

PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Poverty Reduction (the ministry) dated July 6, 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.

The ministry also determined that the appellant is not in any of the classes of persons set out in section 2.1 of the *Employment and Assistance for Persons with Disabilities Regulation* who may be eligible for PWD designation on alternative grounds.

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 and section 2.1

PART E – Summary of Facts

On April 11, 2017, the ministry received the appellant's PWD application comprised of a Medical Report (MR) and an Assessor Report (AR), both completed by the appellant's general practitioner (GP) and dated March 27, 2017, and a 2-page typewritten Self-report (SR) signed by the appellant on January 25, 2017.

The appellant's request for PWD designation was denied on May 18, 2017. On June 21, 2017, the ministry received the appellant's Request for Reconsideration and on July 10, 2017, received a 2-page submission from the appellant's advocate dated July 10, 2017.

On July 6, 2017, the ministry issued its reconsideration decision, which again denied the appellant's request for PWD designation.

The appellant's Notice of Appeal (NOA), which did not include evidence or argument, was received by the tribunal on August 31, 2017. On August 25, 2017, the tribunal received a 1-page submission from the advocate comprised of argument. On September 15, 2017, the tribunal received a 1-page letter dated September 11, 2017, written by the GP.

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 ministry did not object to the admission into evidence of the September 11, 2017, letter from the GP. The panel determined that the additional diagnoses of chronic thoracic and lumbar back pain were not admissible because, while the appellant had self-reported that she suffered from a spine problem, the information from the GP at reconsideration did not include any diagnosis of a back condition or indication that the appellant's functioning was impacted by these conditions. The panel determined that the balance of the letter, and the appellant's oral testimony at the hearing, provided information respecting the diagnoses of anxiety that tended to corroborate the information at reconsideration and was therefore admissible in accordance with section 22(4) of the *Employment and Assistance Act*, as it was in support of the information at reconsideration.

The arguments of both parties, including those in the advocate's reconsideration and appeal submissions, are set out in Part F of this decision.

With the consent of the appellant, a ministry observer was in attendance at the hearing.

Summary of relevant evidence

Diagnoses

In the MR, where asked to provide a specific diagnosis and provide health history, the GP writes:

- anxiety disorder
- MGUS [Monoclonal Gammopathy of Undetermined Significance, which the ministry notes is a condition in which an abnormal protein, known as monoclonal protein or M protein, is in the blood.] At the hearing, the appellant confirmed that she agreed with the Ministry's description of MGUS as it applied to her.

Physical Impairment

The GP provides the following information in the PWD application.

- No prostheses or aids are required.
- The appellant is able to walk 4+ blocks unaided on a flat surface, climb 5+ steps unaided, and remain seated with no limitation.
- Standing requires periodic assistance from another person.
- Lifting is limited to 15 to 35 lbs. Lifting, carrying, and holding require periodic assistance from another person.

In her SR, the appellant describes her disability as including MGUS, as well as a spine problem and severe arthritis.

In his reconsideration submission the advocate writes that the appellant must have a blood test done every 2-4 months, but also says that blood tests are performed 5 times per 5-8 weeks. She must go to the hospital to have excess protein and iron removed from her blood. The appellant experiences chronic fatigue due to MGUS, and cannot carry groceries for more than 8 steps. She cannot lift even 5 lbs.

At the hearing, the appellant stated that every couple of months she has bloodwork done to test the level of protein and iron in her blood and that at least 3-4 times a year she undergoes phlebotomy. She stated that MGUS results in fatigue and exhaustion. She sleeps a lot, does not have the energy to fix things, and never eats properly, sometimes just having broth to get through the day. MGUS affects her quite severely if she doesn't keep up with it. Her family lives in another province, she does not have many friends, and she hasn't asked for help as she is the type of person who needs to try to do things. She added that she does not complain too much to her doctor.

Mental Impairment

The GP provides the following information in the PWD application.

- Anxiety – unable to go to work; shaking and not sleeping. She is trying very hard to work, but anxiety is a huge problem for her.
- In the MR, significant deficits with cognitive and emotional function are identified in 5 of 11 specified areas – consciousness, executive, memory, emotional disturbance, and motivation.
- In the AR a major impact on daily functioning is reported for emotion. A moderate impact on daily functioning is reported for consciousness, impulse control, insight and judgement, attention/concentration, executive, memory, motivation and agoraphobia. A minimal impact is reported on the remaining areas – motor activity, language, psychotic symptoms, and other

neuropsychological problems. No additional commentary is provided by the GP.

