

## 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

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 10, 2017, a medical report (MR) and an assessor report (AR) dated January 26, 2017 and completed by a general practitioner (GP) who has known the appellant for 1.5 years 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 and file/chart information.

Additional evidence consisted of:

- Patient Health Questionnaire – 9 (PHQ-9) with a score of 22 which indicates severe depression.
- Generalized Anxiety Disorder – 7 (GAD-7) with a score of 20 which indicates severe anxiety.
- Questionnaire prepared by an advocate and completed by the GP (questionnaire).

The evidence also included the appellant's Request for Reconsideration (RFR), dated May 2, 2017, which described the her medical conditions as visual, heart disease, blood pressure, anxiety, stress, depression, COPD, lack of sleep, arthritis, sensitivity to light and sounds and swollen legs. She also described the challenges she faces with daily functioning and finances, and described the help she gets on a daily basis from friends. The appellant also provided a list of her natural medication with the cost associated for each.

### ***Diagnoses***

In the MR, the GP diagnosed the appellant with Anxiety (onset 2007), Depression (onset 2007), ischemic heart disease (onset 2007) and arthritis (onset 1980s).

### ***Physical Impairment***

In the MR and AR, the GP reported that:

- the appellant's functional ability is: able to walk 2-4 blocks unaided, cannot climb stairs as she "gets out [of] breath/weak", no lifting and can remain seated with no limitation.
- The appellant's impairment directly restricts her ability to perform her DLA without indicating which DLA are impacted.
- The appellant "has a past history of medication induced hepatitis and had to be taken off all her cardiac medications".
- Walking indoors/outdoors, climbing stairs, standing, lifting and carrying/holding require periodic assistance from another person and commented "prolonged walking causes pain in her knees. Unable to carry objects for long periods".

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

- She cannot work due to her symptoms; especially her anxiety.
- She cannot control her emotions and has uncontrollable tears for no reason.
- She only sleeps 2 hours per night because her grandson has disrupted sleep throughout the night.
- She suffers from COPD, allergies, arthritis in hands and feet, back, hip and legs ache, heart palpitations, panic attacks, has had stents in her heart, is losing her desire to get up and do things, and does not want to be engaged with others.
- Her liver is compromised therefore can only take natural medicines and foods.

### ***Mental Impairment***

In the MR and AR, the GP reported that:

- “Severe anxiety with impaired function. Patient has decreased mood, fatigue. She has difficulty focus[ing] and concentrating. She is unable to do prolonged activity”.
- There are no difficulties with communication.
- Significant deficits with cognitive and emotional function in the areas of ‘executive, memory, emotional disturbance and attention or sustained concentration’.
- In response to whether or not social functioning is impacted, the GP commented “severe anxiety and depression, has difficulty socially engaging with people”. The GP provided the additional comment “difficulty focusing and concentrating”.
- “Due to her anxiety and depression, she is unable to focus, concentrate or maintain good relationship with family and friends. She is unable to handle pressures associated with employment.
- Speaking, writing and hearing are good and reading is poor due to visual problems.
- In terms of cognitive and emotional functioning, the appellant has major impacts in the areas of emotion, attention/concentration, executive, memory, motivation, and other however the ‘other’ problems are not specified. There are moderate impacts to motor activity and other neuropsychological problems however ‘other’ problems are not specified. The GP commented “severe anxiety and depression. Sensitivity to medication with a past history of medication induced hepatitis”.

In her self-reports, the appellant described her mental impairment as anxiety and depression. She stated that she is not motivated to get up and do things or engage with others due to her tearfulness.

### ***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.
- Most listed items in each of the categories of DLA are performed independently. The exceptions to this are: basic housekeeping, which is performed independently and takes significantly longer; going to/from stores and reading prices and labels requires periodic assistance; and under social function the task of ‘interacts appropriately with others’ is left blank by the GP with a comment: “avoids social contact, very emotional”.
- Under social functioning, immediate and extended social networks have very disrupted functioning with ‘major withdrawn, often rejected by others and major social isolation’ underlined.

### ***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 friends.
- When asked to describe the assistance that would be necessary, the GP commented: “financial support” and “stress relief counselling”.
- Under ‘assistance provided through the use of assistive devices’, the GP commented: “N/A”.
- The appellant does not have an assistance animal.

### ***Additional information***

In her Notice of Appeal (NOA), the appellant stated that she has more medical problems than in the first PWD application and that her doctor has not been helpful in her application process.

### ***Evidence at the Hearing***

At the hearing the appellant's first witness stated the following:

- She has known the appellant since 2008 and the appellant used to help her with her daily living activities but no longer can.
- She checks in on the appellant daily to see if she has showered, eaten, and to see if her finances are up to date.
- She helps the appellant with food, bathing, medications, driving, housekeeping, reading labels and gives her money when necessary.
- The appellant does not have the energy to maintain a job and cannot keep her own house as clean as she would like.

At the hearing the appellant's second witness stated the following:

- He has known the appellant since 1995 and has known her to be enthusiastic, helpful and energetic.
- Since 2007 she has had heart problems and has been deteriorating since.
- He helps her every day and she needs help with money.
- She has COPD, had jaundice several times and conventional medication will not work for her because of her liver. She needs natural medication which is costly.
- He helps her with driving, up-keep of the building she manages, grocery shopping and makes her one meal per day. He helps her every day.

