

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the ministry) reconsideration decision dated December 11, 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 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.

The ministry also found that the appellant is not one of the prescribed classes of persons who may be eligible for PWD designation on the alternative grounds set out in Section 2.1 of the *Employment and Assistance for Persons with Disabilities Act* and the appellant did not appeal the decision on that basis.

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 Persons With Disabilities (PWD) Application comprised of the appellant's information and self-report dated July 30, 2017, a medical report (MR) dated August 4, 2017 and an assessor report (AR) dated August 5, 2017, both completed by a general practitioner (GP) who has known the appellant for 8 years and has seen her 2 to 10 times in the last year.

The evidence also included the Request for Reconsideration dated November 21, 2017 and attached letter signed by the GP on November 23, 2017 (the "checklist").

Diagnoses

In the MR, the GP diagnosed the appellant with depression and anxiety disorder, alcoholism and PTSD [Post Traumatic Stress Disorder] with no dates of onset specified.

Physical Impairment

In the MR and the AR, the GP reported:

- The appellant does not require any prostheses or aids for her impairment.
- In terms of functional skills, the appellant has no limitations as she can walk 4 or more blocks unaided on a flat surface, climb 5 or more steps unaided, and has no limitations with lifting or remaining seated.
- The appellant is assessed as independent with all areas of mobility and physical ability, specifically she is independent with walking indoors and walking outdoors, climbing stairs, standing, lifting, and carrying and holding.
- In the section of the AR relating to assistance provided, the GP indicated that none of the listed assistive devices are applicable to the appellant and the appellant does not have an assistance animal.

In her self-report, the appellant wrote:

- She had a seizure in March 2017 and she has been taking medication and she suffers many associated side effects, including fatigue, nausea, daily vomiting, dizziness, weight loss, and a lack of energy. She lost 45 lbs. in the past year.
- The preliminary results of an EEG [electroencephalogram] in August 2017 show that she suffers from epilepsy. She is awaiting an appointment with a neurologist.
- She is also suffering with digestive issues, thyroid problems, muscle aches and pains, flood disorders, vomiting blood, skin disorders (rashers, blisters, bruises), and chronic fatigue syndrome.

In the checklist document, the GP indicated that one of the appellant's severe conditions includes having a seizure. She was hospitalized for 4 to 5 days. The GP also wrote for additional information: "possible epilepsy" and "awaiting neurologist appointment."

Mental Impairment

In the MR and the AR, the GP reported:

- Regarding the appellant's health history, that she is "depressed and anxious with a comorbidity of alcoholism. She had drug addictions in the past. She is due to her alcoholism and depression not able to care for herself and rely on her boyfriend and other family members for this. Severe PTSD from past abuses ever since childhood."
- The appellant has no difficulties with communication.
- The appellant has significant deficits with her cognitive and emotional function in the areas of executive, emotional disturbance, motivation and impulse control. Despite instructions to give details, the GP did not provide any additional comments.
- The appellant has a good ability to communicate in all areas, specifically: speaking, reading, writing and hearing.
- With respect to the section of the AR relating to daily impacts to the appellant's cognitive and emotional functioning, the GP assessed major impacts in the areas of emotion, impulse control and motivation. There are moderate impacts in the areas of bodily functions, insight and judgment, attention/concentration and executive function. Minimal impacts are assessed for memory and psychotic symptoms, and there are no impacts in the areas of consciousness, motor activity, language, other neuropsychological problems or other emotional or mental problems. The GP did not provide any comments.
- Regarding an assessment of the appellant's social functioning, the GP reported that the appellant requires periodic support/supervision in all aspects, specifically: making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others, dealing appropriately with unexpected demands, and securing assistance from others. The GP wrote: "Again, due to alcoholism and mental health mostly not in a position to make good decisions for herself."
- The appellant has very disruptive functioning with both her immediate social network and the GP noted that the appellant is "at risk for abuse," as well as her extended social network and the GP wrote that the appellant "has had many changes in relations. Risk for abuse is high."
- Asked to describe the support/supervision required that would help to maintain the appellant in the community, the GP wrote that the appellant "should have regular visits with social workers" and the safety issue is that there is "danger patient can be abused by others."

