

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 August 8, 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 April 13, 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 and dated April 4, 2017, and the appellant's Self-report (SR), dated February 22, 2017. The appellant also submitted the results of an April 3, 2017 CT Scan of the Lumbar spine.

The appellant's request for PWD designation was denied on May 19, 2017. On July 24, 2017, the ministry received the appellant's Request for Reconsideration which was supported by an undated 2-page handwritten submission from the appellant and a 1-page letter dated June 13, 2017, from the GP. On August 8, 2017, the ministry issued its reconsideration decision, which again denied the appellant's request for PWD designation.

On August 11, 2017, the tribunal received the appellant's Notice of Appeal (NOA), in which the appellant writes that she is not satisfied that the minister made the appropriate choice.

No additional evidence was provided on appeal.

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

Summary of relevant evidence

Diagnoses

The GP diagnoses:

- generalized anxiety disorder (GAD)
- chronic pain syndrome
- major depressive disorder
- lumbar spine pars defect and lumbar disc disease

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 on a good day, 1 block on a bad day.
- The appellant is able to climb 5+ steps unaided on a good day.
- It is unknown how much weight the appellant can lift as it varies due to pain fluctuations. The time the appellant can remain seated is also unknown.
- Walking indoors is managed independently.
- Walking outdoors, climbing stairs, standing, and lifting/carrying/holding take significantly longer than typical to perform. "She reports that a recent 10 block walk took 2 hours due to pain." "Her symptoms fluctuate when her pain levels are BAD. She takes much longer to walk, climb stairs."
- Chronic pain and "a lot of pain" from lumbar disc disease confirmed by CT scan which shows prominent degenerative changes.
- The GP thinks the appellant has severe chronic back pain that interferes with her activities of daily living.

The dictating physician reports that the CT scan identified “Bilateral pars defect at L5 with evidence of prominent slightly asymmetric degenerative change affecting the pars defect more prevalent on the left side. There is evidence of significant generalized bulging of the disc at L5-S1 and marked encroachment of the intervertebral foramen bilaterally at this L5-S1 level. There is likely compromise of this exiting L5 nerve roots bilaterally as they course through their respective foramen. No evidence of spinal stenosis.”

In her SR, the appellant writes that every day is a coin flip as to whether she will wake up in pain too bad to carry on with her day. Some days she can do quite a bit but more and more often she is unable to stand or walk for more than a few minutes and sitting is worse. She spends most of her day stretching to keep her muscles from being restless. She can only do so much in a day and on a bad day can't even cook for herself.

In her reconsideration submission, the appellant writes that she has a trade ticket which she cannot use. She has daily pain from her back, can't stand or sit for long times. She cannot twist, bend or lift repeatedly.

Mental Impairment

The GP provides the following information in the PWD application:

- Generalized anxiety with social anxiety.
- Pain medication may interfere with thinking. Antidepressant may cause moderate side effects.
- Significant deficit with cognitive and emotional function in 1 of 11 specified areas – emotional disturbance. “Severe anxiety and panic attacks.”
- No cognitive, motor, sensory, or other difficulties with communication are identified in the MR. In the AR, good ability with speaking, reading, writing, and hearing is reported.
- Respecting the impact on daily functioning for 14 listed areas of cognitive and emotional function a major impact is reported in 1 area – emotion (“often severe”). Moderate impacts are reported for bodily functions (sleep disturbance) “chronic poor sleep”; consciousness (“asso. with anxiety”); impulse control, attention/concentration, and other “some anger management issues.”
- Four listed areas of social functioning require periodic support/supervision: develop and maintain relationships (“Anxiety impairs relationships”); interacts appropriately with others (“Social anxiety interferes”); deal appropriately with unexpected demands (“Anxiety”); and, ability to secure assistance from others. The fifth areas, appropriate social decisions, is managed independently.
- Marginal functioning with immediate (Anxiety +++”) and extended social networks.
- The GP feels that the appellant suffers from severe anxiety and depression.

In his subsequent letter, the GP writes “I feel this patient remains unfit for work due to chronic anxiety.”

In her SR, the appellant reports that her depression can be crippling when it gets bad and can be triggered by her pain easily. She will have no energy to get up and do anything and doesn't want to see anyone. Anxiety makes leaving the house hard, especially alone. She has panic attacks at random, hyperventilates, is dizzy, scared and sometimes faints.

