

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the Ministry) reconsideration decision dated June 29, 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 was likely to continue for at least two years. However, the Ministry was not satisfied that 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.

The ministry also found that the appellant is not one of the prescribed classes of persons who may be eligible for PWD designation on the alternative grounds set out in Section 2.1 of the EAPWDA, and the appellant did not appeal the decision on this basis.

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 Appellant is a single parent in receipt of employment and assistance benefits.

The evidence before the Ministry at the time of the reconsideration decision included the PWD Application comprised of the applicant information and self report (SR) dated October 17, 2016, a medical report (MR) dated January 10, 2017 and completed by the Appellant's general practitioner (GP) who has known the Appellant for 4 years and who has seen the Appellant 11 or more times in the past year, and an assessor report (AR) dated January 10, 2017 completed by the GP.

The evidence also included the following documents:

- 1) Request for Reconsideration (RFR), signed on June 15, 2017, stating that her disabilities are affecting her life on a daily basis; and,
- 2) A second self-report (Second SR) attached to the RFR which describes her impairment, its impact on her physical and mental functioning, and her ability to perform DLA.

Diagnoses

In the MR, an unidentified person whose handwriting varies from that of the GP wrote that the Appellant has an unspecified anxiety disorder and an unspecified form of arthritis with unknown onset and full body fibromyalgia and a back sacroiliac (SI) joint dysfunction, both with onset in 2012.

Physical Impairment

In the MR, the GP reported that:

- in terms of health history, the Appellant has "1) *backpain secondary to the abdominal L5 alia/lial pseudojoint in the back (left) side. Cause(s) separate pain with reduced ability to function. Just walking is already impaired. Any movement of the back in all directions affected. (Has) seen (a) chronic pain specialist. No relief ? for operation.* 2) *Severe 2nd degree) bursitis (in) greater trochanter.*"; and,
- in terms of functional skills, the Appellant can walk less than 1 block unaided on a flat surface, can not climb any steps unaided, and can remain seated for less than an hour. Due to a typographical error in the MR form, the GP's assessment of lifting ability is not clear, particularly in light of the fact that he had ticked the first of two "no lifting" boxes on the form, which should read "no limitation", and given his assessment of lifting ability provided in the AR (see below).

In the AR:

- the GP reported that the Appellant takes significantly longer than typical to climb stairs, standing, lifting and carrying and holding (without describing how much longer or providing any other explanations or comments);
- where asked to identify the applicant's mental or physical impairments that impact her ability to manage DLA, the GP wrote "*backpain and left hip pain*"; and,
- where asked to provide any additional information that may be relevant to understanding the nature and extent of the applicant's impairment the GP wrote "*structural abnormalities in lower back*".

In the SR, the Appellant wrote that:

- she currently has disabilities relating to fibromyalgia and arthritis and she is waiting for back surgery on her SI joint;
- she cannot sit longer than 5 minutes or stand longer than 5 minutes without falling; and,

- fibromyalgia sometimes “keeps (her) in bed for days”.

In the Second SR, the Appellant wrote that:

- fibromyalgia causes wide-spread nerve pain which results in problems with sleeping and swelling in her hands and feet, leaving her unable to walk on some days;
- on a good day she can walk with the assistance of a cane or by using the counter tops and walls to brace herself;
- her arthritis also causes swelling of her hands and her back problem also contributes to the weakness in her legs;
- on some days she cannot make a fist, hold a pen or grip the steering wheel on her car;
- on average she gets 2 hours of sleep per night and not all at once as the pain regularly wakes her up;
- her SI joint dysfunction causes bone-on-bone contact which sends shooting pain down her legs with every move she makes, bending “*leaves her breathless from the pain*”, and she cannot sit or stand for more than 15 minutes; and,
- she has recently been told that surgery is not an option so she will have to endure the pain for the rest of her life.

Mental Impairment

In the MR and the AR, the GP Reported that:

- the Appellant has no difficulties with communication or significant deficits with cognitive and emotional function;
- the Appellant’s social functioning is not impacted by her medical condition;
- the Appellant’s level of ability in speaking, reading, writing and hearing are all good;
- the Appellant’s condition has no impact on any daily cognitive or emotional functioning except for emotion, for which the GP reports a minimal impact without making any further comment; and,
- the Appellant is independent with respect to all elements of social functioning, with good functioning of her relationship with both her immediate social network and her extended social networks.

In the SR, the Appellant wrote that all of her disabilities sometimes leave her in tears.

In the Second SR, the Appellant wrote that her anxiety disorder causes her to have “*increased heartrate, shakes and sweats when (she is) presented with stressful situations and/or large groups of people*”, which she describes as “*panic attacks*”.

