

#### **PART C – DECISION UNDER APPEAL**

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the ministry) reconsideration decision dated October 25, 2017 that found that the appellant did not meet two 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 she has a severe mental impairment, though not a severe physical impairment, which, in the opinion of a medical practitioner, is likely to continue for at least two years.

However, the ministry was not satisfied that the evidence establishes that:

- 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**

With the consent of both parties, the hearing was conducted as a written hearing, pursuant to section 22(3)(b) of the *Employment and Assistance Act*.

The evidence before the ministry at the time of the reconsideration decision included the Person With Disabilities (PWD) Application comprised of the applicant information and self-report dated June 30, 2017, a medical report (MR) dated July 18, 2017 and completed by a psychiatrist who has known the appellant since June 2017, and an assessor report (AR) dated July 27, 2017 and completed by a general practitioner (GP) who has known the appellant for 26 years and has seen her 2 to 10 times in the last year.

The evidence also included the following documents:

- 1) Emergency Outpatient Records dated May 7 and May 21, 2017 with notes of admission for depression/ suicidal/ deliberate self-harm and head injury due to spousal assault;
- 2) Psychiatric Progress Note dated May 11, 2017 in which the psychiatrist noted recent “psychosocial stressors” and the appellant presented as “sad and tense, which is her usual presentation” and her medication dosages were increased; and,
- 3) Request for Reconsideration dated October 2, 2017.

### ***Diagnoses***

In the MR, the appellant was diagnosed by the psychiatrist with Major Depressive Disorder with an onset approximately 6 years ago. In the AR, when asked to describe the mental or physical impairments that impact the appellant’s ability to manage daily living activities, the GP wrote: “Significantly depressed. Feel anxious most of the time. Sometimes get panic attacks. Affects ability to do basic ADL’s when anxious.”

### ***Daily Living Activities (DLA)***

In the MR, the psychiatrist reported:

- The appellant’s health history includes decreased concentration and decreased interest in activities.
- The appellant has not been prescribed any medication and/or treatment that interfere with her ability to perform DLA.
- The appellant has no difficulties with communication.
- The appellant is periodically restricted with the personal self care DLA and the meal preparation DLA. Regarding the periodic restrictions, the psychiatrist wrote: “during periods of severely depressed mood.”
- The appellant is restricted with social functioning, but the psychiatrist does not indicate whether the restrictions are continuous or periodic. The psychiatrist wrote: “inherent symptom of severe depression.”
- Asked to provide additional comments regarding the degree of restriction, the psychiatrist wrote: “severely restricted.”
- The appellant is not restricted with the management of medications DLA, the basic housework DLA, the daily shopping DLA, the mobility DLA (inside and outside the home), the use of transportation DLA, and the management of finances DLA.
- For additional comments, the psychiatrist wrote: “she is severely impaired and has difficulty performing activities including holding down a paid job. She needs to be on psychotropic medication in this next 2 to 3 years.”

In the AR, the GP reported:

- The appellant has a good ability to communicate in all areas, specifically: speaking, reading, writing and hearing.
- The appellant is independent with walking indoors and with walking outdoors.
- For the personal care DLA, the appellant is independent with all tasks with the exception of regulating her diet, for which she requires periodic assistance from another person, specified by the GP as: “some assistance from family.”
- For the basic housekeeping DLA, the appellant requires periodic assistance from another person with the tasks of both doing laundry and housekeeping, with no explanation or description provided by the GP.
- Regarding the shopping DLA, the appellant is independent with the task of reading prices and labels, paying for purchases and carrying purchases home. She requires periodic assistance with going to and from stores and making appropriate choices. The GP wrote: “staying with parents, who help out with meal preparation, shopping, and laundry.”
- For the meals DLA, the appellant is independent with the task of safe storage of food, and requires continuous assistance from another person with meal planning and periodic assistance with the tasks of food preparation and cooking. There is no additional explanation or description provided by the GP.
- Regarding the pay rent and bills DLA, the appellant is independent with her banking and requires periodic assistance from another person with budgeting and paying rent and bills. There is no additional explanation or description provided by the GP.
- For the medications DLA, the appellant is independent with all tasks, specifically: filling/refilling prescriptions, taking as directed, and safe handling and storage.
- Regarding the transportation DLA, the appellant is independent with the task of getting in and out of vehicle, and requires continuous assistance from another person with using public transit (note: “has not used public transit locally”) and with using transit schedules and arranging transportation.
- For social functioning, the appellant requires periodic support/supervision with making appropriate social decisions (note: “has shown inappropriate social judgment in past, when depressed”), developing and maintaining relationships, and interacting appropriately with others. The appellant requires continuous support/supervision from another person with dealing appropriately with unexpected demands, and the GP wrote: “anxiety and depression would affect ability to deal with unexpected demands.”
- Asked to describe the support/supervision required to help maintain the appellant in the community, the GP wrote “family helps on a daily basis for support.” The GP did not identify any safety issues.
- The appellant has marginal functioning in both her immediate and extended social networks.
- For additional information to the AR that may be relevant to understanding the nature and extent of the appellant’s impairment and its effect on DLA, the GP wrote: “has had significant anxiety and depression for a few years affecting ability to carry out some ADL’s, impaired ability to look after her children. Requires assistance.”

In her self-report, the appellant wrote:

- She has suffered depression and anxiety for 6 years and has not been in the workforce during this time. A lot of times her anxiety makes her not able to talk or communicate.
- She is currently living with her parents to help with her daily functions.
- Being depressed and having anxiety makes her extremely tired, down, frustrated, and not able to cope in many daily situations.

- When she gets anxious, she is not able to talk and, therefore, cannot communicate well.
- Even getting dressed in the morning, or making food, is a chore.

In her Request for Reconsideration, the appellant wrote:

- She needs PWD and daily help from her parents as her mental health is very bad.
- She would like to go into the workforce in the future when her health is better.
- Her health has gotten a lot worse since she was physically abused “almost to death.”
- She wants to be “on PWD” until she is “confident enough to walk outside.”

### ***Need for Help***

In the AR, the GP indicated that the help required for DLA is provided by family. None of the listed assistive devices are identified by the GP as being routinely used by the appellant to help compensate for her impairment.

### ***Additional Information***

In her Notice of Appeal dated October 31, 2017, the appellant expressed her disagreement with the ministry’s reconsideration decision and wrote that every day her mental health is getting worse. She cannot do daily activities on her own. She is not being treated fairly as a Canadian and she has a right to be on disability. She has tried everything she can to get better.

Prior to the hearing, the appellant submitted the following additional documents:

- 1) Emergency Outpatient Record dated May 7, 2017;
- 2) Psychiatric Consultation dated May 7, 2017;
- 3) Psychiatric Progress Note dated May 11, 2017; and,
- 4) Letter dated May 31, 2017 from the GP to a psychiatrist.

The ministry relied on its reconsideration decision as the ministry’s submission on the appeal.

### ***Admissibility of Additional Information***

The ministry did not raise an objection to the admissibility of the additional documents submitted by the appellant. The panel considered that the Emergency Outpatient Record and the Psychiatric Progress Note were before the ministry at reconsideration and were admitted as such. The panel considered that the information in the Psychiatric Consultation and the letter from the GP corroborates the extent of the appellant’s impairment as a result of a medical condition diagnosed in the MR, which was before the ministry at reconsideration. Therefore, the panel admitted this additional information as being in support of information and records that were before the ministry at the time of the reconsideration, in accordance with Section 22(4)(b) of the *Employment and Assistance Act*.

## PART F – REASONS FOR PANEL DECISION

The issue on the appeal is whether the ministry's reconsideration decision, which found that the appellant is not eligible for PWD designation, 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 appellant has a severe mental impairment, though not a severe physical impairment, but her DLA are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods and that it could not be determined, as a result of those restrictions, 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, 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.

