

## 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 September 7, 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 May 15, 2017, the ministry received the appellant's PWD application comprised of a Medical Report (MR) and an Assessor Report (AR), both dated May 9, 2017 and completed by the appellant's general practitioner (GP) who has had the appellant as a patient for 11 years.

The appellant's request for PWD designation was denied on June 26, 2017. On August 9, 2017 the appellant requested reconsideration and an extension of the reconsideration period so that she could provide additional information. An extension until September 7, 2017 was granted but no additional information was provided.

On September 7, 2017, the ministry issued its reconsideration decision, which again denied the appellant's request for PWD designation.

The appellant's Notice of Appeal (NOA) was received by the tribunal on September 18, 2017. On October 4, 2017, the tribunal received the appellant's appeal submission - an undated 1-page letter from the appellant's grandmother.

The ministry's submission on appeal indicated that it would rely on its reconsideration decision. The ministry did not address the admissibility of the appellant's appeal submission.

### Admissibility of Information Provided on Appeal

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

The panel determined that the information in the Notice of Appeal and the letter from the appellant's grandmother for the most part corroborated the information at reconsideration and was therefore admissible in accordance with section 22(4) of the *EAA*, as it was in support of the information at reconsideration.

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

## Summary of relevant evidence

### Diagnoses

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

- gender dysphoria
- depression
- anxiety
- Raynaud's Phenomenon
- Hyperthyroid

### 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 has no limitations with lifting or remaining seated.
- Walking outdoors requires continuous assistance from another person ("Won't leave house").

### Mental Impairment

The GP provides the following information in the PWD application.

- Gender dysphoria, depression, social isolation at home. Gender change and very depressed. Problems adjusting to changes and fatigue.
- "Anxiety with treatment plan & fatigue with hormones and hyperthyroid."
- With gender change severe social isolation and phobia. Not responding well to therapy. "Fatigue and depression severe."
- In the MR, the GP indicates there are no cognitive, motor, sensory, or other difficulties with communication, commenting "but introverted." In the AR, the appellant is reported to have satisfactory ability with speaking, reading, writing, and hearing.
- In the MR, significant deficits with cognitive and emotional function are identified in 3 of 11 specified areas – emotional disturbance (depression, anxiety), motivation and attention or sustained concentration.
- In the AR, a major impact on daily functioning is reported for emotional disturbance (depression, anxiety). A minimal impact on daily functioning is reported for bodily functions, consciousness, impulse control, insight and judgement, attention/concentration, and motivation. No impact is reported for all remaining areas: executive, memory, motor activity, language, psychotic symptoms, and other neuropsychological problems. No additional commentary is provided by the GP.
- In the MR, social functioning is reported to be continuously restricted, described as "social isolation and depression." Degree of restriction is "severe."
- In the AR, periodic support/supervision is reported to be required with appropriate social decisions and to deal appropriately with unexpected demands. Continuous support/supervision is required for ability to develop and maintain relationships and interact appropriately with others ("social phobia and social isolation"). No information is provided respecting the ability to secure assistance from others. Help is described as "counselling."
- Very disrupted functioning with immediate and extended social networks ("social phobia").

The appellant's grandmother writes that in her opinion, the appellant's anxiety is extreme, as well as depression and gender dysphoria that have been ongoing for a few years now. She sees the appellant suffering on a daily basis. The appellant needs continuous assistance from another person, which is usually provided by the grandmother with whom the appellant lives. The grandmother has written the appeal submission because the appellant is unable to do it herself because of her anxiety. The appellant also needs occasional help communicating with others and has difficulty in the smallest of social interaction as well as trouble maintaining social relationships. She seems to be unable to go outside by herself because of her anxiety which is made worse by her gender dysphoria and ongoing transition. She also lacks motivation because of her depression.

### DLA

In the MR, the GP reports the following.

- Medication and/or treatments do not interfere with the ability to perform DLA.
- Personal self-care, meal preparation, management of medications, basic housework, and mobility inside the home are not restricted.
- Daily shopping, mobility outside the home, use of transportation, management of finances, and social functioning ("social isolation and depression) are continuously restricted. Degree of restriction is "severe."
- Assistance needed with DLA is "counselling and further treatment hormones."

In the AR, the GP reports that gender change dysphoria, depression, and hyperthyroid are the impairments that impact the appellant's ability to manage DLA. 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 ("at home").

Shopping

- Going to and from stores and carrying purchases home require continuous assistance from another person ("social phobia at present").
- Reading prices and labels, making appropriate choices, and paying for purchases are managed independently.

Meals

- All listed tasks are managed independently - meal planning, food preparation, cooking, and safe storage of food.

### Paying Rent and Bills

- All listed tasks are managed independently – banking, budgeting, and pay rent and bills. All tasks are also reported as taking significantly longer than typical to perform (“social phobia”).

### Medications

- All listed tasks are managed independently - filling/refilling prescriptions taking as directed, and safe handling and storage. All tasks are also reported as taking significantly longer than typical to perform (“social phobia”).

### Transportation

- Getting in and out of a vehicle is managed independently.
- Using public transit and using transit schedules/arranging transportation require continuous assistance from another person and take significantly longer than typical to perform (“social phobia”).

### Social Functioning

- As described above under *Mental Impairment*.

In her Notice of Appeal, the appellant writes that her daily living restrictions are not so much physical; however, the anxiety she suffers greatly restricts her DLA and is more severe than shown in her first application.

The appellant’s grandmother writes that the appellant needs help to even get through most days where living activities are concerned, such as cooking meals, banking, shopping for personal needs and food, as well as other things that require going out.