Restrictions in the Ability to Perform DLA

In the MR, the GP reported that the Appellant:

- took pain medication that interfered with her ability to perform DLA and did not require any prostheses or aids for her impairment, but sometimes used a cane;
- is continuously restricted in the basic housekeeping and use of transportation DLA;
- is both continuously and periodically restricted in the daily shopping DLA (in the section of the MR asking for an explanation of any periodic restrictions the GP has written “N/A”);
- is periodically restricted in the mobility inside the home DLA (in the section of the MR asking for an explanation of any periodic restrictions the GP has written “N/A”);
- is restricted in the mobility outside the home DLA (with no indication as to whether the restriction is periodic or continuous); and,

- has no restrictions with respect to the personal self care, meal preparation, management of medications, management of finances or social functioning DLA.

In the AR, the GP reported that the Appellant is independent with respect to all aspects of personal care, shopping (except for carrying purchases home for which she requires continuous assistance, but for which no further explanation is provided), meals, paying rent and bills, medications and transportation (except for getting in and out of a vehicle which takes significantly longer than typical, but there is no information provided about how much longer it takes).

Also in the AR, the following comment was written by someone other than the GP beside “getting in and out of a vehicle”: *“move slowly because of serious pain”*.

In the SR, the Appellant wrote that:

- she is severely limited in daily tasks; and
- simple tasks like washing the floor, taking out the garbage and shoveling the driveway are impossible.

In the Second SR, the Appellant wrote that simple tasks like washing the floor cause such severe pain and swelling that afterwards she is *“laid up for 2-3 days”*.

Need for Help

In the MR and the AR, the GP indicated that the Appellant:

- lives with a dependent child;
- Is helped with her DLA by family and friends;
- cannot manage without help with her DLA;
- needs assistance with *“all physical activity, (which she receives from her) family”*;
- needs periodic assistance from another person when walking indoors and outdoors (without any further explanation or comment); and,
- the Appellant does not have an assistance animal but uses a cane “at times” as an aid for her impairment.

In the Second SR, the Appellant wrote that:

- she depends on her adult children to do tasks such as sweeping and washing floors, cutting the grass and carrying heavy bags of groceries into the house; and,
- every three months she travels to a neighbouring community for cortisone shots in her back which alleviate some of the pain and provide enough relief that she can manage most DLA with help.

Additional Information submitted after reconsideration

In her Notice of Appeal (NOA) dated Jul 10, 2017, the Appellant stated that she disagreed with the Ministry’s reconsideration decision and wrote that she is limited in her ability to sit or stand for long periods which results in her not being able to work and she welcomes the opportunity to explain how much she suffers every day.

The Appellant did not attend the hearing. After the panel confirmed that the Appellant had received delivery of the notice of the hearing at least 2 business days before commencement of the hearing, pursuant to Section 85(2) of the Employment and Assistance Regulation, the hearing proceeded without the Appellant.

At the hearing, the Ministry relied on its reconsideration decision.

Admissibility of Additional Information

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.

No additional written information was provided by either party after the reconsideration decision was made. The Ministry did not object to the admissibility of the information in the NOA. The panel considered the information in the NOA to be written testimony in support of information that was before the Ministry at reconsideration, and therefore admissible.

PART F – Reasons for Panel Decision

The issue on the appeal is whether the Ministry's reconsideration decision, which found that the Appellant is not eligible for designation as a person with disabilities (PWD), was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the Appellant. Specifically, the Ministry determined that the information provided did not establish that the Appellant had a severe physical impairment which, in the opinion of a prescribed professional, directly and significantly restricts her ability to perform DLA either continuously or periodically for extended periods; and that, as a result of those restrictions, she requires help to perform those activities.

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 ...

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).

Severity of Impairment

A diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a "severe" impairment. Section 2(2) of the EAPWDA requires that in determining whether a person may be designated as a PWD the Ministry must be satisfied that the individual has a severe physical or mental impairment. An "impairment" is a medical condition which results in restrictions to a person's ability to function independently or effectively. With respect to assessing the severity of an impairment, Section 2(2)(b)(i) of the EAPWDR requires that a mental or physical impairment *directly and significantly* restrict the person's ability to perform DLA either *continuously, or periodically for extended periods*. Therefore, to assess the severity of an impairment, the Ministry must consider both the nature of the impairment and the extent of its impact on daily functioning as evidenced by

functional skill limitations and the degree to which the ability to perform DLA is restricted. In making its determination the Ministry must consider all the relevant evidence, including that of the Appellant. However, the legislation is clear that the fundamental basis for the analysis is the evidence from a prescribed professional – in this case the Appellant’s GP.