In her self-report, the appellant wrote:

- She has been plagued with anxiety, depression, alcoholism, and past drug abuse. These conditions have manifested from a history of physical/emotional abuse and victimization, and as a result she suffers from PTSD.
- She is too timid and fearful and needs assistance to deal with everyday life and obligations.
- She is also suffering with stress due to economic reasons, suicidal thoughts, feeling overwhelmed, mood disorders, irritability, eating disorders, and agoraphobia.

In the checklist, the GP indicated:

- There is a major impact to the appellant's executive functioning.
- The appellant has fatigue on a daily basis.
- The appellant has constant mood swings from overly high to deep depression a couple of times during the week.
- The appellant has difficulty communicating due to anxiety, depression, PTSD, alcoholism "as well as when listening to other people."
- Regarding appropriate social interaction, the appellant requires continuous assistance due to severe anxiety and depression as well as years of alcoholism. Ability to deal appropriately with unexpected demands "is very poor (depression, panic attacks)." Developing and maintaining relationships- "poor ability due to severe depression. She is also extremely socially isolated can go up to 3 weeks without leaving her house."

Daily Living Activities (DLA)

In the MR and the AR, the GP reported:

- With respect to the appellant's health history, the GP wrote "she is due to her alcoholism and depression not able to care for herself- rely on boyfriend and other family members for this."
- The appellant has not been prescribed any medication and/or treatments that interfere with her ability to perform DLA.
- In the additional comments to the MR, the GP wrote that the appellant is "...not able to do her own meal prep, personal self-care, housework, etc. Due to her severe alcoholism with anxiety and depression."
- In the AR, the appellant is independent with walking indoors and with walking outdoors.
- The appellant requires period assistance from another person with all of the tasks for all the listed DLA, specifically the personal care DLA, with a comment "would need assistance when in alcoholic stupor," the basic housekeeping DLA and the shopping DLA, with a comment by the GP that the appellant "needs assistance when drunk. She mostly needs medical and mental health assistance to overcome her alcoholism. Her friends should also help her to try to overcome her addiction to alcohol."
- The appellant also requires periodic assistance from another person with all of the tasks of the meals DLA, the pay rent and bills DLA, the medications DLA, and the transportation DLA. The GP commented: "Again needs assistance when under influence of alcohol. She is probably not able to handle her own money as she would squander it on alcohol."

In her self-report, the appellant wrote:

- She has trouble obtaining and maintaining employment and maintaining any meaningful relationships with family or friends. She has lost 6 to 8 jobs in the past 12 months.
- She is currently too timid and fearful and needs assistance to deal with everyday life and obligations.

In the checklist, the GP indicated:

- The appellant is unable to use public transportation as she does not feel comfortable, gets paranoid, and has constant panic attacks being around people.
- Lack of energy and motivation prevent her from doing laundry and housekeeping, and she needs assistance from friends and family continuously.
- The appellant has severe restrictions with banking as well as handling funds.
- For her personal care, the appellant requires somebody to motivate her and needs constant support. During severe depression and anxiety stage, she neglects these activities for weeks.
- The appellant has a poor ability with meal planning and safe storage of food.
- The appellant has a hard time managing her medications (refilling prescriptions, taking medication as directed) and needs constant reminders as she is often forgetful.
- The appellant is unable to do her daily shopping “due to severe mental health condition of being in public places.” The appellant gets her friends to do the shopping for her as she will not go into the stores.

Need for Help

The GP reported in the AR that help required for DLA is provided by friends. The GP did not identify any of the listed assistive devices as being used by the appellant. The GP indicated she does not have an assistance animal.