In her reconsideration submission, the appellant reports that her biggest issue is anxiety and depression. She is working with the GP, but success has been limited due to agoraphobia and constant struggle to survive. She cannot go out alone to shop or even go for a walk. She has panic attacks and suffers from select mutism (can't talk even if you try as hard as you can).

DLA

The GP reports:

- Pain medication may interfere with thinking. Antidepressant may cause moderate side effects.
- Social anxiety prevents many normal social relationships.
- Back pain is sometimes severe and she can't go to store or shop.

Information respecting each prescribed DLA is as follows.

Move about indoors and outdoors;

- As described under Physical Impairment

Personal Care

- Transfers in/out of bed and on/off chair take significantly longer than typical "when pain levels are BAD" All other listed tasks are managed independently.

Basic Housekeeping

- Both tasks - laundry and basic housekeeping - take significantly longer to perform "when pain is severe"

Shopping

- Going to and from stores ("takes longer when she has pain") and carrying purchases home take significantly longer than typical.
- Reading prices and labels, making appropriate choices, and paying for purchases are managed independently.
- Avoids stores and errands due to anxiety – agoraphobia.

Meals

- Food preparation and cooking take significantly longer than typical ("when BACK BAD")
- Meal planning and safe storage of food are managed independently.

Management of finances

- All listed tasks are managed independently.

Medications

- All listed tasks are managed independently.

Transportation

- Using transit schedules and arranging transportation is managed independently.
- Getting in and out of a vehicle requires periodic assistance ("Back Pain").
- Anxiety prevents use of public transit.

Social Functioning

- As described under *Mental Impairment*.

In her SR, the appellant writes that when her depression is bad she will have no energy to get up or do anything and does not want to see anyone. Anxiety makes leaving the house hard, especially alone. She fears people, getting lost, being seen, crowds, and humiliation. She is most comfortable at home.

In her reconsideration submission, the appellant writes that she can't go out alone, to shop or even take a walk due to her mental health conditions.

Need for Help

The GP reports that assistance is provided by family and friends, and that she frequently uses a stool or chair to help support her when back is bad.

PART F – Reasons for Panel Decision

Issue on Appeal

The issue on appeal is whether the ministry's decision to deny the appellant designation as a PWD was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. In particular, was the ministry reasonable in determining that the requirements of section 2(2) of the EAPWDA were not met because:

- a severe physical or mental impairment was not established;
- the appellant's DLA are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and
- as a result of those restrictions, in the opinion of a prescribed professional, the appellant does not require an assistive device, the significant help or supervision of another person, or the services of an assistance animal to perform DLA?

Relevant Legislation

EAPWDA

2 (1) In this section:

"**assistive device**" means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform;

"**daily living activity**" has the prescribed meaning;

"**prescribed professional**" has the prescribed meaning.

(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person has a severe mental or physical impairment that

(a) in the opinion of a medical practitioner or nurse practitioner is likely to continue for at least 2 years, and

(b) in the opinion of a prescribed professional

(i) directly and significantly restricts the person's ability to perform daily living activities either

(A) continuously, or

(B) periodically for extended periods, and

(ii) as a result of those restrictions, the person requires help to perform those activities.

(3) For the purposes of subsection (2),

(a) a person who has a severe mental impairment includes a person with a mental disorder, and

(b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires

(i) an assistive device,

(ii) the significant help or supervision of another person, or

(iii) the services of an assistance animal.

(4) The minister may rescind a designation under subsection (2).

EAPWDR

Definitions for Act

2 (1) For the purposes of the Act and this regulation, "**daily living activities**",

(a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:

- (i) prepare own meals;
- (ii) manage personal finances;
- (iii) shop for personal needs;
- (iv) use public or personal transportation facilities;
- (v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
- (vi) move about indoors and outdoors;
- (vii) perform personal hygiene and self-care;
- (viii) manage personal medication, and

(b) in relation to a person who has a severe mental impairment, includes the following activities:

- (i) make decisions about personal activities, care or finances;
- (ii) relate to, communicate or interact with others effectively.

(2) For the purposes of the Act, "**prescribed professional**" means a person who is

(a) authorized under an enactment to practise the profession of

- (i) medical practitioner,
- (ii) registered psychologist,
- (iii) registered nurse or registered psychiatric nurse,
- (iv) occupational therapist,
- (v) physical therapist,
- (vi) social worker,
- (vii) chiropractor, or
- (viii) nurse practitioner, or

(b) acting in the course of the person's employment as a school psychologist by

- (i) an authority, as that term is defined in section 1 (1) of the [Independent School Act](#), or
- (ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the [School Act](#),
if qualifications in psychology are a condition of such employment.

