

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the Ministry) reconsideration decision dated September 18, 2017, which found that the Appellant did not meet three of the five 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 her impairment is likely to continue for at least two years. However, the Ministry 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 these restrictions, the Appellant requires the significant help or supervision of another person, the use of an assistive device, 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

The evidence before the Ministry at the time of the reconsideration decision included the PWD Application comprised of the applicant information and self report (SR) dated April 27, 2017, a medical report (MR) dated March 24, 2017 and completed by the Appellant's general practitioner (GP) who has known the Appellant for 5 years and who has seen her 2-10 times in the past year, and an assessor report (AR) also dated March 24, 2017 and completed by the GP.

The evidence also included the following documents:

- 1) Request for Reconsideration (RFR) signed on August 29, 2017 in which the Appellant provides a four page typed document (the first revised self report or RSR1) summarizing the legislation and the information provided by the GP in the MR, and a three page hand-written document (the second revised self report or RSR2) dated September 14, 2017 which provides additional information about the Appellant's physical impairments and need for help, focussing on the time period since her original application for the PWD designation on June 26, 2017; and
- 2) Work BC Program Medical Report dated February 27, 2017 providing information on the Appellant's primary and secondary diagnosis, prognosis, medications and impacts on her ability to participate in an employment program.

Diagnoses

In the MR, the GP diagnosed the Appellant with type 1 diabetes (with related diabetic retinopathy, peripheral neuropathy, and frequent severe infections) and a gastroesophageal reflux disease (GERD) related intractable cough. No additional comments are provided.

Physical Impairment

In the MR and the AR, the GP reported that:

- In terms of health history, the Appellant has severe, poorly controlled diabetes with severe complications;
- The Appellant does not require any prostheses or aids for her impairment;
- In terms of functional skills, the Appellant can walk less than one block unaided, is not able to climb and stairs unaided ("*handrail at all times*"), can lift 2 to 7 kg. (5 to 15 lbs.) and can remain seated for a maximum of one hour;
- The Appellant is assessed as requiring continuous assistance from another person or being unable to perform most aspects of mobility and physical ability, specifically: walking indoors ("*takes three times longer - neuropathy*") and walking outdoors ("*takes three times longer, less than one block max.*"), lifting ("*<10 lbs.*") and carrying and holding ("*<35 lbs., <5 feet*"). She uses an assistive device to climb stairs ("*handrail at all times*") and has to lean while standing;
- Where asked in the MR to indicate the severity of the medical conditions relevant to the Appellant's impairment, the GP wrote "*severe, poorly controlled diabetes with severe complications*";
- Where asked in the MR to provide any additional information considered relevant to understanding the significance of the Appellant's medical condition, the GP wrote "*several hospitalizations related to severe infections as complications from diabetes*" and "*number of severe complications*";
- Where asked in the AR to provide any additional information that might be relevant to understanding the nature and extent of the applicant's impairment and its effect on DLA, the GP wrote "*severe diabetic complications, irreversible, permanent condition. Disabling impact on her (DLA)*"; and
- In the section of the AR relating to assistance provided, the GP indicated that none of the listed assistive devices are applicable and that the Appellant does not have an assistance animal.

In the SR, the Appellant provided information about her physical impairment which is consistent with the information provided by the GP in the MR and the AR.

In the RSR2 the Appellant wrote that:

- While she had intended to have the GP provide additional information in advance of the reconsideration decision, the GP was not available to provide that information because the GP was on maternity leave;
- Since originally applying for her PWD designation the Appellant has had three eye surgeries and many eye injections, and that “these are still ongoing to save (her) eyesight”;
- At times she has next to no sight at all;
- In the past year her neuropathy in her feet and legs has gotten worse to the point that the burning, stabbing pain is now felt all the time, not just at night;
- It is hard for her to walk and stand due to poor balance;
- She has fallen many times;
- She has recently been referred to a specialist because her kidneys are shutting down; and
- She has a chronic cough which gets worse when she eats and affects her breathing.

Mental Impairment

In the MR and the AR, the GP reported that the Appellant has no significant deficits with cognitive and emotional function and that, while she had poor eyesight and required a magnifying glass to read, the Appellant did not have an identified mental impairment or brain injury.

In none of her self reports (SR, RSR1 or RSR2) did the Appellant indicate that she had any form of mental impairment.