### *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 and health authority professionals.

## 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 requirements of 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 Raynaud's Phenomenon and hypothyroid, with the GP also describing severe fatigue related to treatment for gender dysphoria. However, the panel finds that, as was noted by the ministry, aside from commenting that mobility outdoors requires continuous assistance from another person due to social anxiety, not a physical condition, the GP does not identify restrictions with physical functioning. Additionally, the panel notes that the information from the appellant and her grandmother does not identify limitations to physical functioning.

Accordingly, in the absence of information or argument relating to a physical impairment, the panel concludes that the ministry's determination that a severe physical impairment has not been established was reasonable.

### Mental Impairment

The appellant is diagnosed with gender dysphoria, depression and anxiety by her GP, and the appellant and her grandmother both emphasize the impact that anxiety has on the appellant's functioning. The ministry's position is that the diagnosis of a serious medical condition does not in itself establish a severe impairment and that the information provided respecting the appellant's cognitive, emotional and social functioning does not establish a severe impairment of mental functioning.

The GP identifies significant deficits in 3 areas of cognitive and emotional function, describing the appellant's depression as severe. However, as was noted by the ministry, a major impact on daily functioning is reported in only one of those areas – emotion, which the GP indicates relates to the appellant's depression and anxiety. For the other two areas for which significant deficits are reported, motivation and attention/sustained concentration, only a minimal impact on daily functioning is reported. Additionally, either minimal or no impact is reported on daily functioning for the remaining 11 listed areas of cognitive and emotional functioning, which include insight and judgement, executive, and attention/concentration. Based on this information, the panel finds the ministry's conclusion that the cumulative impact to cognitive and emotional functioning is not indicative of a severe mental impairment is reasonable.

Respecting social functioning, which the GP has described as "severe social isolation," two of five listed aspects (develop and maintain relationships, interact appropriately with others) are reported as requiring continuous support/supervision, which the GP describes as counselling. Respecting the remaining aspects of social functioning, there is no description of the appellant's functioning in terms of securing assistance from others and there is no description of the frequency or duration of the periodic support/supervision required for making appropriate social decisions and dealing appropriately with unexpected demands. Additionally, as the ministry notes, while extremely disrupted functioning is reported for both immediate and extended social networks, the GP reports that assistance is provided by members of the appellant's immediate social network, her family. As was also noted by the ministry, there is no indication of safety issues with regards to social functioning, and but for being described as introverted by the GP, and as having occasional difficulties communicating according to her grandmother, the GP indicates there are no cognitive difficulties with communication and that the appellant's ability to communicate is satisfactory.

Based on the above analysis of the information, the panel considers the ministry reasonable in concluding that while the information establishes that the appellant is currently experiencing impacts to her mental functioning, in particular regarding aspects of social functioning, a severe impairment of mental functioning has not been 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.

The appellant’s position is that anxiety greatly restricts her DLA, more severely than was indicated in the PWD application. The ministry’s position is that the appellant is reported as independently managing the majority of DLA and that the information respecting restrictions with some DLA is inconsistent and/or does not appear to relate to the identified cause of the restriction, the appellant’s social phobia.

The panel finds that while the GP has diagnosed a number of medical conditions, including physical medical conditions and severe fatigue, restrictions with DLA are identified by the GP as relating to depression and anxiety, with an emphasis placed on the appellant’s social phobia.

In the MR, the GP reports that the following DLA are not restricted: personal self-care, meal preparation, management of medications, basic housework, and mobility indoors (one part of the DLA move about indoors and outdoors). The GP reports continuous restrictions with shopping, mobility outside the home, use of transportation, finances, and social functioning, and describes the assistance required as counselling and further hormone treatment.

As the ministry notes, the information respecting management of finances and medications is not clear. In particular, in the MR the appellant is reported as not being restricted with the management of medications but in the AR, the appellant is reported to take significantly longer than typical to perform all listed tasks of managing medications. Additionally, while reporting a continuous restriction with management of finances in the MR, in the AR all listed tasks of paying rent/bills are reported as being managed independently, though all listed tasks take significantly longer than typical to perform. The panel considers the ministry reasonable to question why the appellant is reported as taking significantly longer than typical with tasks of management of finances and medications that do not require interaction with other people (budgeting, taking medication as directed, and safe handling/storage of medication). Additionally, a minimal impact on daily functioning is reported for aspects of cognitive and emotional functioning related to such tasks, such as impulse control, insight/judgement, and executive functioning.

Respecting the degree of DLA restrictions, in the MR, the GP describes the restrictions as severe. However, in the AR, where DLA are broken down into individual tasks, the GP reports that as well as independently managing the DLA of personal self-care, meal preparation, medications, basic housework, and mobility inside the home, the appellant also independently manages many tasks within those DLA assessed as continuously restricted in the MR. Specifically, the appellant independently manages standing and climbing stairs (move about indoors and outdoors), reading prices and labels, making appropriate choices, and paying for purchases (shopping), getting in and out of a vehicle (transportation), and banking, budgeting, and paying rent and bills (management of finances), which is consistent with the GP’s assessment of good physical functioning and minimal impacts on cognitive functioning. Accordingly, the panel considers the ministry reasonable to

conclude that as the appellant is reported as independent with the majority of listed areas of DLA in the AR, it is difficult to establish significant restrictions.

In conclusion, the panel finds that the ministry's determination that while the appellant experiences restrictions to DLA due to social phobia, the information from the prescribed professional has not confirmed a severe impairment that significantly restricts the appellant's ability to perform DLA either 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 either continuously or periodically for extended periods, 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 to meeting the need for help criterion. The panel concluded that the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established; therefore, 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.