

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 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 and duration requirements, but 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 those restrictions, 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 November 23, 2016 the ministry received the appellant's PWD application comprised of a Physician Report (PR) and an Assessor Report (AR) completed by the appellant's Nurse Practitioner (the "Assessor") on February 9, 2016, and the appellant's Self-report (SR) dated February 9, 2016.

The appellant also provided the following:

- Letter from a specialist in endocrinology and metabolism dated June 16, 2015 (the "Endocrinologist")
- Letter from a neurologist dated July 2, 2015 (the "Neurologist")
- List of medications

The appellant's request for PWD designation was denied on June 6, 2017.

On July 10, 2017 the appellant requested a reconsideration and requested a 10 day extension because she was unable to see an advocate until July 17, 2017.

On August 28, 2017, the tribunal received the appellant's Notice of Appeal.

Summary of relevant evidence

Diagnoses

In the PR, the Assessor indicates that the appellant has graves disease – hyperthyroid (onset August 2013), myasthenia gravis (onset August 2013) and anxiety panic attacks (onset February 1995).

The Endocrinologist indicates that the appellant has graves disease and significant hyperthyroidism. The Neurologist indicates that the appellant has systemic myasthenia gravis.

Physical Impairment

In his letter dated June 16, 2015, the Endocrinologist indicates that the appellant was seen originally in 2013, treated with a medication and her symptoms seemed to settle. He states that she was seen again in fall 2014 and she was hyperthyroid again secondary to Graves disease and started on a medication again. At the time of his assessment in June 2015, the Endocrinologist indicated that the appellant was generally well and that he would follow her until she is in a stable euthyroid state.

In his letter dated July 2, 2015 the Neurologist states that the appellant was seen for review regarding systemic myasthenia gravis primarily affecting bulbar muscle. He states that the appellant has done well but stopped taking all of her medication about three weeks earlier resulting in some deterioration in her condition including drooping of her left eye. The Neurologist stressed the importance of being compliant with her medications and that he would review her again in 6-8 weeks time.

In the PR, the Assessor indicates that the appellant has persistent weakness and fatigue, trouble standing and lifting and that her illness is unpredictable.

In the PR for Functional Skills, the Assessor indicates that the appellant is able to walk 1 to 2 blocks unaided on a flat surface, can climb 5+ steps unaided, is limited to lifting 5 to 15 pounds but no lifting above her shoulders, and can remain seated for less than 1 hour.

In Part F – Additional Comments, the Assessor indicates that because the appellant's myasthenia gravis is unpredictable, the appellant has periods of relapse where it would not be possible to work.

In the AR, the Assessor indicates that the appellant's ability to communicate with speaking and reading are poor explaining that it varies and is poor when the appellant's eyesight is affected by her myasthenia gravis. The Assessor indicates that her writing and hearing are good. The Assessor indicates that the appellant is independent with walking indoors, walking outdoors, and climbing stairs, but requires continuous assistance from another person with lifting and carrying and holding, and periodic assistance with standing. The Assessor comments that the appellant has weakness and trouble lifting/reaching over her head.

In the SR, the appellant states that her disability is myasthenia gravis, anemia, and graves disease. She states that some of her conditions are speech impairment and double/blurred vision. She states that she has difficulties swallowing and that she catches every bug that she is exposed to including pneumonia twice in 2014. She states that she is fatigued easily and that she has engorged and tender breasts where she can't have anything touch them.

Mental Impairment

In the PR, the Assessor indicates that the appellant has significant deficits with cognitive and emotional function in the areas of language, perceptual psychomotor and emotional disturbance.

In the AR, the Assessor indicates that the appellant has moderate impact in the areas of bodily functions, consciousness (fatigue), emotion, attention concentration (short term memory), memory, and other emotional or mental problems. The Assessor indicates that the appellant has minimal impact in the areas of executive and other neuropsychological problems and no impact in the areas of impulse control, insight and judgment, motivation, motor activity, language and psychotic symptoms. The Assessor comments that the appellant's myasthenia gravis affects her ability to see at times, affects her speech, and causes fatigue.

In the SR the appellant states that she has extreme uneasy feelings.

DLA

In the PR the Assessor indicates that the appellant has not been prescribed any medication and/or treatments that interfere with her ability to perform DLA. The Assessor indicates that the appellant requires continuous assistance with management of medications and periodic assistance with basic housework and social functioning. The Assessor indicates that the appellant is not restricted with DLA of personal self care, meal preparation, daily shopping, mobility inside the home, mobility outside the home, use of transportation, or management of finances. The Assessor explains that the appellant cannot do some of her housework that involves lifting/reaching and that she has trouble with speaking sometimes. With respect to social functioning the Assessor explains that the appellant's impairment affects her communication and increases her social anxiety.