Restrictions in the Ability to Perform DLA

In the MR, the GP did not indicate whether the Appellant had been prescribed any medication or treatments that interfered with her ability to perform DLA, but when asked to explain if the answer was “yes” wrote “*regular checking/administration - insulin*” and where asked for the anticipated duration of treatments and medications, she wrote “*permanent, lifelong insulin*”.

In the AR, the GP reported that the Appellant was independent in managing all DLA with the following exceptions:

- She requires continuous assistance from another person or is unable to manage basic housekeeping (“*unable to do floors - can’t see properly*”), going to and from stores (no explanation provided), reading prices and labels (no explanation provided), carrying purchases home (“*unable >10 lb.*”) and using transit schedules and arranging transportation (“*poor vision*”);
- She uses an assistive device and takes longer than typical with dressing (“*sits to get pants/socks on - 2x longer*”), transferring in and out of bed (“*neuropathy - 3x longer - uses furniture for support*”), and getting in and out of a vehicle (“*3x longer, neuropathy - seat/door for support*”);
- She basic takes longer than typical with basic housekeeping (“*takes breaks, neuropathy - 3x longer*”), going to and from stores (“*3x longer*”), and carrying purchases home (“*3x longer*”); and,
- She is both independent *and* requires continuous assistance from another person or is unable to do laundry, prepare food and cook, with no explanations provided.

In the SR, the Appellant provided information about how her physical impairment impacted certain specific areas of DLA (personal care, basic housekeeping, shopping and transportation) which were consistent with the information provided by the GP in the MR and the AR.

Need for Help

In the AR, the GP indicated that the Appellant had help from her friends and family for her DLA but did not provide any explanation or additional information.

In the SR, the Appellant stated that she had to rely on others for her assistance with her DLA but did not elaborate further other than that she has friends come over to clean her floors and that she has to rely on a magnifying glass to read prices and labels when shopping and to read transit schedules.

In the RSR2 the Appellant wrote that she relies on her son to help her “*prepare food, test (her) blood sugars, clean (her) house, carry things, etc.*”.

Additional Information submitted after reconsideration

In her Notice of Appeal dated October 3, 2017, the Appellant stated that all of her health issues are ongoing, impact her DLA and none of them are temporary.

The Appellant did not attend the hearing. After confirming that proper notification was provided to the Appellant in accordance with Section 85(2) of the Employment and Assistance Regulation, the Panel proceeded with the hearing.

At the hearing, the Ministry relied on its reconsideration decision.

Admissibility of Additional Information

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 Ministry when the decision being appealed was made and “oral and written testimony in support of the information and records” before the Ministry when the decision being appealed was made – i.e. information that substantiates or corroborates the information that was before the Ministry at reconsideration. These limitations reflect the jurisdiction of panels established under section 24 of the EAA: to determine whether the Ministry’s reconsideration decision is reasonably supported by the evidence or a reasonable application of the enactment in the circumstances of an appellant. That is, panels are limited to determining if the Ministry’s decision is reasonable and are not to assume the role of decision-makers of the first instance. Accordingly, panels cannot admit information that would place them in that role.

The Ministry did not provide any additional written information at the hearing.

The Panel considered the information in the Appellant’s Notice of Appeal to be an argument that does not contain any evidence.

PART F – Reasons for Panel Decision

The issue on appeal is whether the Ministry's reconsideration decision, which found that the Appellant is not eligible for 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. The Ministry found that the evidence does not establish that the Appellant has a severe mental or physical impairment that, in the opinion of a prescribed professional, is likely to continue for at least 2 years, and that her DLA are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods. Also, as a result of those restrictions, it could not be determined that the Appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

The criteria for being designated as a PWD are set out in Section 2 of the EAPWDA as follows:

Persons with disabilities

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 is in a prescribed class of persons or 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).

The EAPWDR provides as follows:

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 ...

Part 1.1 — Persons with Disabilities

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).

