

## 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 15, 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 February 15, 2017, the ministry received the appellant's PWD application comprised of a Physician Report (PR) and an Assessor Report (AR) which were both completed on September 26, 2016 by the appellant's general practitioner (GP), and the appellant's Self-report (SR) section of the PWD application dated February 12, 2017.

The appellant's request for PWD designation was denied on March 31, 2017. The appellant requested a reconsideration and an extension of the reconsideration period. The extension was granted but no additional information was provided. On June 15, 2017, the ministry issued its reconsideration decision, which again denied the appellant's request for PWD designation.

Additional documents provided by the appellant on appeal comprised:

- the appellant's Notice of Appeal (NOA) and one additional page, both dated July 2, 2017, which included argument respecting her previous request for an extension and additional information;
- a June 21, 2017 letter from the GP ("the letter") describing the discontinuation of an anti-depressant due to financial constraints and that counselling has also been limited due to financial constraints; and
- a 3- page typewritten submission written by the appellant dated July 26, 2017.

The ministry did not provide additional evidence but in an August 4<sup>th</sup>, 2017 email, indicated that its submission will be the reconsideration summary. The ministry did not address the admissibility of the information in the appellant's appeal submission.

Section 22(4) of the *Employment and Assistance Act* (EAA) provides that panels may admit as evidence (i.e. take into account in making its decision) the information and records that were before the minister when the decision being appealed was made and "oral and written testimony in support of the information and records" before the minister when the decision being appealed was made – i.e. information that substantiates or corroborates the information that was before the minister at reconsideration. These limitations reflect the jurisdiction of the panel established under section 24 of the EAA – to determine whether the ministry's reconsideration decision is reasonably supported by the evidence or a reasonable application of the enactment in the circumstances of an appellant. That is, panels are limited to determining if the ministry's decision is reasonable and are not to assume the role of decision-makers of the first instance. Accordingly, panels cannot admit information that would place them in that role.

The panel determined that the additional information provided by the GP in the letter and by the appellant in her written appeal submissions is consistent with and therefore in support of the information at reconsideration. Accordingly, the panel admitted the information in accordance with section 22(4) of the *Employment and Assistance Act*.

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

## Summary of relevant evidence

### Diagnoses and History provided by the GP

- Major depressive disorder
- Generalized anxiety disorder (GAD)
- Soft tissue chronic pain.

In the letter, the GP writes “Her diagnoses as stated are ongoing with partial remission and her treatment titration continues.”

### Physical Impairment

The GP provides the following information:

- In the MR, the GP reports that the appellant is able to walk 4+ blocks unaided on a flat surface, climb 5+ steps unaided, lift 5 to 15 lbs., and remain seated for less than 1 hour.
- In the AR, the GP reports that walking indoors (“son helps with socks”), walking outdoors, and climbing stairs take significantly longer than typical. Standing is managed independently. Lifting and carrying/holding require periodic assistance from another person and take significantly longer than typical (“needs to carry small loads or ask for assistance”).

In the SR, the appellant writes that she experiences neck, shoulder and back pain caused by a motor vehicle accident 2 years ago. Since then, she has a very hard time without pain doing/completing daily tasks/duties. She works part-time and, if she works 2 days in a row, by the end of the second day neck pain causes her head to feel very heavy to hold up, her shoulders are tight and sore, and she gets debilitating headaches like migraines and blurry vision. She is very sensitive to light and noise. It is very difficult to pick things up if she drops anything and she needs to use a counter to pull herself up. She loves to see movies and it’s harder to sit in the theater.

In her reconsideration submission, the appellant reports having done 4-5 months of physio and that she takes medication for pain.

In her appeal submissions, the appellant describes sleep disruption due to pain, her head feeling very heavy, blurry vision, and headaches, adding that it takes her much longer to get herself going and ready to leave the house “and a lot of days I don’t leave at all.” She does not wish to be very sociable, and is isolated due to not feeling well, including headaches. She describes activities she can no longer enjoy with her son due to her pain, including jumping on the trampoline and ice skating, and that while she does some bike riding with her son, later that day or the next, she has lower back, leg and neck pain that hurts so much she needs to rest and use ice and heat a bit before returning. Also, recently, after seeing a movie that lasted for over 2 hours, she had a difficult time getting up, was in severe pain, and had nausea and a headache.

