

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated April 13, 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

The evidence before the ministry at the time of the reconsideration decision consisted of the following:

- The appellant's Persons with Disabilities (PWD) Application comprised of the appellant's information and self-report dated October 24, 2016, a physician report (PR) dated September 21, 2016 and an assessor report (AR) dated September 21, 2016 and both completed by a general practitioner (GP) who has known the appellant for 6 years and has seen her 11 or more times in the past 12 months.
- Twelve medical reports detailing consultations and treatments that the appellant has received for her medical conditions since about 2013.
- A Disability Tax Credit form completed by the appellant on May 2, 2016.
- The appellant's Request for Reconsideration dated March 30, 2017, including a letter written by the appellant dated March 6, 2017.

Diagnoses

In the PR, the GP diagnosed the appellant with Leukemia (onset June 2013), left hand Complex Regional Pain Syndrome (CRPS) (onset February 2015) and left leg clot (onset in 2014). Asked to describe the severity of the physical impairments that impact the appellant's ability to manage daily living activities (DLA), the GP writes: "Leukemia – bone marrow treatment done June 2014; recurrent anemia, fatigue, infection and bleeding tendency. Left hand chronic pain so poor ADLs. Tests and reports attached."

Physical Impairment

In the PR and the AR the GP reported:

- The appellant requires a brace for her left hand and wrist and occasionally uses a cane.
- In terms of functional skills, the appellant can walk 2 to 4 blocks unaided on a flat surface, climb 2 to 5 steps unaided, lift 2 to 7 kg. (5 to 15 lbs.), and remain seated for 2 to 3 hours.
- The GP also comments: "Fatigue and infections greatly cloud judgement and cognition affecting ability to manage meds and interactions with others".

In the AR the GP reported:

- The appellants speaking and reading are good, her hearing is satisfactory and her writing is poor, due to left hand pain and fatigue due to leukemia and infections.

The appellant did not complete the self-report.

Mental Impairment

In the PR and the AR, the GP reported:

- There are no difficulties with communication.
- There are no significant cognitive or emotional deficits.
- In terms of cognitive and emotional functioning, the appellant's medical conditions have no impact or minimal impact except for bodily functions and motor activity, which are moderately impacted. In this context the GP writes: "Flares in Luekemia related symptoms and fatigue, infections, bleeding affect emotions / cognitive and activities.

Daily Living Activities (DLA)

In the PR, the GP reported:

- The appellant has not been prescribed medication and/or treatments that interfere with her ability to perform DLA.
- The GP indicates that the appellant's medical conditions directly restrict all 10 of the listed DLA continuously except for management of medications, which is impacted periodically, and management of finances, which is not restricted. Social functioning is not restricted.

In the AR, the GP reported:

- The appellant is assessed as requiring periodic assistance from another person due to her medical conditions in regard to her mobility and physical ability.
- The appellant requires periodic assistance from another person in all DLAs except the tasks of bathing and toileting, with which she requires continuous assistance.
- The appellant is independent in all aspects of social functioning except 'Able to secure assistance from others' with which the appellant requires periodic support/assistance, the GP commenting that the appellant is "independent mentally and overall very sure and makes good decisions.
- The appellant has good functioning with both immediate and extended social networks.

In her Request for Reconsideration, the appellant wrote:

For some reason when a doctor informs you I can only lift about ½ lbs. you put up to 15kg. In my house I only use plastic glasses with a grip because I've drop and break the items, they fall because I can't hold them.

I can't open a can because I can't hold it and can't turn handle. I even bought an electric can opener but I can't hold the cans.

I can't operate scissors, or use knives the CRPS has stopped me from baking cooking. My neighbours make meals but I can't open the microwave because it requires pulling with my hand. Just writing this is radiating pain from finger, hand, wrist, elbow and shoulders. Since the day of accident my hand is always swollen and compare the feeling in hands and colour change is very noticeable.

In your letter you wrote I can walk up to four blocks. Well that is a bunch of bull. I walk to next door and sit down for about 10 mins to subside the pain a little to walk home.

