

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 June 27, 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 requirement and that a medical practitioner has confirmed that the appellant's impairment is likely to continue for at least 2 years.

However, the ministry was not satisfied 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, in the opinion of a prescribed professional, 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 March 24, 2017, the ministry received the appellant's PWD application comprised of a Medical Report (MR) dated March 1, 2017, and an Assessor Report (AR) dated March 8, 2017, both completed by the appellant's general practitioner of approximately 7 years, and the appellant's Self-report (SR), dated March 1, 2017.

The appellant's request for PWD designation was denied on May 10, 2017. On June 14, 2017, the ministry received the appellant's Request for Reconsideration. On June 27, 2017, the ministry issued its reconsideration decision, which again denied the appellant's request for PWD designation.

On July 10, 2017, the tribunal received the appellant's Notice of Appeal (NOA) which included additional information from the appellant that was consistent with the appellant's previous submissions. At the hearing, the appellant provided oral testimony which, with the exception of her description of recent problems with her right ankle giving out and recent use of a cane, was consistent with information before the ministry at reconsideration. With the exception of the oral testimony respecting previously unidentified ankle problems and use of a cane, the panel admitted the additional evidence in the NOA and the appellant's oral testimony under section 22(4) of the Employment and Assistance Act, as information in support of the information before the ministry at reconsideration.

At the hearing, the ministry relied on its reconsideration decision. A ministry observer attended the hearing with the consent of the appellant.

The arguments of both parties are set out in Part F of this decision.

Summary of relevant evidence

Diagnoses

The GP diagnoses:

- Anxiety/Depression - severe
- Fibromyalgia - severe
- Chronic fatigue syndrome - severe
- Restless leg syndrome

Physical Impairment

The GP provides the following information in the PWD application:

- Fibromyalgia flares up often. Difficulty going up stairs, walking.
- No prostheses or aids are required.
- The appellant is able to walk 2 to 4 blocks unaided on a flat surface, climb 2 to 5 steps unaided, lift 5 to 15 lbs., and remain seated for 1 to 2 hours.
- Walking indoors and outdoors, standing, and lifting/carrying/holding are managed independently. Can do these activities with limitation. Fibromyalgia with joint pain.
- Climbing stairs takes significantly longer than typical due to joint and muscle pain due to fibromyalgia.

In her SR, the appellant describes her disability as including bone pain, muscle pain, fatigue, restless leg syndrome, and kidney stones. She feels tired and in pain most of the time. The pain in her bones and muscles is all over her body and worst in her hands and knees – going up and down stairs is painful. Pain from a kidney stone can be harsh at times. Her legs get so restless if she stays in the same position for more than an hour or two. All of her symptoms, including anxiety and depression, affect her ability to look for work and or keep a position for any length of time.

In her reconsideration submission, the appellant describes her pain as being so bad that she can't even get up to answer the door and all she can do is lay down. Restless leg syndrome causes aching, painful twitching resulting in the constant need to move her legs, which prevents the appellant from sleeping, so she wakes up exhausted and unable to function.

At the hearing, the appellant reaffirmed that chronic widespread pain caused by fibromyalgia affects her daily activities. She also experiences knee pain some days, and restless leg syndrome keeps her up at night. She wakes up tired and in a lot of pain, and sometimes cannot get out of bed. She stated that she had discussed the MR with the GP and that she felt the GP's assessment of physical functional skills in the MR is accurate but that the GP could have commented more on the difficulty she experiences due to her pain. She stated that she had not discussed the AR with the GP. She relies on her son's father for assistance taking care of their autistic son.

