

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated June 19, 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 March 1, 2017, a medical report (MR) and an assessor report (AR) dated February 21, 2017 and completed by a general practitioner (GP) who has known the appellant for 10 years and saw the appellant 11 times or more 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, past input from the appellant's daughter and file/chart information.

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

Diagnoses

In the MR, the GP diagnosed the appellant with Fibromyalgia (FM) (onset 2013), Hearing impairment/Tinnitus (onset 2012), Osteoporosis with multiple fragility fractures (onset 2016), AVN Right Shoulder (onset 2015) and Chronic Depression (onset 2012).

Physical Impairment

In the MR and AR, the GP reported that:

- The appellant has had increased disability secondary to generalized chronic pain for several years which was eventually confirmed as FM in 2013.
- Increased hearing loss/tinnitus over past few years, affects communication – needs quiet environment and focus.
- In the past 2 years the appellant has had a left hip fracture [and right] shoulder [fracture with secondary condition of AVN] and a [right] wrist [fracture secondary to] newly diagnosed osteoporosis – recently resulting in a shoulder replacement. These injuries have caused a significant increase in FM symptoms [and] resulted in [increased] disability.
- The appellant can walk unaided 2-4 blocks, climb 2-5 steps unaided, lift under 5lbs and remain seated less than 1 hour.
- “Multiple surgeries/hospitalizations/hip repair, shoulder replacement [secondary to] AVN [right] shoulder/surgical repair pre-existing FM/chronic pain – resulting in significant disability”.
- The appellant is independent and takes significantly longer with walking indoors, walking outdoors, and climbing stairs. The GP comment that it takes the appellant 2-3 times longer to complete these tasks.
- The appellant is independent with standing.
- The appellant requires periodic assistance with lifting and carrying/holding and commented: “unable to lift full jug of milk due to pain - needs help [with] anything heavier”.

In her self-report, the appellant described her medical conditions and the impact that they have to her day to day functioning.

Mental Impairment

In the MR and AR, the GP reported that:

- The appellant has difficulties with communications and the cause is sensory. The GP commented: “hearing loss- needs quiet environment – one to one”.
- There are significant deficits with cognitive and emotional function in the areas of: executive, memory, emotional disturbance, motivation and attention or sustained concentration. The GP commented: “Chronic mood disorder”.
- The appellant has satisfactory speaking and writing, and poor hearing.
- There is a major impact to motivation, and all other listed items under cognitive and emotional functioning are indicated as moderate, minimal or no impact, including executive, emotion,

memory, emotions and attention. The GP commented: “chronic depression exacerbated by chronic pain/physical disability”.

- The appellant is independent with all aspects of ‘personal care’, ‘medication’ and ‘pay rent/bills’ as they are listed in the PWD application.
- The appellant is independent with all aspects of social functioning has good functioning with immediate social networks and marginal functioning with extended social networks. The GP commented: “difficult communicating in public due to hearing”.

In her self-reports, the appellant described her mental impairment depression which impacts her motivation to function on a daily basis.

Daily Living Activities (DLA)

In the AR, the GP reported:

- Medication/treatment does not interfere with appellant’s ability to perform her DLA.
- The appellant is independent with all listed tasks under ‘personal care’, ‘paying rent/bills’ and ‘medication’.
- The appellant is independent with ‘reading prices and labels’, making appropriate choices’, paying for purchases’, ‘safe storage of food’, getting in/out of a vehicle’, and ‘using transit schedules and arranging transportation’.
- The appellant requires periodic assistance with ‘meal planning’, ‘food preparation’, ‘cooking’, ‘using public transit’, ‘laundry’, ‘basic housekeeping’, going to/from stores’, and carrying purchases home’.
- The appellant “recently moved back [with] parents as was not coping at home on own”.

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 left the section blank and commented: “previously used cane but no longer able to due to wrist pain/injury – [the appellant] is hoping to get funding for motorized scooter”.
- The appellant does not have an assistance animal.

Additional information

In her Notice of Appeal (NOA), dated July 3, 2017, the appellant stated that her disabilities interfere with everything from communication, mobility, physical activities and motivation, and that she is not able to work.

Evidence at the Hearing

At the hearing the appellant submitted a letter from her GP (the letter), dated June 26, 2017. The letter stated that the appellant is “disabled due to multiple medial issues which together cause significant disability. [The appellant] needs a cane to walk due to instability and deconditioning following multiple injuries and surgeries. She requires hearing aids as she is unable to communicate in public due to her hearing loss”.

At the hearing the appellant’s advocate, who is also her daughter, provided the following information:

- A description of the appellant’s medical conditions and surgeries.
- The appellant uses a cane (for indoors and outdoors) and wrist braces on a daily basis.
- 4-5 times per week she comes to the appellant’s home to assist with personal care (such as washing her hair), meal preparation and providing transportation to medical appointments and stores for shopping.

- There is more going on with the appellant's disabilities on a day to day basis than the doctor can observe.
- The appellant's constant pain from FM and osteoporosis is only getting worse.
- The appellant has had surgeries on each hand. The thumb bones have deteriorated and now the thumbs are attached to the hand by screws. Even lifting a milk jug is difficult for the appellant.
- Speech had declined and she requires hearing aids. As a result communication is difficult.
- The appellant fell 11 feet down. This is when the osteoporosis was first discovered. She landed on her bottom and shoulder. The shoulder is deteriorating.
- The appellant's mental health is declining and she is forgetful.
- The appellant struggles with depression and in the past has taken anti-depressant medication. But she has not had a mental health examination and her mental condition has gone undiagnosed. The depression causes a lack of motivation, loss of appetite, irritability, exasperation, and isolation. The irritability is exasperated by irritable bowel syndrome. She feels sad when she remembers the quality of her past life and has limited contact with others.
- The appellant suffered seizures during the birth of her daughter and that must have impacted her cognitive ability.
- The appellant has problems with depth perception and therefore requires assistance to manage stairs or she may fall. She cannot manage steps without a cane and the handrail. She requires updated eyeglasses.
- The appellant needs physiotherapy and hearing aids but cannot afford them.

