

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 May 2, 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 and duration requirement but was not satisfied that:

- 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 February 16, 2017 the ministry received the appellant's PWD application comprised of a Medical Report (MR) completed by a general practitioner (GP) on January 31, 2017, an Assessor Report (AR) completed by the GP, undated, and the appellant's Self-report (SR) dated January 20, 2017.

The appellant's request for PWD designation was denied on March 28, 2017. On April 20, 2017, the ministry received the appellant's Request for Reconsideration (RFR) in which the appellant states that she would like to apply for reconsideration because she thinks that her GP's statement was not quite true.

On May 12, 2017, the tribunal received the appellant's Notice of Appeal.

Summary of relevant evidence

Diagnoses

In the MR, the GP diagnoses the appellant with:

- Alcoholism (onset 30 years);
- Osteoarthritis (onset 10 years);
- Diabetes Type II (onset 3 year).

Physical Impairment

In the MR the GP indicates that the appellant has moderate arthritic conditions, slowing general activity and alcohol abuse. The GP indicates that the appellant does not require any prostheses or aids for her impairment. The GP indicates that the appellant can walk 2 to 4 blocks unaided on a flat surface, can lift 5 to 15 pounds, and has no limitation with respect to remaining seated. The GP did not indicate how many stairs the appellant can climb.

In the AR the GP indicates that the appellant is independent with all aspects of mobility and physical ability.

In the SR, the appellant indicates that her painkiller prescription has doubled and that she is taking insulin for her high blood sugar. The appellant states that because she has high blood pressure and high blood sugar, she gets dizzy and has headaches constantly. The appellant states that her ability to walk and shops is slower and that taking a shower is challenging because she is afraid she might fall due to dizziness. She also states that she has to take painkillers every night otherwise she cannot sleep because of the pain. The appellant also states that she has to have an ultrasound in February 2017 for her kidney. The appellant states that she had a problem a long time ago but she is not an alcoholic.

In the RFR the appellant states that the information provided by the GP is not fair or true as she states that she is not an alcoholic and has recently had an ultrasound, which found that her liver is totally okay. The appellant states that she has a lot of health problems that her GP does not know about because when she visits him she does not get more than 2-3 minutes each visit. She states that the GP refused to send her for an x-ray and she is now seeing a specialist who found that she has high blood pressure, very high blood sugar and a kidney stone that causes a lot of pain. The appellant states that she has a lot of pain in both of her leg, especially her right side. She states that she has to stop after walking 2-3 blocks. She states that she has steady dizziness, lots of headaches,

and her legs are unstable. She also states that she has lost 8 pounds recently because she has lost her appetite.

In the RFR the appellant states that she is still looking for some part-time work but she is unable to perform any heavy lifting or use ladders, which she cannot do.

Mental Impairment

In the MR the GP indicates that the appellant does not have any significant deficits with cognitive and emotional function. In the AR the GP indicates that there is no mental disability.

DLA

In the MR, the GP indicates that the appellant's impairment does not restrict her ability to perform DLA. He also indicates that the appellant has not been prescribed any medication and/or treatments that interfere with her ability to perform DLA.

In the AR the GP indicates that the appellant is independent with all listed aspects of DLA except laundry and basic housekeeping for which she requires periodic assistance.

In the SR, the appellant indicates that she has trouble with walking, shopping and taking a shower. In the RFR the appellant states that she has problems with her daily routine such as shopping and cleaning. She states that she has a friend who helps her sometimes, but her friend is older and has her own problems too. The appellant also states that she takes more than 15 prescriptions plus insulin per day and that her daily routine is not easy.

Need for Help

In the MR the GP did not provide any information regarding assistance needed for DLA. In the AR, the GP indicates that family or friends provide the help required for DLA.

In the SR, the appellant states that she has friends and neighbours who help her with housework, cooking, shopping and transportation. In the RFR the appellant states that she cannot hire anyone to help her, as she cannot afford it.

Additional information provided

In her Notice of Appeal, undated, the appellant states that she still has a lot of pain, is taking 16 pills daily including 6 painkillers, but they are not working well.

At the hearing the appellant stated the GP did not fill out the paperwork for her PWD application correctly. She stated that when she saw him it was only for 2-3 minutes at a time and he dismissed her pain reports, refused to send her for an x-ray, and did not check into her right sided pain. The appellant stated that she was referred for a rehabilitation assessment where she was tested for lifting, walking, bending and that a report was provided to the GP but that he never gave her a copy of the assessment and did not rely on it in completing the PWD application. The appellant stated that she has very bad pain "24/7" and that after she walks 2-3 blocks she has to stop. The appellant stated that she has seen one specialist for her diabetes but has not been referred to a rheumatologist. The appellant stated that she had some struggles with alcohol many years ago but has not been an issue for many years.