- In the MR, the GP did not provide a response when asked if there are cognitive, motor, sensory, or other difficulties with communication. In the AR, the appellant is reported to have good ability with speaking, reading, writing, and hearing.
- In the MR, social functioning is reported to be continuously restricted, described as “poor relationships – no family here.”
- In the AR, periodic support is reported to be required with appropriate social decisions, interact appropriately with others, and ability to secure assistance from others. Ability to develop and maintain relationships and ability to deal appropriately with unexpected demands require continuous support/supervision. Help is described as “friend/advocate.”
- Very disrupted functioning with immediate and extended social networks.

The advocate’s reconsideration submission does not address mental impairment. In his appeal submission, the advocate writes that the appellant does have communication difficulties as she is agoraphobic and cannot be in a social setting with a large number of people.

In his September 11, 2017, letter the GP writes that the appellant has had quite significant anxiety despite medication; she suffers from social phobia and agoraphobia, and has been referred to see a psychiatrist. In his opinion, due to her ailments, the appellant is not able to work and fits the criteria for a person with disability.

DLA

In the MR, the GP reports the following.

- Medication interferes with the ability to perform DLA. This medication will taper off as another medication is increased.
- Anxiety/depression are the impairments that impact the appellant’s ability to manage DLA.
- Personal self-care, meal preparation, basic housework, daily shopping, and mobility inside and outside the home are not restricted.
- Management of medications, use of transportation, and management of finances are periodically restricted. The GP explains “If extremely anxious – won’t go out – agoraphobic.”

In the AR, the GP provides the following information respecting each prescribed DLA.

Move about indoor/outdoors

- As described above under Physical Impairment.

Personal care

- All listed tasks are managed independently with no noted restriction – dressing, grooming, bathing, toileting, feeding self, regulate diet, and transfers in/out of bed and on/off chair.

Basic Housekeeping

- Both tasks, laundry and basic housekeeping, are managed independently.

Shopping

- Going to and from stores, reading prices and labels, making appropriate choices, and carrying purchases home require periodic assistance from another person.
- Paying for purchases requires continuous assistance from another person.

Meals

- Safe storage of food requires periodic assistance from another person.
- Meal planning, food preparation and cooking are managed independently.

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

- All listed tasks are managed independently - getting in and out of a vehicle, using public transit and using transit schedules/arranging transportation.

Social Functioning

- As described above under *Mental Impairment*.

In her SR, the appellant reports being continually prevented from being able to complete basic DLA independently due to being exhausted from coping with depression and anxiety, which also impedes her motivation. Leaving her home greatly increases her anxiety, and activities including managing finances and public transportation are overwhelming. A specialist told the appellant to be careful how she does housekeeping chores, and the appellant is so preoccupied just contending with the everyday pressures of life that housekeeping is way at the bottom of her list of priorities. Social functioning is greatly impacted by anxiety and depression.

Need for Help

In the MR, the GP indicates that no prostheses or aids are required. In the AR, the GP reports that assistance is provided by family, an advocate, and friends.

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. That is, was the ministry reasonable when determining that the appellant is not a person described in section 2.1 of the EAPWDR and 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

As the appellant has not provided any information or argument respecting eligibility for PWD designation under section 2.1 of the EAPWDR, the panel finds that the ministry reasonably determined that it has not been established that the appellant falls within the prescribed classes of persons under that section. The panel's discussion below is limited to eligibility for PWD designation under section 2 of the EAPWDA and section 2 of the EAPWDR.

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 MGUS. The appellant also reports a spine problem and severe arthritis, but neither of these conditions was diagnosed or identified by the GP as causing an impairment. In his reconsideration submission, the advocate appears to argue that the severity of the problem is demonstrated by the need for frequent blood tests. As the ministry notes, the GP does not describe how MGUS affects the appellant's physical (or mental) functioning and, in the MR, assesses the appellant at the highest level of physical functioning for walking and climbing stairs, with no

limitation remaining seated. While the GP indicates that the appellant requires periodic assistance with standing, lifting (limited to 15-35 lbs.), and carrying, as the ministry notes, there is no explanation as to why the appellant has these limitations or requires assistance. The only commentary provided by the GP in the PWD application relates to mental impairment, and the appellant's SR also only addresses impairment related to anxiety. While the advocate's reconsideration submission states that the due to MGUS the appellant cannot even lift 5lbs. and suffers from fatigue, with fatigue being confirmed by the appellant at the hearing, this information is not supported by the information from the GP. It is also unclear why the appellant would require assistance for standing as she is assessed as being able to independently walk 4+ blocks on a flat surface and climb 5+ steps unaided.