Severity of Impairment

Section 2(2) of the EAPWDA requires that in determining whether a person may be designated as a PWD the Ministry must be satisfied that the individual has a severe physical or mental impairment. An "impairment" is a medical condition which results in restrictions to a person's ability to function independently or effectively. With respect to assessing the severity of an impairment, Section 2(2)(b)(i) of the EAPWDR requires that a mental or physical impairment *directly and significantly* restrict the person's ability to perform DLA either *continuously, or periodically for extended periods*. The Ministry must consider all the relevant evidence, including that of the Appellant. However, the legislation is clear that the fundamental basis for the analysis is the evidence from a prescribed professional – in this case the Appellant's GP.

Physical Functioning

In the reconsideration decision, the Ministry argues that taking three times longer to perform acts of mobility or physical ability, the ability to lift up to 10 lbs and carry up to 35 lbs, and the ability to remain seated for no more than one hour are not considered indicative of *severe* impairments to physical functioning. The Ministry notes that, while the GP states in the AR that the Appellant has to lean while standing, the GP does not say how long the Appellant is able to stand. The Ministry also argues that requiring a magnifying glass to read is not in and of itself sufficient evidence of severe limitations to vision, and notes that while the GP states in the AR that the Appellant has hearing loss in one ear, the GP does not describe the severity of the hearing loss. In addition, the Ministry points to discrepancies between the Work BC Program Medical Report and the AR in assessing the Appellant's ability to stand and use stairs and argues that stair handrails are not considered assistive devices when establishing limitations to climbing stairs. The Appellant argues that she has severe, poorly controlled diabetes with severe complications, and that she had intended to have the GP provide additional information but the GP was on maternity leave. In the RSR2, she stated that since originally applying for her PWD designation she has had three eye surgeries and many eye injections and at times she has next to no sight at all, in the past year her neuropathy in her feet and legs has gotten worse, and that she has recently been referred to a specialist because her kidneys are shutting down. In its reconsideration decision, the Ministry did not address the additional diagnoses provided by the Appellant in the RSR2, nor were those additional specific diagnoses identified by the GP in the MR.

Panel Decision

The Panel finds that the Ministry's determination that taking three times longer to perform acts of mobility or physical ability, the ability to lift up to 10 lbs, the ability to carry up to 35 lbs, and the inability to remain seating for more than one hour are not considered indicative of a severe impairment to physical functioning was reasonable. In addition, the Panel acknowledges the discrepancies between the Work BC Program Medical Report and the AR in assessing the Appellant's ability to stand and use stairs, and finds that, as a result, the Ministry was reasonable in determining that it was not able to draw any firm conclusions regarding restrictions in the Appellant's ability to stand or climb stairs. In addition, the Panel finds that the use of a magnifying glass when reading is not sufficient evidence of a severe limitation to reading.

Regarding the Ministry's assertion that stair handrails are not considered assistive devices when establishing limitations to climbing stairs, the Panel notes that an "assistive device" is defined in Section 2(1) of the EAPWDA as "*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*". The Panel acknowledges that a stair handrail is a safety feature required by the British Columbia building code on all steps where there are 4 or more risers in all residential structures, and as such is a device designed to provide safety for any individual, regardless of whether or not he or she has a physical impairment. Therefore the Panel finds that the Ministry's determination that stair handrails are not considered assistive devices as defined in the EAPWDA was a reasonable interpretation of the legislation in the circumstances of the Appellant.

Because the Appellant's limitations in physical functioning as assessed by the GP can be reasonably argued to be not indicative of *severe* restrictions, the Panel finds that the Ministry was reasonable in determining that the information provided does not establish a severe impairment of the Appellant's physical functioning.

Mental Functioning

In its reconsideration decision, the Ministry found that the GP's assessments in the MR provided evidence of significant deficits with respect to cognitive and emotional functioning in the areas of emotional disturbance and motivation, but no significant deficits for any of the other nine areas. In addition, the Ministry determined that the GP indicates that the Appellant is independent in all aspects of social functioning and major impacts to only one area, moderate impacts to only one area, minimal impacts to six areas, and no impact to six areas of cognitive and emotional functioning. On balance the Ministry found that, based on the GP's assessment, the cumulative impact on cognitive and emotional functioning was not indicative of a severe impairment to mental functioning. The Appellant did not argue that she had a mental impairment.

Panel Decision

The Panel notes that the GP drew a line through the section of the MR asking for significant deficits with cognitive and emotional functioning (Section 2-E), and the two sections of the AR that are required to be completed for an applicant with an identified mental impairment (Section 3-B4 and C).