(3) The definition of "parent" in section 1 (1) applies for the purposes of the definition of "dependent child" in section 1 (1) of the Act.

Alternative grounds for designation under section 2 of Act

2.1 The following classes of persons are prescribed for the purposes of section 2 (2) [*persons with disabilities*] of the Act:

- (a) a person who is enrolled in Plan P (Palliative Care) under the Drug Plans Regulation, B.C. Reg. 73/2015;
- (b) a person who has at any time been determined to be eligible to be the subject of payments made through the Ministry of Children and Family Development's At Home Program;
- (c) a person who has at any time been determined by Community Living British Columbia to be eligible to receive community living support under the [Community Living Authority Act](#);
- (d) a person whose family has at any time been determined by Community Living British Columbia to be eligible to receive community living support under the [Community Living Authority Act](#) to assist that family in caring for the person;
- (e) a person who is considered to be disabled under section 42 (2) of the [Canada Pension Plan](#) (Canada).

Panel Decision

Severe Physical or Mental Impairment

The legislation provides that the determination of severity of impairment is at the discretion of the minister, taking into account all of the evidence including that of the appellant. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a prescribed professional respecting the nature of the impairment and its impact on daily functioning. While the legislation does not define "impairment", the MR and AR define "impairment" as a "loss or abnormality of psychological, anatomical or physiological structure or functioning causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration." While this is not a legislative definition, and is therefore not binding on the panel, in the panel's opinion, it reflects the legislative intent and provides an appropriate analytical framework for assessing the degree of impairment resulting from a medical condition.

When considering the evidence provided respecting the severity of impairment, the ministry must exercise its decision-making discretion reasonably by weighing and assessing all of the relevant evidence and cannot simply defer to the opinion of a prescribed professional as that would be an improper fettering of its decision-making authority.

Physical Impairment

The appellant is diagnosed with lumbar spine pars defect and lumbar disc disease. Both the appellant and her GP describe fluctuating pain levels and the GP writes that the appellant has "bad days" when her back pain is severe. The GP also writes that he thinks the appellant has severe chronic pain that interferes with "her activity of daily living" but, as the ministry notes, the GP does not explain how often the appellant has "good days" versus "bad days." The panel finds that the ministry was not unreasonable to presume that because the GP chose to indicate the level of functioning reported on good days, that the appellant experiences more good days than bad. This conclusion is further supported by the fact that no assistive devices, such as a cane or grab bars in the bathroom, are required which, as the ministry argues, would be an indication of the severity of impairment. The ministry recognizes the GP's comment that the appellant experiences "a lot of pain" due to her back condition but is not satisfied that this, in and of itself, confirms a severe physical impairment, which the panel finds to be a reasonable conclusion given the absence of any indication as to how often the

appellant's physical functioning is impaired by severe back pain. The appellant herself describes her physical functioning in terms of being a "coin flip" as to whether her pain will be too bad for her to carry on with her day. As the ministry also notes, there is no mention of a referral to a specialist or pain clinic, which would be expected if a condition was considered severe. Additionally, while the appellant describes the inability to use her employment qualifications due to her conditions, as the ministry argues, the PWD application is not intended to assess employability and that the ability to engage in paid employment is not a legislated criterion for severity.

Given the absence of information respecting the frequency and duration of the periods when the appellant's back pain is bad, the panel concludes that the ministry reasonably determined that the information establishes that the appellant experiences some degree of restriction due to her impairment but that the combination of the functional skills and mobility and physical ability are not evidence of a severe physical impairment.

Mental Impairment

The appellant is diagnosed with GAD and major depressive disorder. The appellant argues that anxiety and depression are her biggest issue and that due to agoraphobia and panic attacks she cannot go out alone. She argues that a severe mental impairment is confirmed by her GP who re-stated his medical opinion following the original denial of disability. The ministry argues that simply providing a diagnosis does not establish a severe impairment, noting that when asked to describe the severity of the appellant's impairments, the GP mainly writes about physical impairments.

