

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated April 27, 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 *Employment and Assistance Act*.

The evidence before the ministry at the time of the Reconsideration Decision included:

Persons With Disabilities (PWD) Application comprised of the appellant's information and self-report dated January 9, 2017, a medical report (MR) and an assessor report (AR) dated January 21, 2017 and completed by a general practitioner (GP) who has known the appellant since December 2, 2016 and saw the appellant 2-10 times in the past 12 months prior to completing the PWD application. The information the GP used to complete the PWD application was an office interview with the appellant.

Additional evidence consisted of:

- Consultation reported from a neurologist dated October 27, 2017.
- Radiology report – MRI dated October 23, 2017.
- EMG/Nerve conduction studies report dated August 22, 2016.
- Follow-up report from a rheumatologist dated January 12, 2017.
- Imaging report dated January 31, 2017.

The evidence also included the appellant's Request for Reconsideration (RFR) dated April 3, 2017.

### **Diagnoses**

In the MR, the GP diagnosed the appellant with Arthritis (onset unspecified) and Degenerative Disc Disease (DDD) (onset unspecified).

### **Physical Impairment**

In the MR and AR, the GP reported that:

- The appellant has severe neck pain radiating to left and right arm.
- She has a history of lower back pain.
- Both cervical and lumbar MRI results are abnormal.
- She was referred to a rheumatologist and neurosurgery due to nerve compression.
- She can walk unaided less than 1 block, unaided climb 2-5 steps, in terms of limitations to lifting the GP indicated 'no lifting' and can remain seated for less than 1 hour.
- Neck and lower back pain are the physical impairments that impact her ability to manage DLA. The GP does not indicate how.
- Walking indoors/outdoors, climbing stairs and standing are performed independently. The GP comments: "but still has constant pain".
- Lifting and carrying/holding require continuous assistance. The GP did not provide any comments.

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

- She suffers from daily pain affecting her neck and back.
- The pain is constant and affecting her arms and sleep.
- The back pain goes down to her legs.
- She has recently been diagnosed with diabetes.

### **Mental Impairment**

In the MR and AR, the GP reported:

- There are no difficulties with communication.
- There are no significant deficits with cognitive and emotional function.

- The appellant's speaking, reading, writing and hearing are listed as 'good'.
- The section dealing with cognitive and emotional functioning in the AR is left blank.
- The items listed under the DLA of 'pay rent and bills' and 'medications' are all listed as independent.
- All listed items under 'social functioning' are listed as independent and the appellant has marginal functioning with immediate and extended social networks. The GP comments: "help with mobility" as the support/supervision required.

In her self-reports, the appellant did speak to or describe a mental impairment.

### ***Daily Living Activities (DLA)***

In the AR, the GP reported:

- The appellant has not been prescribed medication and/or treatments that interfere with her ability to perform DLA.
- All tasks under the DLA of 'personal care', 'meals', 'pay rent and bills' and 'medications' are indicated to be performed independently.
- Basic housekeeping and laundry require periodic assistance with the comment: "family".
- All tasks under 'shopping' are indicated as requiring periodic assistance with the comment: "family helps".
- Under 'transportation', 'going to/from stores' is listed as independent and takes significantly longer with the comment: "slow". All other tasks in this category of DLA are indicated as 'takes significantly longer than typical'.

In her self-report, the appellant stated that "I am not able to do my daily activities without being in pain" and "it interferes with daily activities from cooking, shopping, cleaning difficulties".

### ***Need for Help,***

In the MR and AR, the GP reported that:

- The appellant does not require any prostheses or aids for her impairment.
- The help required for DLA is provided by family.
- Under 'assistance provided through the use of assistive devices', the GP comments: "to be assessed by occupational therapist".
- The appellant does not have an assistance animal.

### ***Additional information***

- In her Notice of Appeal (NOA), signed and dated May 16, 2017, the appellant stated in part that she is appealing the reconsideration decision due to severe pain in her back and neck and because she has diabetes. She further stated that she needs help and support at home, which comes from her son.
- Letter (the letter) from the GP, signed and dated May 12, 2017, which, in part, stated: 1) the appellant suffers with neck and lower back pain most of the time and she does get help from the family with cleaning and preparing meals; 2) recently she has been diagnosed with impaired glucose/borderline diabetes and most likely will start medication soon; and 3) she suffers with restriction in her daily activities due to her condition.

### ***Admissibility of Additional Information***

The panel considered the information from the letter, for the most part, as being in support of, and tending to corroborate the information referred to in the PWD application and the Request for Reconsideration, which were before the ministry at reconsideration. Therefore, the panel admitted the letter in accordance with Section 22(4)(b) of the *Employment and Assistance Act*.