Physical Functioning

In its reconsideration decision, the Ministry was not satisfied that the information provided establishes a severe physical impairment. The Ministry found that it is difficult to develop a clear and coherent picture of the degree of the Appellant’s impairment due to inconsistencies between the information provided by the GP in the MR and the information provided by the GP in the AR. The Ministry also notes that Section A of the MR (Diagnosis) was not completed by the GP and that there is no indication that he or any prescribed professional agrees with the diagnosis provided. As a result, the Ministry decided to rely on the diagnosis provided by the GP in the MR, which it identified as back pain secondary to an abnormal L5 alia/ilial pseudojoint, greater trochanteric bursitis and hip pain. In its analysis of the Appellant’s physical functioning the Ministry determined that the GP’s indicated that the Appellant does not require any aids for her impairment and that use of a cane “*at times*” is not indicative of a severe impairment. The Ministry also notes that, while in the AR the GP states that the Appellant requires periodic assistance from another person to walk indoors and outdoors and that she takes significantly longer than typical to climb stairs, stand, lift, carry and hold, he does not describe how much longer the Appellant takes to do these things. Therefore the Ministry finds that it cannot determine whether the extra time taken represents a significant restriction to her ability to manage those activities. The Ministry also finds that the GP’s assessment of the Appellant’s basic functioning in the MR does not correlate with his assessment of her ability to manage activities requiring mobility and physical ability in the AR, providing the example of the Appellant’s ability to climb stairs or lift, which the GP indicates the Appellant is unable to do in the MR whereas he indicates in the AR that she is able to do these activities, albeit requiring significantly more time than normal to do so. The Ministry concludes that these discrepancies make it difficult to determine which assessment accurately depicts the Appellant’s overall level of functioning in these areas. The Appellant’s position, as described in the SR and he Second SR, is that she has a significant level of impairment; for example, that she cannot sit longer than 5 minutes or stand longer than 5 minutes without falling. In its reconsideration decision, the Ministry states that it finds that the evidence provided in the SR “*is not supported by the assessments provided in (the MR and the AR)*”.

Panel Decision

The panel acknowledges that in order to assess whether the periodic impairments were for extended periods, as required by the legislation, the Ministry would need to know for how long the periodic episodes occur. In addition, the panel acknowledges a number of inconsistencies between the evidence provided by the GP in the MR and the evidence he provides in the AR, including the ones given by the Ministry by way of example in its reconsideration decision.

Therefore, the panel finds that the Ministry’s determination that there is not sufficient evidence to establish that the Appellant has a severe physical impairment which directly and significantly restricts the Appellant’s ability to perform DLA either *continuously or periodically for extended periods* pursuant to Section 2(2) of the EAPWDA, was reasonably supported by the evidence before the Ministry at reconsideration.

Mental Functioning

In its reconsideration decision, the Ministry noted that the GP did not provide a diagnosis of a mental impairment and that the Appellant has no significant deficits with cognitive and emotional function. In addition, the Ministry notes that the GP describes her ability to communicate is good and that she does not require assistance with making decisions about personal activities, care or finances, or relating to communicating or interacting with others effectively, and describes her as independent in all areas of social functioning. The Appellant's position is that she has an anxiety disorder which causes her to have panic attacks.

Panel Decision

The panel acknowledges the Ministry's finding that the GP has not diagnosed the Appellant with a mental impairment. The panel also acknowledges that the Appellant has no significant deficits with cognitive and emotional function, as the evidence shows that all but one of the cognitive and emotional functions are not impacted by her mental condition, and that for the only function where an impact is identified (emotion) it is described by the GP as being minimally impacted. In addition, the panel notes that the GP has indicated in the MR that this minimal impact on emotion is not episodic in nature and does not vary over time. Therefore the panel finds that the Ministry reasonably determined that a severe mental impairment was not established pursuant to Section 2(2) of the EAPWDA.