### **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).

#### **Direct and Significant Restrictions in the ability to perform DLA**

In the reconsideration decision, the ministry was satisfied that the appellant has a severe mental impairment. However, the determination that a person has a severe impairment does not itself determine eligibility for the PWD designation. According to the legislation, Section 2(2)(b) of the EAPWDA, the ministry must assess direct and significant restrictions to DLA in consideration of the opinion of a prescribed professional, in this case the appellant's psychiatrist and GP. This does not mean that the other evidence is not factored in as required to provide clarification of the professional evidence, but the legislative language makes it clear that a prescribed professional's evidence is fundamental to the ministry's determination as to whether it is

“satisfied.” Therefore, the prescribed professional completing the assessments has the opportunity to indicate which, if any, DLA are significantly restricted by the appellant’s impairments either continuously or periodically for extended periods.

In the reconsideration decision, the ministry reviewed the information provided in the MR and wrote that while the psychiatrist reported that the appellant is periodically restricted in her ability to perform her personal care DLA and her meal preparation DLA, the comments by the psychiatrist that the degree of restriction is “severely restricted” and the periodic nature is “during periods of severely depressed mood” do not explain the frequency and the duration of the restrictions. The ministry also considered that in the AR the appellant’s long-time GP reported that the appellant is independent with all but one task of the personal care DLA, that she requires periodic assistance with regulating diet, and that the explanation “some assistance from family” does not describe the frequency and duration of the assistance required.

The ministry considered that the GP reported with respect to the meals DLA the appellant is independent with the task of safe food storage, requires continuous assistance with the task of meal planning, and periodic assistance with food preparation and cooking. The ministry noted that the explanation “staying with parents who help out with meal preparation, shopping, and laundry” does not explain the frequency or duration of the assistance required. In the AR, when asked to describe the impairments that impact the appellant’s ability to manage DLA, the GP wrote that the appellant is “significantly depressed,” she feels anxious “most of the time,” she “sometimes” gets panic attacks, and the impairment affects her ability to do basic DLA “when anxious,” with no further detail of the frequency of specific restrictions.

Section 2(2) of the EAPWDA requires that a severe impairment directly and significantly restricts the appellant’s ability to perform the prescribed DLA either continuously or periodically for extended periods. The direct and significant restriction may be either continuous or periodic. If the restriction is periodic, it must be for an extended time. 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 which occurs several times a week. Accordingly, in circumstances where the evidence indicates that a restriction arises periodically, it is appropriate for the ministry to expect evidence from the prescribed professional of the duration and frequency of the restriction in order to be “satisfied” that this legislative criterion is met. There are footnotes in the MR and the AR that state that periodic assistance “refers to the need for significant help for an activity some of the time as would be the case where a person required help due to the episodic nature of the impairment.” The panel notes that there is insufficient evidence that would point to the appellant’s impairment being episodic in nature, or if it is, the pattern of how and to what degree it is episodic. The ministry considered that while the GP assessed the need for periodic assistance for some other tasks of DLA, specifically: laundry, basic housekeeping, going to and from stores, making appropriate choices, budgeting, and pay rent and bills, the psychiatrist reported in the MR that the appellant is not restricted in these DLA and there was no further explanation provided by the GP to explain this discrepancy. The ministry wrote that while the GP indicated that the appellant requires continuous assistance for tasks of transportation and noted that she “has not used public transit locally,” the psychiatrist reported in the MR that the appellant is not restricted with the use of transportation DLA. The panel finds that the ministry reasonably concluded, in the absence of further explanation or description, that it remains unclear whether the assistance is required due to the appellant’s mental impairment or as a result of sharing household duties within her family home.