## Mental Impairment

The GP provides the following information:

- Severe anxiety GAD
- Severe depression
- Compound grieving – loss of family members over 2 years, also son with anxiety, contentious relationship with ex-husband, and financial strain.
- In the MR, significant deficits with cognitive and emotional function are identified for executive, memory, emotional disturbance, motivation, motor activity, and attention/sustained concentration.
- In the AR, a major impact on daily functioning is reported in 3 areas – emotion, motivation and motor activity. Moderate impacts are reported for bodily functions, attention/concentration, executive, memory, and other emotional/mental problems. No impacts are identified for the remaining 6 areas of cognitive and emotional functioning. “Isolating but has to get out as cares for son.”
- No cognitive, motor, sensory, or other difficulties with communication are identified in the MR. In the AR, the appellant is reported to have good ability with speaking, reading, writing, and hearing.
- In the AR, periodic support/supervision is required for being able to develop/maintain relationships (“isolates – seeing counselor”). The remaining 4 specified aspects of social functioning are managed independently - appropriate social decisions; interact appropriately with others; ability to deal appropriately with unexpected demands; and, ability to secure assistance from others. Where asked to describe the support/supervision required and identify any safety issues, the GP has not provided any response.
- Marginal functioning is reported for immediate and extended social networks.

In the SR, the appellant writes that she can't concentrate as well as she used to and that she has memory issues.

In her appeal submissions, the appellant writes that she suffers with memory loss and poor concentration.

## DLA

No medications or treatments have been prescribed that interfere with the ability to perform DLA.

Information about the prescribed DLA is as follows:

Move about indoor/outdoors

- As described above under Physical Impairment.

Personal care

- Grooming, bathing, toileting, feeding self, and regulating diet are managed independently without assistance from another person or an assistive device.
- Dressing requires periodic assistance from another person and takes significantly longer than typical (increased time to wear bra, needs help with socks)
- Transfers in/out of bed and on/off chair (ex. getting out of car seat/chair/bed) take significantly longer than typical.

### Basic Housekeeping

- Both listed tasks - laundry (“smaller more freq loads”) and basic housekeeping – take significantly longer than typical to perform.

### Shopping

- Going to and from stores and carrying purchases home take significantly longer than typical (“smaller more freq loads”).
- Reading prices and labels, making appropriate choices, and paying for purchases are managed independently.

### Meals

- Meal planning and safe storage of food are managed independently.
- Food preparation and cooking take significantly longer than typical (“difficult to stand for too long”).

### Paying Rent and Bills

- All listed tasks are managed independently – banking, budgeting, and pay rent and bills.

### Medications

- All listed tasks are managed independently - filling/refilling prescriptions taking as directed, and safe handling and storage.

### Transportation

- Getting in and out of a vehicle takes significantly longer than typical (“takes longer to get out of seat”).
- Using public transit and using transit schedules/arranging transportation are marked “N/A.”

### Social Functioning

- As described above under *Mental Impairment*.

In her SR, the appellant reports that carrying groceries is done in 3-4 trips to the car. Her neck is sore when driving, making shoulder checking difficult and tough to get in and out of the car. Housework is much more challenging, after a few minutes of vacuuming she gets stuck in a bent over position. Mopping floors causes excruciating pain. Emptying the dishwasher hurts her back. She has a tough time getting socks on when her back is sore, her son helps when needed, and describes difficulties shaving due to being unable to turn her neck.

In her reconsideration submission, the appellant writes that she did not realize that she could have asked for assistance with home. She cannot do all of what is needed.

In her appeal submissions, the appellant says she has no help with household chores. She used to be able to clean her home in about an hour and now cannot manage to complete even the kitchen floor and hallway all at once. She describes difficulties with activities including cleaning the bathtub, vacuuming, cooking, and driving due to pain and headaches. She also describes difficulties with driving due to “phobia” resulting from the accident.

### *Need for Help*

The GP reports that counselling is provided for the appellant and her child. No assistive devices are indicated.

## 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 PR 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 by her GP with soft tissue chronic pain and argues that since being injured in a motor vehicle accident 2 years ago, she has a very hard time completing daily tasks due to the resulting pain in her neck, shoulder, back and legs, as well as nausea, headaches, and blurry vision. The ministry's position is that the information respecting the impact on functioning does not reflect a severe physical impairment of functioning.

Respecting the GP's assessment of physical functional skills, the ministry notes that the GP does not describe how much less than 1 hour the appellant can remain seated. The panel notes that the MR form does not request or prompt a physician completing this section of the MR to be more specific.