In the AR, the Assessor indicates that the appellant is independent with all aspects of personal care, basic housekeeping, meals, paying rent and bills and transportation. With respect to shopping the appellant is independent with going to and from stores, reading prices and labels, making appropriate choices and paying for purchases but requires continuous assistance with carrying purchases home, explaining that she cannot carry things well. With respect to medication the appellant is independent with filling/refilling prescriptions and safe handling and storage of medications but requires continuous assistance with taking as directed as she frequently forgets to take her medications.

With respect to social functioning, the Assessor indicates that the appellant is independent with interacting appropriately with others and dealing appropriately with unexpected demands but requires periodic support/supervision with making appropriate social decision, developing and maintaining relationships, and securing assistance from others, explaining that the appellant doesn't go out much and is socially isolated. The Assessor indicates that the appellant has marginal functioning with respect to her immediate and extended social networks.

Need for Help

In the PR, the Assessor indicates that the appellant does not require any prosthesis or aids for her impairment.

In the AR, the Assessor indicates that the appellant gets help from friends but does not get much help. The appellant does not have an Assistance Animal.

Additional information provided

In her Notice of Appeal dated August 28, 2017, the appellant states that her brother comes and takes her to appointments or she would not be able to get to them. She also states that her brother sits while she eats because of choking.

Neither the appellant nor the ministry attended the hearing. As both parties were notified of the hearing as required pursuant to section 85(2) of the *Employment and Assistance Regulation*, the panel proceeded with the hearing in their absence.

Admissibility of New Information

The ministry did not object to the information in the appellant's Notice of Appeal.

The panel has admitted the new information in accordance with section 22(4) of the *Employment and Assistance Act* as it is written testimony in support of the information and records that were before the minister when the reconsideration decision was made. In particular, the new information tends to support information regarding the appellant's difficulties with swallowing as set out in the SR and help needed.

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 when concluding it was not satisfied that

- a severe physical or mental impairment was established;
- 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 help, as it is defined in the legislation, 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

The legislation provides that the determination of severity of an 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.

Severe Physical Impairment

The appellant's position as set out in the SR, is that she has a severe physical impairment due to myasthenia gravis, anemia and graves disease that impact her speech, vision and swallowing and cause her to feel fatigued and have a decreased immune system.

The ministry's position is that the PR, AR and other medical documentation do not establish a severe physical impairment. The ministry's position is that while the information provided demonstrates that the appellant experiences limitations to her physical functioning due to fatigue and weakness, the assessments provided speak to a moderate rather than a severe physical impairment.

The reconsideration decision also notes that while the Assessor indicates that the appellant is unable to work due to the unpredictability of her impairment causing periods of relapse, an applicant's employability or ability to work is not taken into consideration.

The panel notes that the information provided by the Endocrinologist and Neurologist confirm the diagnosis of the Assessor but the letters are from June and July 2015 so the information is quite old. The Endocrinologist indicates that the appellant is generally well and the Neurologist indicates that the appellant had done well until she stopped taking her medication. While both specialists indicate that they would see the appellant for follow up, no updated information was provided indicating the

appellant's ongoing condition or providing further information regarding the severity of her physical impairment.

In the PR, the Assessor indicates that the appellant has persistent weakness and fatigue, trouble standing and lifting and that her illness is unpredictable.

In the PR for Functional Skills, the Assessor indicates that the appellant is able to walk 1 to 2 blocks unaided on a flat surface, can climb 5+ steps unaided, is limited to lifting 5 to 15 pounds but no lifting above her shoulders, and can remain seated for less than 1 hour.

In the AR, the Assessor indicates that the appellant's ability to communicate with speaking and reading are poor explaining that it varies and is poor when the appellant's eyesight is affected by her myasthenia gravis. The Assessor indicates that her writing and hearing are good. The Assessor indicates that the appellant is independent with walking indoors, walking outdoors, and climbing stairs, but requires continuous assistance from another person with lifting and carrying and holding, and periodic assistance with standing. The Assessor comments that the appellant has weakness and trouble lifting/reaching over her head.

The panel finds that the ministry was reasonable in determining that the information provided demonstrates that the appellant experiences limitations to her physical functioning due to fatigue and weakness, but that the assessments provided speak to a moderate rather than a severe physical impairment.

While the Assessor indicates that the appellant has periods of relapse making her unable to work, the panel notes that employability is not a criterion for designation.

Based on the information provided, the panel finds that the ministry reasonably determined that a severe physical impairment has not been established.