The Panel finds that the evidence shows that neither the Appellant nor the GP argued that the Appellant had a mental impairment. Therefore the Panel finds that the Ministry reasonably determined that a severe mental impairment was not established pursuant to Section 2(2) of the EAPWDA.

Restrictions in the ability to perform DLA

In the reconsideration decision, the Ministry acknowledges that the legislation does not specifically require that the frequency and duration of an applicant's restrictions be explained in a PWD application, but that the Ministry finds such information valuable in determining the significance of the applicant's restrictions, implicitly suggesting that this information is not included in the application. The Ministry also states that the GP did not indicate whether the Appellant was prescribed any medications or treatments that interfere with her ability to perform DLA. The Ministry argues that taking two to three times longer in performing DLA is not considered indicative of a severe impairment to physical functioning, and that sitting while dressing, using furniture and relying on car doors and seats for support are not considered assistive devices. In addition, the Ministry argues that it is difficult to establish significant restrictions to DLA because the Appellant is independent with the majority of DLA. The Appellant argues that, due to her severe impairment, she requires continuous assistance from another person or is unable to manage a significant number of DLA, including basic housekeeping, laundry, going to and from stores, reading prices and labels, carrying purchases home, food preparation and cooking, and using transit schedules and arranging transportation.

Panel Decision

Section 2(2)(b) of the EAPWDA requires that the Ministry be satisfied that a prescribed professional has provided an opinion that an applicant's severe impairment *directly* and *significantly* restricts his or her DLA, continuously or periodically for extended periods. In this case, the GP is the prescribed professional. DLA are defined in Section 2(1) of the EAPWDR and are also listed in the MR and, with additional details, in the AR. Therefore, the prescribed professionals completing these forms have the opportunity to indicate which, if any, DLA are significantly restricted by the Appellant's impairments either continuously or periodically for extended periods, and to further elaborate so that the nature and extent of the restrictions to DLA are clear. Prescribed professionals are further

encouraged to elaborate on the nature and extent of the limitations or restrictions in the instructions provided in those sections of the forms. For example, in Part C of the AR the assessor is instructed to identify whether assistance is required in each case with respect to the full range of DLAs, and if the applicant is not independent, to describe the type and amount of assistance required.

The Panel notes that the Appellant is assessed by the GP as being independent for a large majority of DLA, and the GP has not indicated whether the Appellant was prescribed any medications or treatments that interfere with her ability to perform DLA, even though the form specifically asked for this information in Section 2-B13.

The Panel finds that it is reasonable for the Ministry to conclude that sitting while dressing, using furniture and relying on car doors and seats for support are not considered assistive devices as Section 2(1) of the EAPWDA defines an assistive device as a device designed to enable a person to perform a DLA, and none of these devices were designed for that purpose.

Therefore the Panel finds that the Ministry reasonably concluded that there is not enough evidence from the prescribed professional to establish that the Appellant's impairment *significantly* restricts her ability to manage her DLA either continuously or periodically for extended periods, thereby not satisfying the legislative criterion of Section 2(2)(b)(i) of the EAPWDA.

Help with DLA

In its reconsideration decision, the Ministry states that it cannot be determined that significant help is required because it has not been established that DLA are significantly restricted. The Appellant argues that she has to rely on others to help her with her DLA, that she has friends come over to clean her floors, that she relies on her son to help her with a few of her DLA, and that she has to rely on a magnifying glass to read prices and labels when shopping and to read transit schedules.

Panel Decision

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. That is, the establishment of direct and significant restrictions under section 2(2)(b)(i) is a precondition of meeting the need for help criterion. 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 a DLA.

The Panel finds that the Ministry reasonably determined that, as direct and significant restrictions in the Appellant's ability to perform DLA have not been established, it cannot be determined that the Appellant requires help to perform DLA as a result of those restrictions, as defined by Section 2(3)(b) of the EAPWDA.

Conclusion

Having reviewed and considered all of the evidence and relevant legislation, the Panel finds that the Ministry's reconsideration decision, which determined that the Appellant was not eligible for PWD designation under Section 2 of the EAPWDA, was reasonably supported by the evidence and was a reasonable application of the EAPWDA in the circumstances of the Appellant, and therefore confirms the decision. The Appellant's appeal, therefore, is not successful.