning with some tasks taking significantly longer and with no revised assessment provided by the GP on the appeal, the panel finds that the ministry reasonably determined that there is not sufficient evidence to establish that the appellant has a severe physical impairment pursuant to Section 2(2) of the EAPWDA.

Severe Mental Impairment

In the reconsideration decision, the ministry was not satisfied that the information provided was sufficient evidence of a severe mental impairment. The ministry noted that the GP did not diagnosis a "mental condition" in the MR. The ministry noted that the GP reported a significant deficit with cognitive and emotional functioning in the area of emotional disturbance, motivation and motor activity, but did not indicate how often the appellant experienced these deficits. Additionally the ministry noted that in the AR under the impacts to cognitive and emotional functioning the GP indicated "N/A". The ministry wrote that the GP did not complete the section regarding the aspects of social functioning in the AR. Finally the ministry argued that the information in the appellant's self-report did not establish that she has a severe impairment to her mental functioning. The panel notes that in regards to tasks related to making decisions about personal activities, care and finances the GP indicated that the appellant is independent, and that she has good hearing, speaking, writing and reading skills.

Given the lack of evidence of significant impacts to the appellant's cognitive, emotional and social functioning, the panel finds that the ministry reasonably determined that a severe mental impairment was not established under Section 2(2) of the EAPWDA.

Restrictions in the ability to perform DLA

In the reconsideration decision, the ministry was not satisfied that the appellant has a severe physical or mental impairment that, in the opinion of the prescribed professional, directly and significantly restricts DLA either continuously or periodically for extended periods of time. According to the legislation, Section 2(2)(b) of the EAPWDA, the ministry must assess direct and significant restrictions to DLA in consideration of the opinion of a prescribed professional, in this case the appellant's GP. This does not mean that the other evidence is not factored in as required to provide clarification of the professional evidence, but the legislative language makes it clear that a prescribed professional's evidence is fundamental to the ministry's determination as to whether it is "satisfied." Therefore, the prescribed professional completing the assessments has the opportunity to indicate which, if any, DLA are significantly restricted by the appellant's impairments either continuously or periodically for extended periods.

In the reconsideration decision, the ministry reviewed the information provided in the AR and noted that the GP did not assess the appellant as requiring periodic or continuous assistance in any areas of her DLA and indicated that the appellant is capable of performing almost all her DLA independently with the exception of those that take significantly longer to complete. The ministry wrote that taking 20 minutes longer to comb/style/wash hair or 30 minutes longer to complete basic housekeeping does not establish a significant restriction in these areas. The ministry also noted that the GP did not indicate how much longer carrying purchases home, getting in/out of a vehicle or using public transit takes, which makes it difficult to determine how significant the restriction is in these areas. The ministry argued that the GP indicated that the appellant independently manages: laundry, dressing, toileting, feeding self, transfers in/out of bed, transfers on/off a chair, going to/from stores, reading labels, making appropriate choices, paying for purchases, meal planning, food preparation, cooking, safe storage of food, banking, budgeting, paying rent/bills, taking medications as directed and safe handling and storage of medication.

Given the assessment by the GP of independence with all DLA with the sole exception of need to take significantly longer with 8 of the 34 listed tasks of DLA, the panel finds that the ministry reasonably determined that there was insufficient evidence from a prescribed professional of significant restrictions. Therefore, the panel finds that the ministry reasonably concluded that the evidence is insufficient to show that the appellant's overall ability to perform his DLA is significantly restricted either continuously or periodically for extended periods, pursuant to Section 2(2)(b)(i) of the EAPWDA.

Help to perform DLA

In the reconsideration decision, the ministry held that, as it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required. Section 2(2)(b)(ii) of the EAPWDA requires that, as a result of being directly and significantly restricted in the ability to perform DLA either continuously or periodically for extended periods, a person must also require help to perform those activities. That is, the establishment of direct and significant restrictions under section 2(2)(b)(i) is a precondition of meeting the need for help criterion. 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 a DLA.

In their reconsideration decision, the ministry did not take note of the GP's AR where he states that the appellant requires assistance of family and friends. However, the panel finds that even with the evidence that the appellant requires assistance with family and friends, the GP provides no additional information about what kind of help is provided or if that help is significant.

Given that the GP indicated that the appellant does not use aids or prosthesis or require either continuous support or periodic support for extended periods from another person, the panel finds that the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established, the panel finds that the ministry also reasonably concluded that under section 2(2)(b)(ii) of the EAPWDA, it cannot be determined that the appellant requires significant help or supervision of another person to perform DLA.

Conclusion

The panel finds that the ministry's reconsideration decision, which determined that the appellant was not eligible for PWD designation pursuant to Section 2(2) of the EAPWDA, was reasonably supported by the evidence. The panel therefore confirms the ministry's decision. The appellant's appeal, therefore, is not successful.