Mental Impairment

The GP provides the following information in the PWD application:

- Unable to hold a job because of depression.
- Significant deficit with cognitive and emotional function in 5 of 11 specified areas – executive, memory, emotional disturbance, motivation, and attention or sustained concentration.
- No cognitive, motor, sensory, or other difficulties with communication are identified in the MR. In the AR, good ability with speaking, reading, writing, and hearing is reported.
- Respecting the impact on daily functioning for 14 listed areas of cognitive and emotional function:
 - Major impact in 1 area – emotion.
 - Moderate impact in 3 areas – bodily functions, memory, and motivation.
 - Minimal impact in 1 area – attention/concentration.
 - No impact in all other areas.
- All 5 listed aspects of social functioning are managed independently: appropriate social decisions; develop and maintain relationships; interacts appropriately with others; deal appropriately with unexpected demands; and, ability to secure assistance from others.
- Marginal functioning with immediate and extended social networks.

In her SR, the appellant reports that anxiety and depression affect her and that just making a simple phone call to book an appointment is difficult. There are times when she has no motivation to get out of bed and she has to force herself out of bed and out the door.

In her reconsideration submission, the appellant reports that being depressed has left her with persistent sadness, crying, and loss of interest and pleasure in activities that were once fun.

At the hearing, the appellant stated that she is depressed most of the time. She listed the prescribed medications she takes and explained that while she had been attending counselling, her attendance has been postponed while she takes care of her son's issues.

DLA

The GP reports:

- No medications or treatments have been prescribed that interfere with the ability to perform DLA.
- “Unable to perform/difficulty performing ADL.”
- Information respecting each prescribed DLA:

Move about indoors and outdoors

- The appellant is able to walk 2 to 4 blocks unaided on a flat surface, climb 2 to 5 steps unaided, lift 5 to 15 lbs., and remain seated for 1 to 2 hours.
- Walking indoors and outdoors, standing, and lifting/carrying/holding are managed independently. Can do these activities with limitation. Fibromyalgia with joint pain.

Personal Care

- All listed tasks are managed independently.

Basic Housekeeping

- Both tasks - laundry and basic housekeeping - take significantly longer to perform due to fibromyalgia muscle and joint pain.

Shopping

- Going to and from stores (“joint pain”) and carrying purchases home (uses a shopping cart) take significantly longer than typical.
- Reading prices and labels, making appropriate choices, and paying for purchases are managed independently.

Meals

- All listed tasks – meal planning, food preparation, cooking, safe food storage) take significantly longer than typical (“takes an inordinate time to do household chores due to depression & joint & muscle pain.”)

Management of finances

- All listed tasks are managed independently.

Medications

- All listed tasks are managed independently.

Transportation

- All listed tasks are managed independently.

Social Functioning

- All listed areas are managed independently.

In her SR, the appellant writes that pain and fatigue affect her ability to do daily tasks such as laundry, cleaning, cooking and going to the grocery stores, which take a little longer than usual.

In her reconsideration submission, the appellant reports that due to depression, she struggles everyday just to get up, take a shower, and get dressed. She has a hard time just trying to put dinner on the table and has recently asked for help with dinner and cleaning.

In her NOA, the appellant reports that because of chronic, widespread pain, her daily activities are affected – appointments are cancelled and have to be rescheduled.

At the hearing, the appellant stated that something that should take half an hour to perform can take an extra 20 minutes. Three times a week she can't make dinner and she needs assistance 5 times a week.

Need for Help

The GP reports that assistance is provided by family and friends.

In her NOA, the appellant reports that she needs assistance with getting her autistic child ready for school every day and with the bedtime routine.

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 in determining that the requirements of section 2(2) of the EAPWDA were not met because:

- a severe physical or mental impairment was not established;
- the appellant's DLA are not, 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 does not require an assistive device, the significant help or supervision of another person, or the services of an assistance animal 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 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 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 is diagnosed with fibromyalgia, chronic fatigue syndrome and restless leg syndrome, and argues that the resulting chronic pain and fatigue she experiences severely impairs her ability to function physically and leaves her unable to work. Noting that employability or vocational abilities is not the basis upon which PWD eligibility is determined, which the ministry points out is stated on both the MR and AR forms, the ministry argues that the physical functional assessments by the GP are not in keeping with a severe impairment.