Severe Mental Impairment

The appellant's position is that she has anxiety panic attacks and has extreme uneasy feelings.

The ministry's position is that while the Assessor indicates that the appellant has significant deficits with cognitive and emotional functioning in the areas of emotional disturbance, language, and perceptual psychomotor, the AR indicates that the appellant has no major impacts in any areas, six moderate impacts in the areas of bodily functions, consciousness, emotion, attention/concentration, memory, and other emotional or mental problems, two minimal impacts in the areas of executive and other neuropsychological problems but no impacts in the remaining areas. In addition, the reconsideration decision states that while the Assessor indicates that the appellant requires periodic support/supervision with making appropriate social decisions, developing and maintaining relationships and securing assistance from others, the Assessor does not explain or describe the degree and duration of support/supervision required. The ministry's position is that the information provided speaks to a moderate rather than a severe mental impairment.

While the PR indicates that the appellant has significant deficits with cognitive and emotional functioning in the areas of emotional disturbance, language, and perceptual psychomotor, the AR indicates that the appellant has no major impacts in any areas, six moderate impacts in the areas of bodily functions, consciousness, emotion, attention/concentration, memory, and other emotional or mental problems, two minimal impacts in the areas of executive and other neuropsychological problems but no impacts in the remaining areas. The panel also notes that the information provided

by the Assessor is inconsistent in that in the PR the Assessor indicates that the appellant has significant deficits with cognitive and emotional function in the area of language, but in the AR the Assessor indicates no impact to language.

The panel finds that based on the information in the PWD application, the ministry reasonably concluded that the cumulative impact to cognitive and emotional functioning is not indicative of 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 that the legislative criteria are met, 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 how frequently the activity is restricted. 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.

The appellant's position is that the information provided in the PWD application demonstrates that she meets the requirements for designation for PWD.

The ministry's position is that the information provided by the Assessor is not sufficient to establish significant restrictions to DLA. The reconsideration decision states that the PR indicates that the appellant is continuously restricted in her ability to manage her medications and periodically restricted from managing to perform basic housekeeping and that the AR indicates that the appellant is able to manage all aspects of DLA independently except carrying purchases home and taking medications as directed. The ministry's position is that considering the appellant's medical history it is reasonable to expect that she would encounter some restrictions to her ability to perform DLA and require assistance as a result. However, the ministry's position is that there is not enough evidence to confirm that her impairment significantly restricts her ability to perform DLA continuously or periodically for extended periods so the legislative criteria have not been met.

The PR indicates that the appellant is continuously restricted with management of medications and the AR indicates that the appellant is independent with filling/refilling prescriptions and safe handling and storage of medications but that she requires continuous assistance from another person with taking medications as directed. The PR indicates that the appellant is periodically restricted with basic housework, explaining that she is unable to do some housework that involves heavy lifting or reaching but the Assessor does not provide further information regarding the frequency or duration of the appellant's restrictions. In addition, in the AR, the Assessor indicates that the appellant is independent with basic housekeeping.

The PR indicates that the appellant is periodically restricted with social functioning and the AR indicates that the appellant needs periodic support/supervision with making appropriate social decisions, developing and maintaining relationships and securing assistance from others, noting that the appellant doesn't go out much and is socially isolated. However, the Assessor does not provide further information regarding the frequency or duration of support/supervision required.

Although the appellant states in her Notice of Appeal that she cannot get to appointments unless her brother takes her, the AR indicates that the appellant is independent with going to and from stores and getting in and out of a vehicle. The appellant states that her brother sits with her when she eats because of choking but the AR indicates that the appellant is independent with feeding self.

As the AR indicates that the appellant is independent with all aspects of personal care, basic housekeeping, meals, paying rent and bills and most aspects of shopping (except carrying purchases home), the panel finds that the ministry has reasonably determined that the independence with which the prescribed professional reports that the appellant manages her DLA does not 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.

The appellant's position is that she requires help with DLA, particularly from her brother, with taking her to appointments and making sure she does not choke while eating.

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.

In the PR, the Assessor does not provide any information regarding the assistance needed with DLA. In the AR, the Assessor indicates that the help required for DLA is provided by friends, but comments that the appellant does not get much help. The Assessor indicates that the appellant does not require any prosthesis or aids for her impairment and that she does not have an Assistance Animal.

The panel finds that the appellant may take longer with some tasks due to her impairments and may need help with management of medications and some aspects of housework. However, given that confirmation of direct and significant restrictions with DLA is a precondition of the need for help criterion and 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 is a reasonable application of the applicable enactment, and therefore confirms the decision. The appellant is not successful on appeal.