Considering the two “social functioning” DLA that are specific to a severe mental impairment – make decisions about personal activities, care or finances (decision making), and relate to, communicate or interact with others effectively (relate effectively), the panel finds that the ministry reasonably concluded that there is insufficient evidence to establish that the appellant is significantly restricted in either. Regarding the ‘decision making’ DLA, the GP reported in the AR that the appellant independently manages some of the decision-making components of DLA, specifically: shopping (paying for purchases) meals (safe storage of food), and medications (taking as directed and safe handling and storage). The periodic assistance required by the appellant for the components of decision-making for personal care (regulating diet), shopping (making appropriate choices), and pay rent and bills (including budgeting), have not been explained by the GP in order for the ministry to determine that the assistance is required for extended periods of time.

Given that the psychiatrist reported that the appellant has no restrictions in the use of transportation DLA, the ministry reasonably considered that there is insufficient information to establish that the GP’s assessment of a need for continuous assistance with the decision making components of using transit schedules and arranging transportation is due to the appellant’s mental impairment. The GP reported that the appellant requires periodic support/supervision with making appropriate social decisions and the GP wrote: “has shown inappropriate social judgment in past when depressed,” without specifying how often the appellant’s mood is depressed. The panel notes that the GP did not identify any safety issues.

Regarding the DLA of ‘relating effectively’, the psychiatrist reported in the MR that the appellant is restricted with her social functioning and noted “inherent symptom of depression” and the degree of restriction is “severely restricted.” In the AR, the appellant’s long-time GP assessed her as requiring periodic support/supervision with developing and maintaining relationships and with interacting appropriately with others. The GP reported that the appellant has marginal functioning in both her immediate and her extended social networks, with no further explanation provided. The appellant wrote in her self-report that “a lot of times” her anxiety makes her not able to talk or communicate, although she does not describe how often this occurs. The psychiatrist reported in the MR that the appellant has no difficulties with communication and the GP indicated in the AR that the appellant has a good ability to communicate in all areas, including speaking.

In her self-report, the appellant wrote that she has suffered depression and anxiety for 6 years, she has not been in the workforce during this time, and she is currently living with her parents to help with her daily functions. In her Request for Reconsideration, the appellant wrote that she needs daily help from her parents as her mental health is very bad. She wrote that her health has gotten a lot worse since she was physically abused “almost to death” and she would like to get into the workforce in the future when her health is better.

In the additional comments to the MR, the psychiatrist wrote that the appellant “...is severely impaired and has difficulty performing activities including holding down a paid job.” The GP also commented in the AR that the appellant has had significant anxiety and depression for a few years and that this affects her ability to carry out “some” DLA, and she has an “impaired ability to look after her children.” With respect to these references to the appellant’s inability to work and an impaired ability to look after her children, the panel notes that neither employability nor an ability to look after others are criteria in section 2(2) of the EAPWDA nor are they listed among the prescribed DLA in section 2 of the EAPWDR.



Given the psychiatrist's report of no restriction to the appellant's ability to perform most DLA and the insufficient information regarding the need for periodic assistance with some tasks, as well as insufficient evidence of significant restrictions to the two 'social functioning' DLA specific to a mental impairment, the panel finds that the ministry reasonably determined that the evidence is insufficient to show that the appellant's overall ability to perform her DLA is significantly restricted either continuously or periodically for extended periods, pursuant to Section 2(2)(b)(i) of the EAPWDA.

### **Help to perform DLA**

In the reconsideration decision, the ministry held that, as it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required. Section 2(2)(b)(ii) of the EAPWDA requires that, as a result of being directly and significantly restricted in the ability to perform DLA either continuously or periodically for extended periods, a person must also require 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.

While the GP reported that the appellant receives help from her family, and the appellant wrote that her parents help her with daily functions, as the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established, the panel finds that the ministry also reasonably concluded that, under section 2(2)(b)(ii) of the EAPWDA, it cannot be determined that the appellant requires help to perform DLA.

### **Conclusion**

The panel finds that the ministry's reconsideration decision, which determined that the appellant was not eligible for PWD designation pursuant to Section 2(2) of the EAPWDA, was reasonably supported by the evidence. The panel therefore confirms the ministry's decision. The appellant's appeal, therefore, is not successful.