At the hearing the appellant stated the following facts:

- She needs help to get through the day because her hormonal imbalance causes anxiety.
- She receives help with breakfast and lunch from her friends and her grandson helps with dinner.
- She cannot be in stores or crowds and she will not leave the house unless she has to as she panics.
- She cannot afford the natural medications she needs.
- Her legs and ankles swell and therefore working is difficult. She tried, but was unable to even walk home after a 6-hour shift.
- She has memory problems and cannot see which is why she cannot drive.
- She has COPD and therefore cannot complete the stairs in her building without resting. She cannot walk 2 blocks without resting. But thinks she can be better if she could afford the natural medicines she needs.
- She has a herniated disc in her back and her arthritis does not allow her to close her hands.
- Her grandson helps around the house with little things like taking out the garbage, vacuuming the building corridors, watering plants and making dinner.

At the hearing the ministry relied on its reconsideration decision.

## 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 PWD designation, 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 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 or mental 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.

### **Severe Physical Impairment**

In the MR, the GP diagnosed the appellant with Anxiety (onset 2007), Depression (onset 2007), ischemic heart disease (onset 2007) and arthritis (onset 1980s). She does not require any aids or prosthesis for her impairment.

In the PWD application, self-reports and at the hearing, the GP and the appellant have emphasized the appellant's inability to work. Employability is not a consideration for eligibility for PWD designation because employability is not a criterion in section 2(2) of the EAPWDA nor is it listed among the prescribed daily living activities in section 2 of the EAPWDR.

The MR indicated the appellant could walk unaided 2-4 blocks, was unable to climb stairs unaided as she was out of breath, was unable to lift and there were no limitations on how long she could sit. The AR stated the appellant required periodic assistance with walking indoors/outdoors, climbing stairs, standing, lifting and carrying/holding because walking caused pain in her knees and she was unable to carry objects for long periods. In the Request for Reconsideration submission however, the doctor does not agree with the appellant's statement that she could only walk for one block before she had to take a break, she was only able to lift 5 lbs., only able to sit 15 minutes at a time, and that when standing needed to hold on to something for support. Instead, the doctor states no formal assessment has been made. As such, the ministry determined that the assessments of the appellant's physical abilities are based on self-reports and not the medical practitioner's assessment. The ministry concluded that the information provided by the GP does not establish that the appellant has a severe impairment.

Given the assessments of the appellant's functional ability were based on what the appellant reported to the GP and not independent assessments from the GP, 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.

### 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. In addition to the written statements provided by the GP, the ministry noted the following information:

- Significant deficits with cognitive and emotional functioning in the areas of executive, memory, emotional disturbance and attention/sustained concentration.
- Five major impacts to cognitive and emotional function in the areas of emotion, attention/concentration, executive, memory and motivation. Two moderate impacts in the areas of motor activity and other neuropsychological problems. No impact in the remaining areas.
- In the questionnaire, the GP agreed with the statement that the appellant experiences major impacts with cognitive and emotional functioning in the areas of: 'bodily functions, neuropsychological problems (visual/spatial problems), motor activity (decreased goal oriented activity), other emotional or mental problems, expression (difficulty putting thoughts into words), consciousness, impulsive (spending money).
- The GP did not agree with the statement that the appellant has difficulty speaking.
- The GP reported no difficulties with communication, and that speaking, hearing and writing are good. The GP reported that reading is poor (visual problems).
- The GP indicates that social functioning does not require supervision/support with any listed items except interacting appropriately with others, and the appellant has very disrupted functioning with immediate and extended social networks.

The ministry concluded that the information submitted does not establish a severe mental impairment.

Section 2(2) of the *EAPWDA* requires that the minister must be satisfied that a person has a severe mental. The panel notes that the appellant experiences limitations due to her diagnosed mental condition. However the evidence given by the GP, while indicating 5 major impacts to cognitive and emotional function, there are only two moderate impacts and no impact in the remaining areas. In addition, the GP reported no difficulties with communication and that speaking, hearing and writing, are good, although she has visual problems, and she does not require support with social functioning with the exception of interacting appropriately with others. In the DLA areas specific to mental impairment (making decision about personal activities, care or finances, and relate to, communicate the GP reports good functioning (with the exception of interacting appropriately with others). 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 mental impairment

### 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 any medication that interferes with her ability to perform her DLA. The ministry noted that the GP indicated that all aspects of the appellant's DLA are managed independently except 'going to/from stores and reading prices and labels'. The ministry also noted that in the questionnaire the GP agrees with the appellant's statement that she is unable or needs assistance to manage : 'dressing, grooming, bathing, regulating diet, going to/from stores, reading prices/labels, making appropriate choices when shopping, carrying purchases home, budgeting, paying bills/rent, and social functioning' and stated "Patient reports the following. It is difficult to assess this in the office. Agree with the above based on patient's report".

The ministry determined that these statements suggest that the assessments of the appellant's ability to perform her DLA are based on self-reports and not the GP's medical assessments. As such the ministry was not satisfied that the assessments were the opinion of the GP. Further, the ministry argued that given the appellant's medical history, it was reasonable to expect some restrictions but there is not enough evidence to confirm that her impairment significantly restricts DLA continuously or periodically for extended periods

Section 2(2) of the *EAPWDA* requires that in the opinion of a prescribed professional on whether a person's ability to perform daily living activities is directly and significantly restricted either continuously, or periodically for extended periods. The panel finds that the ministry's decision that this criterion is not met is a reasonable application of the legislation as it is not clear that the prescribed professional provided her opinion as to the appellant's ability to perform daily living activities. As well, the prescribed professional, in providing additional information relevant to the nature and extent of the appellant's impairment and its effect on daily living activities writes: known patient with severe anxiety and depression; also caregiver for her grandson with PTSD; needs financial assistance/support; unable to cope with pressures of employment; and, difficulty interacting with people which supports the ministry's argument that given the appellant's medical history it was reasonable to expect some restrictions but there is not enough evidence to confirm that her impairment significantly restricts DLA 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.

The panel finds that as the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established, , it cannot be determined that the appellant requires help to perform DLA under 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 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.