## 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. 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.

In the reconsideration decision the ministry noted that the additional information provided with the PWD application (the consultation reports and assessment reports) did not speak to the limitations and/or restrictions in the appellant's ability to perform DLA or the help required with DLA. The ministry also noted that the additional information, assessments and consultation reports provided with the RFR do not speak to the limitations or restrictions in the appellant's ability to perform DLA or the help required with DLA. The panel finds that the ministry's finding regarding the additional information provided with the PWD application and RFR was reasonable as the consultation and assessment did not provide sufficient evidence to determine what impact the appellant's medications have on her functional abilities or how the medical condition results in restrictions to the appellant's ability to function independently or effectively or for a reasonable duration.

In the reconsideration decision, The ministry noted that the GP indicated that the appellant does not require any aids or prosthesis for her impairment. The ministry compared the evidence provided in the MR to that which is provided in the AR. The ministry noted that appellant's functional skills, as indicated in the MR, as able to walk less than 1 block unaided, climb 2-5 steps unaided, unable to lift and can remain seated for less than 1 hour. The ministry also noted the appellant's mobility and physical ability as indicated in the AR. The appellant can walk indoors/outdoors, climb stairs and stand independently, and requires continuous assistance with lifting and carrying/holding. The panel notes that there are inconsistent assessments in the MR and AR of the appellant's ability to walk and climb stairs as the MR points to restrictions in functional ability in these two areas and the AR indicates that the appellant is independent in these two areas.

The ministry concluded that "the PWD application demonstrates that the appellant experiences limitations to her physical functioning due to constant pain. However, the ministry determined that the assessments provided by the appellant's GP speak to a moderate rather than a severe physical impairment". Section 2(2) of the *EAPWDA* requires that the minister must be satisfied that a person has a severe mental or physical impairment that results in restrictions to a person's ability to function independently or effectively. The evidence given by the GP is inconsistent as noted above. Therefore the panel finds that the ministry was reasonable in its determination that the evidence does not support a finding that the appellant suffers from a severe physical impairment.

After reviewing the evidence in its entirety, the panel finds that the ministry was reasonable in its determination that the evidence did not establish a finding that the appellant suffers from a severe physical impairment as provided by section 2(2) of the *EAPWDA*.

### **Severe Mental Impairment**

In the reconsideration decision, the ministry was not satisfied that the information provided established that the appellant suffered from a severe mental impairment. The ministry noted that in the MR, the GP noted no significant deficits with cognitive and emotional functioning. The ministry noted that it is reported by the GP that the appellant does not have difficulties with communication. The ministry noted that the GP indicated that speaking, reading, writing and hearing are good. The ministry further notes that the GP indicates that the appellant is independent with all listed areas of social functioning and she has marginal functioning with immediate and extended social networks. The ministry notes that the ministry commented that the support/supervision the appellant required to maintain herself in the community was with mobility.

Section 2(2) of the *EAPWDA* requires that the minister must be satisfied that a person has a severe mental or physical impairment that results in restrictions to a person's ability to function independently

or effectively. The evidence given by the GP does not provided a diagnosis of a mental impairment nor does establish that a mental condition impairs the appellant's ability to function independently or effectively. Therefore the panel finds that the ministry was reasonable in its determination that the evidence does not support a finding that the appellant suffers from a severe physical impairment.

After reviewing the evidence provided by the GP and appellant, the panel finds that the ministry was reasonable in its determination that the evidence did not support a finding that the appellant suffers from a severe mental impairment as provided by 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 noted that the appellant has not been prescribed medications and/or treatments that interfere with her ability to perform DLA. The ministry also noted that the GP did not describe how much longer than typical the appellant takes to manage her DLA (i.e. all listed items under 'personal care' and 'transportation') thus making it difficult to determine if they represent a significant restriction to her overall level of functioning. The panel finds without knowing how much longer the appellant takes than typical to complete a task makes it difficult to determine if there is a significant restriction and there the ministry's determination is reasonable.

The ministry also noted that the GP did not describe the frequency and duration of the help the appellant requires with items listed under 'basic housekeeping' and 'shopping', in order to determine if they represent a significant restriction to her overall level of functioning. The panel notes that the legislation requires that a restriction be continuous or periodic for *extended periods* and therefore information regarding frequency and duration would be helpful in making a determination of 'for extended periods'.

The ministry further notes that the GP did not describe whether the help that is required with food preparation and cooking is needed periodical for extended periods or continuously. The ministry concluded that there is not enough information in the assessments provided by the GP to establish that a severe impairment significantly restricts DLA continuously or periodically for extended periods.

Given the assessment by the GP and additional information submitted with the PWD application, the panel finds that the ministry reasonably determined that the assessments provided do not provide enough information to determine if there are significant restrictions to the appellant's overall level of functioning. Therefore, the panel finds that the ministry reasonably concluded that the evidence is insufficient to establish that the appellant's 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.

Given the GP's evidence in its entirety, including the lack of information regarding the type of help required or the frequency and duration of the help required, 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, and therefore 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.