

## **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 October 4, 2017, which held that the appellant did not meet 4 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. However, the ministry was not satisfied that:

- a medical or nurse practitioner has confirmed that the appellant has an impairment that is likely to continue for at least 2 years;
- 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 July 19, 2017, the ministry received the appellant's PWD application comprised of a Medical Report (MR) and an Assessor Report (AR), both completed in June 2017 by the appellant's general practitioner (GP1) who had seen the appellant twice in the past 12 months.

The appellant's request for PWD designation was denied on September 1, 2017. The appellant requested reconsideration and re-submitted the original MR and AR. The MR remains unchanged but on September 21, 2017, additional information was provided in the AR from a second general practitioner (GP2), as GP1 had retired.

On October 4, 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 October 18, 2017.

Subsequently, the tribunal received the appellant's 15-page faxed appeal submission:

- October 26, 2017, 2-page letter from the appellant.
- September 12, 2017, letter from GP2. "Given [appellant's name] medical conditions and current state, it is my opinion that her daily activities are significantly restricted. She is unable to travel by car or transportation, she requires regular assistance with shopping and any outings, she is unable to handle executive function decision making, she is not able to live alone. These conditions are ongoing, though they can be worse in different social situations. Her daily functioning is limited by these conditions have a severe impact on her emotional daily function. These impairments are ongoing, and although this will be reassessed on a regular basis, it is unknown at this time how many years these will persist."
- October 17, 2017, letter from GP2 – "Based on her clinical assessment I believe her impairments to be severe and at this point do not anticipate them resolving in under two years. Her impairments have a significant impact on her daily functioning and quality of life. I have submitted a revised application which explained these details."
- List of medications.
- Invoice for earplugs.
- October 2, 2017, "Medical Form Confirming Requirement for Guide Dog or Service Dog" completed by GP2.
- October 25, 2017, 2-page letter from a counsellor.
- July 25, 2017 court order prohibiting the appellant's husband from contacting the appellant.
- October 26, 2017, 2-page letter from Victim Assistance/Outreach Worker.

The ministry's submission on appeal indicated that it had reviewed the additional information and that "had it had this information at the time of reconsideration", it may have found the appellant's request met the criteria for PWD designation. The panel noted that the letter from GP2 (September 12, 2017) is dated prior to the Reconsideration Decision (October 4, 2017). However, the letter was not included in the records before the ministry, at the time of reconsideration. 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 September 12, 2017 and October 17, 2017 letters from GP2 respecting the expected duration of impairment, which conflicts with the information at reconsideration, and the references to a past suicide attempt and recent sobriety in the October 25, 2017 letter from the counsellor, which are not mentioned in the information at reconsideration, is not in support of the information at reconsideration. Therefore, this information was not admitted by the panel in accordance with section 22(4) of the *EAA*. The panel determined that the information in the Notice of Appeal as well as the balance of the information in the documents submitted on appeal tended to corroborate and therefore support the information at reconsideration. Accordingly, it was admitted in accordance with section 22(4) of the *EAA*.

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, GP1 writes:

- Severe anxiety – decreased mood, poor sleep. Past abuse from husband – separated.

#### Degree and Course of Impairment

GP1 indicates that the impairment is not likely to continue for two years or more from the date the application was completed. GP2 did not provide additional information respecting duration in the MR or AR.

#### Physical Impairment

No physical limitations to functioning are identified by GP1, GP2, or the appellant, though GP1 does indicate that the appellant's clavicle was fractured and her rotator cuff was torn.

#### Mental Impairment

The following information is provided in the MR and AR (where GP2 has provided additional or conflicting information from that of GP1, it is noted):

- Extreme stress.
- Physically abused.
- Frightened in crowds, isolates. Is getting counselling.
- Lost 30 lbs. weight; has put weight back on away from husband.
- Anxiety and depression secondary to physical assault by husband. PTSD. Significantly physically and mentally traumatized from husband. GP2 adds: Ongoing function restriction from panic + PTSD from domestic violence. Currently living in 24 hr. staffed group home.
- In the AR, the appellant is reported to have good ability with speaking, reading, writing, and hearing.
- In the MR, significant deficits with cognitive and emotional function are identified in 7 of 11 specified areas – consciousness, executive, language, memory, perceptual psychomotor, psychotic symptoms, and emotional disturbance. Occasionally forgets words, difficulty remembering dates etc.
- In the AR, GP1 assesses:

- Major impact on daily functioning for emotion and other emotional or mental problems (“PTSD – anxiety + depression.”) GP2 adds: Uncontrolled anxiety, panic, PTSD, and emotional lability. Extremely on edge and easily startled.
- No impact for the 12 other listed areas including bodily functions, consciousness, executive, language, memory, psychomotor problems, and psychotic symptoms.
- GP2 revises the assessment of GP1 by indicating:
  - Major impact on daily functioning for bodily functions (Insomnia and inability to sleep without medications. Decreased appetite and weight loss);
  - Moderate impacts for both attention/concentration (Decreased focus and attention with some issues with memory when under stress) and executive (Difficulty with decision making and planning as unable to cope and becomes overwhelmed); and
  - Minimal impact for memory.
- In the MR, social functioning is reported to be impacted by “++ anxiety difficulty meeting people.”
- In the AR, appropriate social decisions and ability to secure assistance from others are reported as being managed independently. Periodic support/supervision is required for developing and maintaining relationships (OK with family but fearful of other relationships), interacting appropriately with others [issues with problem solving], and dealing appropriately with unexpected demands.
- GP2 revises to indicate that continuous support/supervision is required for dealing appropriately with unexpected demands commenting, “difficulty with changes or sudden unforeseen demands.”
- Support/supervision for social functioning is described as seeing counsellor. GP2 adds that the appellant is living in group home, attends trauma counselling and Now Canada programming.
- Very disrupted functioning with immediate (was physically abused) and extended social networks. Is only comfortable with family at present.
- GP2 assesses marginal, not very disrupted, functioning with immediate social network “somewhat withdrawn + issues with trust.”
- Only goes out of house with a family member. GP2 adds, ongoing extreme daily impact from panic, PTSD, and anxiety. Unable to live or function outside the home independently.

In her SR, the appellant writes that due to PTSD she is constantly overwhelmed by stress and experiences a state of panic several times a day, which she spends a great deal of time recovering from and managing. She cannot function in public places or crowds and must be accompanied at all times. Sudden or loud noises are startling and deafening (must wear earplugs most of the time) and she cannot be in the dark, and has daily headaches from light and noise. She has difficulty remembering the date, names, words, and where she put things. She can only remember bits and pieces of the past but not dates or sequences of events. She is always fatigued from lack of sleep. She has difficulty with conversations, finding the right words, or forgetting what was being discussed.

In her reconsideration and appeal submissions, the appellant further describes her problems with panic, sleep, headaches, memory, hypervigilance and being around strangers. The appellant reports that she struggled with PTSD for many years when she was living with her husband, not just since separating from him and relocating to BC. Similar information was relayed by the appellant to the counsellor and outreach worker and is reflected in the letters provided on appeal.

#### DLA

In the MR, GP1 reports the following:

- The appellant has not been prescribed any medication and/or treatments that interfere with the ability to perform DLA.
- Personal self-care, meal preparation, management of medications, basic housework, daily shopping, mobility inside the home, and use of transportation are restricted. GP1 does not indicate if the restriction is continuous or periodic, though when asked “If ‘periodic’, please explain”, GP1 writes “Need accompaniment to shops, banking & can’t drive car.” Where asked to describe the degree of restriction,

GP1 writes “some severe at present.”

- Mobility outside the home, management of finances, and social functioning are not restricted. When asked to describe the impact to social functioning, GP1 writes “++ anxiety especially meeting people.”
- Assistance needed with DLA is not described.

In the AR, GP1 and GP2 report that all aspects of mobility and physical ability (DLA move about indoors and outdoors) are managed independently as are all listed tasks of the DLA personal care, basic housekeeping, and medications.

GP1 also assesses all listed tasks of the DLA shopping, meals, and transportation being managed independently.

In contrast, GP2 assesses the need for periodic assistance with 2 tasks of shopping (going to and from stores and carrying purchases home “Issues leaving house alone” “Needs assistance with outings”), the need for continuous assistance with 1 task of the DLA meals, meal planning, “difficulty planning and thinking ahead for meals, and continuous assistance for all listed tasks of the DLA transportation (getting in and out of a vehicle, using public transit and using transit schedules/arranging transportation) “Due to PTSD and panic she is unable to be in a car. Cannot take bus or public transport at this time – in future if possible would require constant assistance. Would need another person with her for this.”)

Both GP1 and GP2 indicate the need for periodic assistance with all listed tasks of the DLA pay rent and bills “can’t go out of home alone.”

Social Functioning is as described above under *Mental Impairment.*

#### *Need for Help*

GP1 indicates that assistance is provided by family, with whom the appellant lives.

GP2 indicates that assistance is not provided by family but rather is provided by community service agencies as the appellant is living in a group home and attending programming. GP2 also indicates that an application for a personal assistance animal is in progress and that the appellant is going for equine therapy.

## 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 medical or nurse practitioner has not confirmed that the appellant's impairment is likely to continue for at least two years;
- 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**

#### **Duration of Impairment**

The legislation requires that in the opinion of a medical or nurse practitioner, a severe mental or physical impairment is likely to continue for at least 2 years. While the appellant argues that her impairment will continue for more than two years, when asked if the impairment is likely to continue for two or more years from today, GP1 ticked the “no” box, and as the ministry notes, GP2 did not amend GP1’s response. Accordingly, the panel concludes that the ministry reasonably concluded this legislative criterion was not met.