At the hearing the ministry relied on its reconsideration decision.

Admissibility of Additional Information

The ministry did not object to the admittance of the letter.

The panel found that the letter dated June 26, 2017 from the GP provided additional detail or disclosed information that was in support of the information addressed in the reconsideration. The GP explained the appellant's need for the use of a cane due to multiple medical issues, injuries and surgeries and the need for a hearing aid due to hearing loss. All of this information was provided to the ministry at the time of reconsideration. Accordingly, the panel has admitted this new information as being in support of information and records that were before the ministry at the time of reconsideration, in accordance with s. 22(4) of the *Employment and Assistance Act*. However the panel places little weight to the letter because the GP did not describe how the need to use a cane to walk or the use a hearing aid impacts the appellant's overall level of physical and/or cognitive and emotionally functioning, or describe the impacts to the ability to perform DLA, and whether or not help is needed.

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 assessing the evidence provided respecting 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

The ministry determined that the appellant does not have a severe physical impairment.

In the MR, the GP diagnosed the appellant with FM, Hearing impairment/Tinnitus, Osteoporosis with multiple fragility fractures, and AVN Right Shoulder. The ministry noted the narrative provided by the GP as outlined above and the functional skills assessments (namely: the appellant can walk 2-4 blocks unaided, climb 2-5 step unaided, lift under 5lbs and remain seated for less than 1 hour), and determined that the appellant’s physical functional skills are not indicative of a severe impairment. The ministry noted that the GP did not describe the nature of the appellant’s disability in terms of impacts to physical functioning when the GP commented “Has significant exacerbated pre-existing FM/chronic pain – resulting in significant disability”. Also the ministry noted that the assessment of mobility and physical ability in the AR is not indicative of a severe impairment. The ministry found that taking 2-3 times longer to complete the tasks of walking indoors or outdoors and climbing stairs is not considered indicative of a severe impairment. The ministry noted that the GP did not describe the frequency or duration of the periodic assistance that is required for lifting and carrying/holding. Therefore it is difficult to establish a severe impairment of physical functioning based on the GP’s assessments.

The panel finds that the ministry reasonably concluded that the appellant’s functional ability, as described by the GP, is not indicative of a severe impairment (namely: the appellant can walk 2-4 blocks unaided, climb 2-5 step unaided, lift under 5lbs and remain seated for less than 1 hour), that the information from the GP insufficiently described the nature of the impairment as it impacts the appellant’s physical functioning, the GP did not describe the frequency and duration of the periodic assistance required for lifting and carrying/holding, and that taking 2-3 times longer to walk indoors, walk outdoors and climb stairs is not indicative of a severe impairment.

Given the assessments of the appellant’s functional ability as reported by 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 the MR, the GP diagnosed the appellant with Chronic Depression. The ministry noted the narrative provided by the GP as outlined above. The ministry noted that the difficulties the appellant faces with communication are sensory and due to her hearing loss. The ministry noted the appellant has significant deficits in cognitive and emotional function in the areas of executive, motivation, memory, emotional disturbance and attention or sustained concentration. Yet in the AR the GP indicated that there was only a major impact to motivation and the remaining listed items under cognitive and emotional functioning were indicated as either moderate, minimal or no impact. The ministry also noted that the GP indicated that the appellant is independent with all aspects of social functioning, she has good functioning with immediate social networks and marginal functioning with extended social networks. The ministry noted that the GP did not describe that support/supervision was required to help maintain the appellant in the community and no indication of safety issues with regards to social functioning.

Section 2(2) of the *EAPWDA* requires that the minister must be satisfied that a person has a severe mental impairment. The panel notes that the appellant experiences limitations due to her diagnosed mental condition. However the evidence given by the GP as listed above does not establish that the appellant suffers from a severe mental impairment. The panel finds that the GP provides inconsistent information in regards to cognitive and emotional functioning in the MR and AR and has failed to demonstrate that the appellant's depression has a significant impact on her daily functioning. 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 taking 2-3 times longer to perform DLA is not considered indicative of significant restrictions to DLA. The ministry noted that the GP did not describe how much longer the appellant takes with laundry, basic housekeeping and getting in/out of vehicles. The ministry further noted that the GP did not describe the frequency and duration of the periodic assistance required with DLA. The ministry concluded that given the information provided by the GP, it is difficult to establish significant restrictions to DLA.

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 GP did not describe the frequency and duration of the periodic assistance required or the nature of the assistance required and therefore it is difficult to determine if the appellant's restriction is significant and for extended periods. The panel finds that the ministry reasonably determined that taking 2-3 longer to complete tasks of daily living is not indicative of a significant restriction.

The panel finds that the ministry's decision that this criterion is not met is a reasonable application of the legislation because the information provided by the GP did not establish that the appellant is directly and significantly restriction in performing her DLA either continuously or periodic for extended periods.

Help to perform DLA

In the reconsideration decision, the ministry noted that the GP does not indicate that the appellant requires any prostheses or aids for her impairment, assistance is provided by family and that the appellant is no longer able to use a cane due to wrist problems. 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.

Though the appellant clearly uses a cane and wrist braces, 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.