The appellant's own description of difficulties remaining seated, which primarily relates to her ability to sit during movies, is that she experiences pain and other side-effects after remaining seated for the duration of a movie, which the panel notes is typically longer than 1 hour. The GP's assessments of the appellant's ability to walk and climb stairs, as the ministry notes, are at the highest level of functioning (4+ blocks unaided and 5+ steps unaided, respectively) which was reasonably viewed by the ministry as not being indicative of a severe impairment of physical functioning. The GP does report that the appellant takes longer with walking, climbing stairs, and lifting/carrying/holding, but as the ministry notes, the GP does not describe how much longer these activities take or the frequency or duration of the periodic assistance required with lifting/carrying/holding. Respecting the appellant's ability to lift, the panel considers the ministry reasonable to view the ability to lift 5 to 15 lbs. as sufficient to lift a variety of household and shopping items, and notes that this conclusion is supported by the GP's comments that the appellant can manage laundry and carrying purchases with smaller more frequent loads. Finally, the panel accepts the ministry's argument that despite the GP's comment respecting the need for assistance with socks in response to the request for information respecting the ability to walk indoors, assistance with socks is not considered indicative of impacting the ability to walk indoors.

Based on the above analysis, the panel concludes that the ministry reasonably determined that the information provided by the GP's assessments and the appellant does not establish a severe impairment of physical functioning.

#### *Mental Impairment*

The appellant is diagnosed with major depressive disorder and generalized anxiety disorder and both the depression and anxiety are described by the GP as severe. The appellant describes difficulties with concentration and memory, being in more fear while driving, as well as not wanting to be sociable due to her pain. The ministry argues that the cumulative impact to cognitive and emotional functioning as indicated in the AR, is of a moderate impairment, not severe.

As the ministry notes, the appellant is reported as independent with the majority of listed areas of social functioning, and the GP does not describe support/supervision required to maintain in the community, or any safety issues. Additionally, despite describing the appellant's depressive and anxiety disorders as severe, the GP reports that all listed cognitive tasks of all other prescribed DLA are managed independently. Based on the level of independent cognitive, emotional, and social functioning described by the GP, and noting that the appellant's own information primarily describes limitations to physical functioning, the panel concludes that the ministry was reasonable to determine that despite currently experiencing limitations to her cognitive and emotional functioning due to anxiety and depression, the information provided by the GP and the appellant 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 PR and the AR sections of the PWD application with the opportunity for the prescribed professional to check marked boxes and provide additional narrative. DLA, as defined in the legislation, do not include the ability to work.

The appellant’s position is that her motor vehicle accident has had a huge impact on what she cannot do on a daily basis, including difficulties with household chores, dressing, and shaving in the shower, driving, and other activities she used to enjoy with her son. The ministry notes that it relies on the information from prescribed professionals when assessing DLA, in this case, the GP.

As the ministry notes, the appellant is reported as independently managing most listed DLA tasks, and that while a number of these tasks take significantly longer to perform, the GP does not describe how much longer than typical. Additionally, for those tasks requiring periodic assistance or support from another person, namely, lifting/carrying/holding, dressing, and developing and maintaining relationships, there is no description of the frequency or duration of the periodic assistance required in order to establish if the assistance is significant and for extended periods. Also of note is that for tasks involving lifting, carrying and holding, such as laundry and carrying purchases home, the GP reports that the appellant can manage smaller more frequent loads.

Based on the level of independence with which the GP reports the appellant can manage most DLA tasks, and in the absence of additional information respecting the extra time or assistance some tasks require to perform, the panel concludes that the ministry reasonably determined that there is not enough evidence to confirm that the appellant has a severe impairment that significantly restricts her ability to perform DLA continuously or periodically for extended periods.

#### Help to perform DLA

Section 2(2)(b)(ii) of the EAPWDA requires that, *as a result of direct and significant restrictions in the ability to perform DLA*, a person requires help to perform those activities. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform DLA.

While the information establishes that the appellant requires some assistance from her son and that she attends counselling, as the establishment of direct and significant restrictions with DLA is a precondition of the need for help, the panel concludes that the ministry reasonably determined that because it has not been established that DLA are significantly restricted, it cannot be determined that help is required.

#### 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 therefore confirms the decision. The appellant is not successful on appeal.