Admissibility of New Information

The ministry did not object to the information in the Notice of Appeal. The panel has admitted the information in the Notice of Appeal and the appellant's oral testimony as it is evidence in support of information and records that were before the ministry at the time of reconsideration, in accordance with section 22(4) of the *Employment and Assistance Act*. In particular, the information relates to information at reconsideration respecting the self-reported severity of the appellant's impairment and to the appellant's prior evidence that the GP did not provide an accurate assessment of her medical condition.

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 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

Severe Physical or Mental Impairment

The legislation provides that the determination of severity of an 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 an 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.

Physical Impairment

The appellant argues that she experiences severe pain that requires her to take a large number of painkillers but even they are not working. The appellant indicates that she is slower at walking and shopping and that she gets dizzy. She also states that the pain makes sleeping difficult. The appellant argues that the GP did not complete the MR or AR accurately.

As the ministry notes, the appellant reports seeing a specialist but has not provided any information from the specialist regarding her physical impairment. The ministry argues that a referral to a specialist would be expected for an individual with a severe impairment as a result of osteoarthritis. The ministry states that although the appellant indicates that she only gets to see the GP for 2-3 minutes at each visit, the GP has been her medical practitioner for 16 years so the ministry places a significant amount of weight on his professional opinion and findings.

As the ministry notes, the GP assesses the appellant as independently managing all aspects of mobility and physical ability, with the MR indicating that walking is limited to 2 to 4 blocks and lifting limited to 5 to 15 pounds. In the MR the GP indicates that the appellant does not have any limitations with respect to remaining seated and he does not indicate how many stairs the appellant can climb unaided. Although the appellant reports that she can only walk 2-3 blocks before she has to stop and relax and that she has constant dizziness and headaches, the panel notes that the level of

functioning reported by the GP is not at the most restricted end of the rating scale in the MR. The panel therefore finds that the ministry has reasonably viewed this level of independent functioning as not establishing a severe impairment of physical functioning. While the appellant states that she was referred for a rehabilitation assessment that provides a more accurate assessment of her functioning, the appellant has not obtained and provided a copy of that assessment so the ministry cannot reasonably be expected to consider information from an assessment that it has not had a chance to review.

In the RFR the appellant states that she is still looking for part-time work but is unable to perform work, requiring heavy lifting. The panel notes that employability is not a criterion for assessment of PWD designation.

Based on the independent level of functioning reported in the MR and the AR, and the lack of other medical documentation indicating that the GP completed the reports inaccurately, the panel finds that the ministry was reasonable in placing a significant amount of weight on the information provided by the GP. The panel finds that the ministry reasonably determined that a severe physical impairment has not been established.

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, the appellant has not been diagnosed with a mental impairment and does not have any significant deficits with cognitive and emotional function.

The information provided does not identify any impacts on the appellant's social functioning and in the AR under Cognitive and Emotional Functioning, the GP writes "N/A".

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

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 that the legislative criteria are met, 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 how frequently the activity is restricted. 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 states that her ongoing pain makes walking, shopping and housework difficult and that her daily routine is not easy. She states that she gets dizzy and is scared of falling in the shower. She states that she requires help with shopping, cleaning and transportation but she has not provided any details of the help needed other than stating a friend helps her once a week with housework and she relies on her neighbours to help her with shopping. In the MR, the GP indicates that the appellant's impairment does not restrict her ability to perform DLA. In the AR, the GP indicates that the appellant is independent with all aspects of DLA except laundry and basic housekeeping, indicating periodic assistance is required. However, the GP does not provide any explanation regarding the degree and duration of support/supervision required. In addition, the AR indicates that the appellant is independent with all aspects of shopping and transportation; thus the information between the appellant and the GP is conflicting but as indicated earlier, the legislation requires the assessment of restrictions to DLA to be in the opinion of the prescribed professional. The GP also indicates that there are no restrictions with respect to social functioning.

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 indicates that she requires assistance with shopping, cleaning and transportation. However, she does not provide any information regarding how much help she needs or how frequently she needs help except for stating that a friend comes in once a week to help her with housework. The GP does not provide any information regarding the frequency or duration of help needed. 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 confirmation 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 is a reasonable application of the applicable enactment, and therefore confirms the decision. The appellant is not successful on appeal.