#### **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**

Neither GP1 nor GP2 diagnoses the appellant with a physical medical condition or identifies limitations to physical functioning, and the appellant does not argue that she has a physical impairment. Accordingly, 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 severe anxiety and decreased mood resulting from past abuse from her husband which she argues has severely impaired her mental functioning. She argues that PTSD causes panic attacks, affects her memory and sleep, and leaving her unable to be alone or leave her home alone. 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 respecting the nature of the impairment and its impact on daily cognitive, emotional and social functioning, which must be considered to assess the severity of a mental impairment, does not establish a severe mental impairment.

Respecting cognitive and emotional functioning, the ministry notes that the GP1 reports significant deficits in 7 of 11 specified areas of cognitive and emotional functioning but argues that the cumulative impact on daily functioning reported by both GP1 and GP2 is not indicative of a severe impairment of mental functioning. The panel considers the ministry reasonable to reach this conclusion given that for the majority of areas for which significant deficits are reported by GP1, specifically, consciousness, language, psychomotor problems, and psychotic symptoms, both GP1 and GP2 assess no impact on daily functioning. Additionally, for 3 other areas for which a significant deficit is reported, attention/concentration, executive, and memory, GP1 assesses no impact and GP2 assesses moderate or minimal impact.

Respecting social functioning, both GP1 and GP2 indicate that the appellant independently makes appropriate social decisions and is independently able to secure assistance from others. For the remaining three aspects of social functioning, GP1 assesses the appellant as in need of periodic support/supervision, with GP2 revising the assessment to indicate the need for continuous support/supervision to deal appropriately with unexpected demands. Neither GP1 nor GP2 describe the frequency of the periodic assistance. Additionally, as noted by the ministry, no safety issues with regards to social functioning are identified and while very disrupted functioning with immediate and extended social networks is reported by GP1, the narrative of both GP1 and GP2 indicates satisfactory functioning with family. Also of note, is that the appellant's communication abilities are assessed by both GP1 and GP2 as good.

Noting that on appeal, GP2 affirms the assessment she provided in the AR, the panel finds that while the information establishes that the appellant's cognitive, emotional and social functioning is impacted by her medical conditions, most notably problems with anxiety when around strangers or in crowds, the ministry was reasonable to conclude that the cumulative impact to cognitive, emotional and social functioning is indicative of a moderate, not 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 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 her impairment significantly impacts her daily life as confirmed by GP2's assessment. of ongoing extreme daily impact from panic, PTSD, and anxiety. The ministry's position is that when looking at the information from GP1 and GP2 collectively, the information establishes that the appellant experiences restrictions to daily living activities which require her to leave home but that there is not enough evidence to confirm that the appellant has a severe impairment that significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods.

In reaching this conclusion, the ministry notes that although GP1 identifies restrictions with most DLA in the MR, in the AR, GP1 assesses the appellant as independently managing all listed tasks of DLA excepting finances and social functioning for which periodic assistance is required with some or all tasks. The panel finds that it is more than likely that GP1 erred when check-marking the DLA boxes in the MR given that the DLA assessed as restricted in the MR are almost entirely at odds with his accompanying narrative in the MR and also conflict with his assessment of DLA in the AR.

The panel again notes that on appeal, GP2 affirms the assessments in the MR. The panel finds that in the MR, the appellant is assessed by both GP1 and GP2 as independently managing all aspects of physical mobility and ability (relates to the DLA move about outdoors and indoors), as well as all listed tasks of the DLA personal care, basic housekeeping, and medications, as well as most listed tasks of the DLA shopping and meals. As discussed above, most areas of social functioning are managed independently or with periodic support/supervision and there is insufficient information to establish the duration of the help required in order to assess both the significance of the restriction and whether it is for extended periods. GP2 identifies the need for periodic assistance from another person with aspects of shopping, going to and from stores which relates to anxiety, and with carrying purchases home, though the panel finds that it is unclear how the physical task of carrying purchases relates to mental functioning. GP2 also identifies the need for continuous assistance from another person with one aspect of the DLA meals, meal planning, which appears somewhat at odds with GP2's assessment of a moderate impact on executive functioning, and for all aspects of transportation and one aspect of social functioning. Both GP1 and GP2 identify the need for periodic assistance with all aspects of paying rent and bills, though again there is no description of the frequency and duration of this assistance.

Based on the above analysis, the panel concludes that the ministry was reasonable to determined that given the level of independent functioning with DLA assessed by the prescribed professionals, GP1 and GP2, there is not enough evidence to confirm that the appellant has a severe impairment that directly and 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 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 therefore confirms the decision. The appellant is not successful on appeal.