Additional information

In her Notice of Appeal dated January 3, 2018, the appellant expressed her disagreement with the ministry’s reconsideration decision and wrote that her application and her appeal demonstrated that she has a severe impairment, she is directly and significantly restricted by her DLA, and she requires assistance with living activities as a result of significant restrictions.

Prior to the hearing, the appellant provided the following additional document:

Letter dated January 19, 2018 in which the GP wrote that:

- He has been the appellant’s physician for the past 8 years and he believes she meets all the criteria for PWD.
- The appellant has severe illnesses, significant restrictions, and needs constant support.
- The appellant has been diagnosed with depression and anxiety disorder, alcoholism, PTSD, and possible epilepsy.
- The appellant has severe restrictions, needs continuous assistance, and her restrictions are most of the time.
- The appellant’s significant restrictions with all DLA are not limited to periods of alcoholic intoxication.

At the hearing, the appellant stated:

- She was overcome with anxiety and preferred that the advocate speak on her behalf.
- She is living on her own and sometimes her neighbour helps her.
- Since her first seizure, she has had “2 or 3” other seizures.
- She was hospitalized for pancreatitis.

At the hearing, the appellant's advocate stated:

- The GP had provided additional information on the checklist document, which read: "possible epilepsy" and "awaiting neurologist appointment." She had communications with the GP prior to drafting the January 19, 2018 letter for the GP's signature.
- The appellant has a severe mental impairment, which does not affect her physical functioning. She is capable with her mobility and physical abilities but has restrictions due to her mental health conditions.
- The appellant requires someone else to get her groceries for her 100% of the time. The appellant has difficulty going out into the community.

The ministry relied on the reconsideration decision as summarized at the hearing. The ministry stated at the hearing that her copy of the checklist available for the hearing has a black bar along the bottom of the first page and she did not know that there was writing in that box and cannot make out the writing suggested by the advocate. The ministry stated that the reconsideration decision referred to the appellant's signed Request for Reconsideration being submitted to the ministry on November 27, 2017, and the usual process at reconsideration is to review and consider all materials submitted to the ministry.

Admissibility of Additional Information

The ministry objected to the admissibility of the letter from the GP dated January 19, 2018 as this document was not before the ministry at reconsideration and indicated epilepsy as a possible diagnosis, which is not in support of information before the ministry at reconsideration, particularly since the reference to "possible epilepsy" was not legible in the ministry's copy of the checklist submitted at reconsideration. The appellant argued that the GP's letter is admissible as referring to the medical conditions diagnosed in the PWD application and, in addition to the GP's information provided at the bottom of the checklist, the GP also referred in the body of the checklist to the appellant's hospitalization as a result of having a seizure, which is also suggestive of possible epilepsy.

The panel considered the information in the GP's letter as being in support of information before the ministry at reconsideration as the appellant had written in her self-report that the preliminary result of tests conducted in the hospital was that she suffers from epilepsy. The panel also admitted most of the oral testimony on the appellant's behalf, except that detailed below, as being in support of, and tending to corroborate, the impact from medical conditions referred to in the PWD application which was before the ministry at reconsideration. Therefore, the panel admitted this additional information in accordance with Section 22(4)(b) of the *Employment and Assistance Act*.

The panel did not admit the appellant's oral testimony regarding her hospitalization for pancreatitis as this condition was not diagnosed by the GP in the PWD application or the Request for Reconsideration and was not before the ministry at reconsideration.

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 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 evidence does not establish that the appellant has a severe mental or physical impairment and that her DLA are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods. Also, it could not be determined that, as a result of those 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.

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).

Severe Physical Impairment

In the reconsideration decision, the ministry was not satisfied that the information provided establishes a severe physical impairment. The ministry wrote that the GP reported no physical impairments, no difficulties communication, and reported that the appellant is independent with her mobility and physical ability. The ministry wrote that the appellant's reference to epilepsy, digestive issues, thyroid and liver problems, eating and skin disorders, and agoraphobia were not considered by the ministry as none of these conditions were reported or confirmed by the GP.