Restrictions in the ability to perform DLA

The Ministry argues that, while the GP indicates that the Appellant has been prescribed pain medication that interferes with her ability to manage DLA, he does not provide an explanation as to in what way the medication impacts the Appellant, and therefore it is difficult to determine the significance of the restrictions caused by the medication. The Ministry also identifies a number of inconsistencies between the information provided by the GP in the MR and what he says in the AR regarding whether certain DLA are continuously restricted or periodically restricted. The Ministry also points out that where in the AR the GP has indicated that some DLA are periodically restricted, he has written "N/A" where asked to elaborate. The Ministry concludes that this makes it difficult for the Ministry to determine the significance of the Appellant's restrictions and if they are periodic restrictions for extended periods as required by the legislation. In addition, the Ministry points out that the GP states that the Appellant takes significantly longer than normal to get in and out of a vehicle, no information is provided to explain how much longer it takes to do this, and as a result, the Ministry concludes that it is unable to determine whether the extra time required represents a significant restriction. The Ministry provides several other examples of DLA for which the GP has identified periodic restrictions, continuous restrictions, or in one instance both, without elaborating. The Appellant's position is that she is severely limited in daily tasks and that simple tasks like washing the floor are either impossible or cause such severe pain and swelling that she cannot function for 2-3 days afterwards, which the Ministry describes as different from the information provided in her PWD application, and which therefore represents a "level of restriction (that) has not been confirmed by her (GP)". As a result, the Ministry finds it difficult to determine which description is more reflective of her ability to manage DLA.

Panel Decision

Section 2(2)(b) of the EAPWDA requires that the Ministry be satisfied that a prescribed professional has provided an opinion that an applicant's severe impairment directly and significantly restricts her DLA, continuously or periodically for extended periods. In this case, the GP is the prescribed

professional. DLA are defined in Section 2(1) of the EAPWDR and are also listed in the MR and, with additional details, in the AR. Therefore, the prescribed professionals completing these forms have the opportunity to indicate which, if any, DLA are significantly restricted by the Appellant's impairments either continuously or periodically for extended periods, and to further elaborate so that the nature and extent of the restrictions to DLA are clear. Prescribed professionals are further encouraged to elaborate on the nature and extent of the limitations or restrictions in the instructions provided in those sections of the forms. For example, in Part C of the AR the assessor is instructed to identify whether assistance is required in each case with respect to the full range of DLA, and if the applicant is not independent, to describe the type and amount of assistance required.

With respect to the prescribed pain medication and the Ministry's argument that the GP does not provide an explanation as to the way in which the medication impacts the Appellant, the panel notes that the instructions in that section of the MR are unclear. Section B3 of the MR poses the question "*Has the applicant been prescribed any medication or treatments that interfere with his/her ability to perform (DLA)?*" and provides tick boxes where the prescribed professional can tick "Yes" or "No". The following instructions then read "*If yes, please explain*", after which the GP has "explained" by describing the type of medication or treatment, i.e. by writing "*pain medication*". It is not clear that the Ministry, in writing "*please explain*", is actually prompting the prescribed professional to explain how the prescribed medication or treatments impact the applicant's ability to perform DLA, which, based on the arguments made in its reconsideration on this point, is apparently the question which the Ministry is intending to ask here.

Notwithstanding the problem with the wording in Section 3B of the MR, the panel acknowledges the Ministry's argument that the information provided by the GP is inconsistent and/or unclear for specific DLA. Specifically, in the MR the GP does not indicate whether the Appellant's restrictions with mobility outside the home is periodic or continuous, he writes "N/A" when asked to provide details about restrictions that he has identified as periodic (daily shopping and mobility inside the home), he has identified restrictions with daily shopping as being both periodic and continuous, and in the MR he indicates that the Appellant is continuously restricted with basic housework while in the AR he says that she is periodically restricted with basic housekeeping. In addition, the panel acknowledges that the GP has provided insufficient evidence in terms of the nature, frequency or duration of the assistance required to perform DLA.

Therefore the panel finds that the Ministry reasonably concluded that there is not enough evidence from the prescribed professional to establish that the Appellant's impairment *significantly* restricts her ability to manage her DLA either continuously or periodically for extended periods, thereby not satisfying the legislative criterion of Section 2(2)(b)(i) of the EAPWDA.

Help with DLA

In its reconsideration decision, the Ministry states that it cannot be determined that significant help is required because it has not been established that DLA are significantly restricted. The Appellant's position is that she has to depend on her children to do tasks such as sweeping and washing floors and carrying heavy bags of groceries into the house.

Panel Decision

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 a DLA.

The panel finds that the Ministry reasonably determined that, as 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 as a result of those restrictions, as defined by Section 2(3)(b) of the EAPWDA.

Conclusion

Having reviewed and considered all of the evidence and relevant legislation, the panel finds that the Ministry's reconsideration decision, which determined that the Appellant was not eligible for PWD designation under Section 2 of the EAPWDA, was reasonably supported by the evidence and was a reasonable application of the EAPWDA in the circumstances of the Appellant, and therefore confirms the decision. The Appellant's appeal, therefore, is not successful.