...

There are four stairs to enter my house but I walk one at a time. I have to use a cane. But the hands will not hold as they are full of pain. I can't wear a brace on L hand but will wear one on the R hand, it helps somewhat.

...

I can't wash my floors or clean the shower due to the weight of the materials required.

I can dust for a time but then the hands start to hurt.

...

The appellant also reports that she has had two recent anxiety attacks and is taking mood stabilizers.

Need for Help

With respect to the assistance provided by other people, the GP reported in the AR that the appellant receives help for DLAs from family, friends health authority professionals and volunteers. The GP notes: "Fatigue and infection and flare in left hand or wrist requires assistance". The appellant does not have an assistance animal.

Additional information

The appellant's application for the Disability Tax Credit, prepared by the appellant's GP, indicates that the appellant's medical condition causes significant impairments in her mobility and her ability to prepare meals and perform most other household tasks.

Notice of Appeal

In her Notice of Appeal dated April 26, 2017, the appellant expressed her disagreement with the ministry's reconsideration decision and she wrote that there is an inaccurate assessment and she feels that the ministry is not taking her injuries and medical conditions seriously.

The Hearing

The ministry did not attend the hearing. After confirming that the ministry was notified of the hearing, the hearing proceeded in accordance with section 86(b) of the Employment and Assistance Regulation.

At the hearing, the appellant and her advocate stated:

- The appellant's physical condition is worsening.
- The appellant is unable to do anything without assistance.
- The nerve pain experienced by the appellant is debilitating physically and mentally and can last for extended periods.
- Because of her treatment for Leukemia, the appellant can't take pain medication.
- The appellant can no longer travel to specialist clinics outside the community due to her financial situation and medical conditions.
- The appellant receives continuous assistance from her elderly mother.
- The PR and AR are inaccurate because:
 - They speak to lifting with her right hand not her left;
 - They do not recognize that, although the appellant can walk some distance and climb stairs, doing so requires a day of preparation and 3 days of recovery;
 - In the advocate's opinion, when the GP refers to "periodic assistance" she was thinking that it applied rather than "continuous assistance" because the appellant engages in the activity periodically (e.g. shopping only once per week);
 - Overall, the appellant was not forthcoming with the GP in regard to the seriousness of her conditions, their impact on her DLAs and the assistance she requires because she is a proud woman, focused on helping others, who does not like to complain.

Admissibility of Additional Information

Section 22(4) of the *Employment and Assistance Act* (EAA) provides that panels may admit as evidence the information and records that were before the minister when the decision being appealed was made and "oral or written testimony in support of the information and records" before the minister when the decision being appealed was made." These limitations reflect the jurisdiction of the panel established under section 24 of the EAA – that is, panels are limited to determining if the ministry's decision is reasonably supported by the evidence or a reasonable application of the legislation in the circumstances of the appellant. Thus panels are not to assume the role of decision-makers of the first instance by considering information that presents a new or different picture of the impairment or restrictions than that which was before the ministry when it made its reconsideration decision.

In this instance, the testimony that the appellant and her advocate provided in regard to how much she can lift is with her right hand and the preparation and recovery time for walking distances explains or provides context for the information that was before the ministry at reconsideration and so is admissible. The panel also accepts as argument the advocate's assertion that the appellant "presents well". The assertion of the appellant's advocate that the GP misunderstood the meaning of "periodic" in the PR and AR is supposition and not substantiated and so is not admissible.

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 her 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 impairment. The ministry acknowledged that the appellant was diagnosed by the GP with several medical conditions. The ministry acknowledged that the appellant experiences some limitations to her physical functioning due to the condition of her left hand and the pain and fatigue she experiences due to her Leukemia recovery, but the ministry concluded that the combination of her functional skills, mobility, and physical abilities speaks to a moderate rather than a severe physical impairment.