The GP describes the fibromyalgia and chronic fatigue syndrome as severe; however, as the ministry notes, the GP assesses the appellant as independently managing all aspects of mobility and physical functioning within limitations, including being able to walk 2 to 4 blocks, climb 2 to 5 steps, and lift 5 to 15 lbs. As the ministry also notes, the GP reports that climbing stairs takes significantly longer, without indicating how much longer. The ministry argues that the appellant's own description of her physical

functioning in her reconsideration submission, that the pain is so bad that she cannot even get up to answer the door, is not in keeping with the medical findings, including the ability to walk 2 to 4 blocks unaided. The ministry notes that it places significant weight on the findings of the medical practitioner, which the panel considers reasonable in view of the legislative language. The panel also notes that the appellant's information at reconsideration is at odds with her description in the SR that performing daily tasks, including cooking and going to the grocery store, "takes a little longer than usual."

Based on the above analysis, the panel finds that the ministry is reasonable in determining that the physical functional assessments establish limitations to the appellant's physical functioning due to her medical conditions, but that the level of independent physical functioning described by the GP does not establish a severe physical impairment.

Mental Impairment

The appellant argues that she has a severe mental impairment based on the impact depression and anxiety have on her ability to manage her daily activities, including that it is a struggle for her to get out of bed. Acknowledging that the GP describes the appellant's depression as severe, the ministry argues that the GP's assessment of the impact on the appellant's mental functioning does not reflect a severe mental impairment. The ministry also notes that the GP does not mention referral to a mental health expert, which the ministry argues would be expected if the appellant's depression and/or anxiety were considered severe.

As the ministry notes, while a number of significant deficits with cognitive and emotional functioning are identified, when the GP assess the impact on daily functioning, a major impact is reported for only one area – emotion. The GP also reports good communication abilities and that all listed aspects of social functioning are managed independently. The panel also notes that with the exception of taking longer with meal planning and safe storage of food (due to depression and pain), the GP does not identify problems managing the decision-making tasks of DLA, including budgeting, making appropriate shopping choices, and managing medications.

Based on the above analysis, the panel concludes that the ministry was reasonable to determine that while the appellant experiences difficulties resulting from depression and anxiety, the information 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, 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 the frequency. 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.

In this case, the appellant's GP is the only prescribed professional who assesses the appellant's ability to perform DLA. The appellant argues that individual daily activities can take 20 minutes longer to perform and that she requires assistance 5 times a week, in particular with meal preparation and taking care of her son. As the ministry notes, the GP reports that the appellant independently manages all aspects of the DLA personal care, paying rent and bills, medications, transportation, and social functioning, as well as the cognitive tasks of the DLA shopping. Additionally, the ability to obtain or maintain employment and providing care for one's child are not DLA as defined in the legislation. Respecting the GP's assessment that the physical tasks of shopping, both basic housekeeping tasks, and all tasks of the DLA meals take significantly longer, described as an "inordinate amount of time due to depression and joint/muscle pain", as the ministry notes, the GP reports functional limitations that are not of a significant nature. In particular, the appellant is assessed as independently being able to walk 2 to 4 blocks unaided, climb 2 to 5 stairs unaided, and carry/lift/hold 5 to 15 lbs., which the appellant confirmed as being accurate, and the GP assessed a major impact on daily cognitive and emotional functioning in only 1 of 14 listed areas.

Based on the assessments by the GP, the panel finds that the ministry was reasonable in determining that the information establishes that the appellant independently completes the majority of her DLA and that, based on her functional abilities, the need to take significantly longer does not establish significant restrictions. Accordingly, the panel concludes that the ministry was reasonable in determining that the information does not establish that the appellant's ability to perform her DLA is directly and significantly restricted either continuously or periodically for extended periods.

Help to perform DLA

The appellant reports that she needs assistance 5 times a week, especially with meals and child care. The ministry's position is that because it has not been established that DLA are significantly restricted, it cannot be determined that help is required.

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 establishment of direct and significant restrictions with DLA is a precondition of the need for help criterion. 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 a reasonable application of the applicable enactment, and therefore confirms the decision. The appellant is not successful on appeal.