Based on the above analysis, the panel concludes that the ministry reasonably determined that the information does not establish a severe physical impairment.

Mental Impairment

The appellant is diagnosed with anxiety disorder by her GP. In his appeal submission, the advocate argues that the duration of the appellant's impairment indicates that it is severe, and that the ministry's finding that no communication difficulties exist is not true, as the appellant's anxiety prevents her from being in a social setting with a large number of people. The GP reports that there are a number of significant deficits with cognitive and emotional functioning. However, as the ministry notes, a major impact on daily functioning is only reported in one area, emotion. While moderate impacts on daily functioning are reported in an additional 8 areas, as the ministry notes, the GP's assessment of DLA does not demonstrate that the appellant requires a significant amount of assistance with making decisions about personal activities, care or finances. Specifically, no assistance is required with regulating diet, and only periodic assistance is required for making appropriate shopping choices and safe storage of food. As there is no description of the frequency or duration of this periodic assistance, the panel considers the ministry to be reasonable when concluding that the assistance required has not been established as being "significant."

In the MR, while the GP reports that social functioning is continuously restricted, the GP also indicates that the appellant's social functioning abilities vary when commenting that the appellant won't go out if extremely anxious. Similarly, in the AR, the GP identifies the need for continuous support/supervision with 2 of 5 aspects of social functioning but the remaining 3 aspects require periodic support/supervision. As the ministry notes, the GP does not provide information about the frequency or duration of the episodes of extreme anxiety in either the MR or the AR in order to determine if they represent a significant restriction to the appellant's overall ability to manage social functioning. While the GP repeatedly states that the appellant is unable to work due to her anxiety, as the ministry points out, employability or vocational abilities are not considered when assessing PWD designation eligibility, which the panel considers to be a reasonable conclusion as the legislative language does not address employment activities and such activities are not included in the prescribed DLA.

In conclusion, the panel finds that there is information establishing that the appellant has ongoing difficulties with "cognitive and emotional functioning", and that the ministry was reasonable to conclude that there is evidence of a moderate to severe restriction of "social functioning." However, as the degree of impairment fluctuates, as evidenced by the need for mostly period support/supervision and mostly moderate impacts on daily cognitive and emotional functioning, and as the information does not establish the frequency or duration of the periods of increased anxiety, the panel concludes that the ministry reasonably determined that the information does not establish a severe mental impairment.

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 she is continually prevented from being able to complete basic DLA independently due to being exhausted from coping with depression and anxiety, which also impedes her motivation, and from exhaustion due to MGUS. The ministry's position is that the periodic restrictions with medications, transportation, and finances identified by the GP in the MR are not accompanied by a description of the frequency or duration of the periods of extreme anxiety in order to determine if they represent significant restrictions. The panel notes that in the absence of this information, it also cannot be determined that the restrictions are for extended periods. Additionally, these DLA are reported as being independently managed in the AR; discrepancies which the ministry reasonably concludes make it difficult to develop a clear and coherent picture of the need for assistance in these areas.

Also, the ministry argues that the need for continuous assistance with paying for shopping purchases and the need for periodic assistance with all other aspects of shopping, as well as safe storage of food, as assessed in the AR are not related to a medical condition, and that there must be a causal link between the medical condition diagnosed and the impacts on functioning. The panel finds this conclusion to be reasonable as it is unclear why paying for purchases would require a greater degree of assistance than going to and from stores, both of which involve interaction with other people. It is also unclear why the appellant is assessed as requiring assistance to read prices and labels and safe storage of food, neither of which appear to be directly related to MGUS or anxiety. As the ministry notes, the nature of the assistance is not described, which may have explained a causal connection. Furthermore, shopping is reported as not being restricted in the MR.

The GP assesses all aspects of personal care and basic housekeeping as being independently managed, which is in conflict with the information in the appellant's SR.

In conclusion, with the exception of continuous assistance with two aspects of social functioning and the unexplained need for continuous assistance with paying for purchases, the GP reports that the appellant either independently manages DLA tasks or requires periodic assistance. Given that the appellant is assessed as being able to manage the majority of DLA tasks independently, and in the

absence of a description of the nature and extent of periodic assistance required, the panel concludes that the ministry was reasonable to determine that there is not enough evidence from a prescribed professional to confirm that the appellant's impairment *significantly* restricts her ability to perform DLA either *continuously or periodically for extended periods*.

Help to perform DLA

The appellant argues that her ability to perform all tasks is severely impaired by her MGUS and anxiety. The ministry's position is that the GP indicates that the appellant independently manages most DLA and 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.