A diagnosis of a serious medical condition or conditions 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 considered the impacts of the appellant’s diagnosed medical conditions on her daily functioning, reviewing the assessments provided in the PR and the AR and the appellant’s letter at reconsideration. The ministry noted that in the PR the GP indicates that physical functional skills are generally good, while in the AR under mobility and physical ability the GP indicates that the appellant requires only periodic assistance due to her conditions. Finally, the ministry acknowledges the statements in the appellant’s reconsideration request but notes that they are not confirmed by a medical practitioner.

The ministry was remiss in ignoring the information in the appellant’s application for the Disability Tax Credit. In that application, the appellant’s GP clearly indicates that the appellant’s medical condition has significant impacts on her mobility and ability to carry out many DLAs. However, the panel recognizes that this evidence must be treated as supplementary to that in the appellant’s application for PWD status and accorded appropriate weight.

For the ministry to be “satisfied” that an impairment is severe, the panel considers it reasonable for the ministry to expect that the information provided by the medical practitioner indicates that the medical condition has a significant impact on the appellant’s physical functioning and quality of life. In this case, the PR and AR do not indicate this and the appellant’s reconsideration request is not consistent with the PR and AR and so not supported by the opinion of a medical practitioner as required by the legislation.

The additional information provided at the appeal hearing regarding the severity of the appellant’s conditions is, again, inconsistent with the information provided by the appellant’s physician. The reason for this was stated by the appellant’s advocate to be that the appellant “presents well” and tends to understate her difficulties in discussions with her GP. This may be the case, but it does not change the information contained in the PR and AR upon which the ministry relies to make a determination as to whether an applicant meets this criteria.

Given the assessments by the GP of functional skills in the moderate range, the panel finds that the ministry reasonably determined that there is not sufficient evidence to establish that the appellant has a severe physical impairment under 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 considered that in the PR the GP had not diagnosed a mental impairment and reported that the appellant has no significant deficits in the areas of cognitive and emotional functioning. The ministry also considered that in the AR the GP indicated that there were two moderate impact to daily functioning in the areas of bodily functions and motor activity and minimal or no impacts in the other areas of deficit. The GP also indicates that the appellant has reasonably good functioning in both communicating and social interactions. Finally, the ministry notes that despite the GP's references to "fatigue and infections greatly cloud judgement and cognition", she writes: "Independent mentally and overall very sure and makes good decisions".

Given the lack of evidence of significant impacts to the appellant's cognitive and emotional 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 PR and noted that the GP indicated that the appellant has not been prescribed any medications or treatments that interfere with her ability to perform DLA. The ministry wrote that in the PR the GP indicates that the appellant's medical condition continuously restricts her ability to perform almost all of the listed DLAs. However, the ministry also notes that in the PR the GP indicates that the appellant requires only periodic assistance with all of her DLAs except for requiring continuous assistance with bathing and toileting.

The ministry notes that the physician indicates in a number of places in the PR and AR that certain of the appellant's conditions "cloud judgement and cognition", that she experiences fatigue and infections that affect emotional/cognition and activities". The ministry also notes that the GP "inclement weather and fatigue/infections dictate use [of wrist brace and cane] (approximately once a month."

The ministry acknowledges the descriptions of how the appellant's DLAs are impacted as described in her reconsideration decision but notes that, again, they are not supported by the statements of a medical practitioner.

The ministry concludes that this information indicates a moderate rather than a severe impact on DLAs.

At the hearing, the appellant and her advocate reiterated in this regard that the PR and the AR are not an accurate representation of the true impact of the appellant's medical condition on her ability to carry out DLAs independently. Again, the panel notes that while this may be the case, it does not change the information contained in the PR and AR upon which the ministry relies to make a determination as to whether an applicant meets this criteria.

Given the appellant's reported independence with many tasks of DLA and the lack of a description by the GP of the extent of periodic assistance required for some tasks of DLA, as well as the absence of evidence of significant restrictions to those DLA that relate to a person with a severe physical impairment, the panel finds that the ministry reasonably determined that the evidence is insufficient to show that the appellant's overall ability to perform her 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.

While the GP reported that the appellant receives help from family, friends, health authority professionals and volunteers, as 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 help 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.