The GP identifies a significant deficit in 1 area of cognitive and emotional functioning, emotional disturbance, which is reported to have a major impact on daily functioning. No other areas are reported to have a major impact on daily functioning, though moderate impacts on daily functioning are reported in areas for which a significant deficit was not identified, including consciousness, impulse control and attention/concentration. The panel finds that the only restrictions with DLA relating to mental impairment are those relating to social functioning, as the appellant is reported to have good ability with all areas of communication and to independently manage, with no noted restriction, all listed decision-making of all DLA tasks (personal care, shopping, meal preparation, finances, management of medications, transportation, and social functioning). The restrictions with social functioning are that the appellant avoids stores and crowds and is unable to use public transit due to anxiety/agoraphobia, and that she requires periodic support/supervision with 4 of 5 listed areas of the DLA social functioning. The GP does not describe the frequency and duration of the periodic support/supervision and assesses marginal functioning rather than very disrupted functioning with both immediate and extended social networks. Additionally, the GP did not provide a response when asked what assistance is required to help maintain the appellant in the community, and there is no mention of or referral to a mental health specialist, which would be expected if the appellant's mental health conditions were considered severe. Based on this information, the panel finds the ministry reasonable to conclude that the information establishes that the appellant is capable of basic interaction and that a severe mental impairment is not established.

Restrictions in the ability to perform DLA

Section 2(2)(b)(i) of the EAPWDA requires that the minister be satisfied that in the opinion of a prescribed professional, a severe mental or physical impairment directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods. While other evidence may be considered for clarification or support, the ministry's determination as to whether or

not it is satisfied, is dependent upon the evidence from prescribed professionals. The term “directly” means that there must be a causal link between the severe impairment and the restriction. The direct restriction must also be significant. Finally, there is a component related to time or duration – the direct and significant restriction may be either continuous or periodic. If periodic, it must be for extended periods. Inherently, any analysis of periodicity must also include consideration of the frequency. All other things being equal, a restriction that only arises once a year is less likely to be significant than one that occurs several times a week. Accordingly, in circumstances where the evidence indicates that a restriction arises periodically, it is appropriate for the ministry to require evidence of the duration and frequency of the restriction in order to be “satisfied” that this legislative criterion is met.

DLA are defined in section 2(1) of the EAPWDR and are listed in both the MR and the AR sections of the PWD application with the opportunity for the prescribed professional to check marked boxes and provide additional narrative. DLA, as defined in the legislation, do not include the ability to work.

In this case, the appellant’s GP is the prescribed professional who assessed the appellant’s ability to perform DLA. As previously discussed under *Physical Impairment*, the GP attributes limitations in the appellant’s ability to function physically to fluctuations in the level of her back pain, but does not indicate how often, or for what duration, the appellant’s back pain is bad, or how much longer those DLA tasks affected take to perform during periods of increased pain. Also, while the appellant reports that she cannot twist, bend or lift repetitively, the GP reports that the appellant independently manages many DLA tasks that require these actions, including dressing, grooming, bathing and toileting. Similarly, laundry and basic housekeeping, which also require those actions, take significantly longer “when pain is severe” but do not require either periodic or continuous assistance, which would be expected if the appellant experiences significant restrictions.

Respecting the two DLA that are specific to mental impairment, “make decisions about personal activities, care or finances” and “relate to, communicate or interact with others effectively,” significant restrictions were not established, as previously discussed under *Mental Impairment*, the panel found that all decision-making DLA tasks were assessed by the GP as being managed independently. Additionally, the GP assessed the appellant as having good ability with communication, and did not describe the duration of the periodic support/supervision required for social functioning, information that relates to both the significance of the restriction and whether or not it is for extended periods.

Based on the above analysis, the panel concludes that the ministry was reasonable in determining that the information establishes certain limitations as a result of the appellant’s medical conditions but that it did not establish that an impairment significantly restricts DLA continuously or periodically for extended periods.

Help to perform DLA

The appellant reports that she is unable to leave her home alone due to her mental conditions and that some days her pain is so bad she cannot cook for herself. The ministry’s position is that because it has not been established that DLA are significantly restricted, it cannot be determined that help is required.

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

The establishment of direct and significant restrictions with DLA is a precondition of the need for help criterion. As the panel found that the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established, the panel also finds that the ministry reasonably concluded that it cannot be determined that the appellant requires help to perform DLA as required by section 2(2)(b)(ii) of the EAPWDA.

Conclusion

The panel finds that the ministry's reconsideration decision, which determined that the appellant was not eligible for PWD designation, was reasonably supported by the evidence and a reasonable application of the applicable enactment, and therefore confirms the decision. The appellant is not successful on appeal.