Given that the appellant did not argue that she has a severe physical impairment and the advocate acknowledged that there is no definitive diagnosis of epilepsy, the appellant still awaiting an appointment with the neurologist, and the GP having reported no physical limitations, the panel finds that the ministry reasonably determined that the evidence is not sufficient to establish that the appellant has a severe physical impairment under Section 2(2) of the EAPWDA.

Severe Mental Impairment

In the reconsideration decision, the ministry was not satisfied that the information provided was sufficient evidence of a severe mental impairment. The ministry acknowledged that the appellant was diagnosed by the GP with depression, anxiety, alcoholism and PTSD, and that the GP wrote that, due to alcoholism and depression, the appellant is not able to care for herself and relies on her friend and family members. The ministry wrote that the GP reported that the appellant's mental impairment majorly impacts emotion, motivation, and impulse control, and

moderately impacts bodily functions, insight, judgment, attention/concentration, and executive thinking. The ministry acknowledged that the GP reported that the appellant's alcoholism, anxiety, depression, and PTSD are "severe," but wrote that the GP reported that the appellant only requires periodic assistance from others when the appellant is in an alcoholic "stupor" and that she requires assistance to overcome alcoholism. The ministry wrote that the GP did not identify the frequency and duration of the appellant's addictive episodes, the appellant's level of functioning between episodes remains unclear, and, therefore, the ministry was unable to conclude that the appellant's mental impairments severely affect her ability to function independently or effectively.

The appellant's advocate argued that there is nothing in the ministry's analysis regarding the severity of the appellant's mental impairment in the reconsideration decision that indicates that the ministry considered the two-page "checklist" document that was submitted by the appellant at reconsideration. In the checklist, for example, the GP indicated that there is a major impact to the appellant's executive functioning, which had been assessed by the GP in the AR as a moderate impact, and the ministry did not refer to the GP's new assessment with respect to this aspect of functioning.

The panel notes that in the PWD application, the GP reported that the appellant has no difficulties with communication and that her ability to communicate in all areas is good; however, in the checklist, the GP indicated that the appellant has difficulty communicating due to anxiety, depression, PTSD, alcoholism "as well as when listening to other people," and this indicates a change in the GP's original assessment. In the reconsideration decision, the ministry does not refer to these noted changes in the GP's assessment, nor to any of the other evidence provided by the GP in the checklist that relates to the severity of the appellant's mental impairment, which was available to the ministry at reconsideration.

While the ministry may have concluded that the GP's assessment in the checklist did not warrant any weight as evidence due to the lack of an explanation by the GP for the change in his assessment 3 months after the completion of the MR and the AR, the ministry did not express this finding in the reconsideration decision. Other than referring to the receipt of the Request for Reconsideration in the Summary of Facts of the reconsideration decision, the ministry did not comment about the GP's information in the checklist at all. As the ministry unreasonably failed to demonstrate that the evidence of the GP in the checklist was considered by the ministry, by either explaining why little weight was placed on this evidence or by reviewing the new assessments provided, the panel finds that the ministry's determination that a severe mental impairment was not established under Section 2(2) of the EAPWDA was unreasonable.

Restrictions in the ability to perform DLA

In the reconsideration decision, the ministry was not satisfied that the appellant has a severe physical or mental impairment that, in the opinion of the prescribed professional, directly and

significantly restricts DLA either continuously or periodically for extended periods of time.

Section 2(2)(b) of the EAPWDA requires that a prescribed professional provide an opinion that an applicant's severe impairment directly and significantly restricts her ability to perform DLA, either 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, a prescribed professional completing these forms has the opportunity to indicate which, if any, DLA are significantly restricted by the appellant's impairment continuously or periodically for extended periods.

In the reconsideration decision, the ministry reviewed the information provided in the MR and AR and wrote that the GP reported in the MR that the appellant is not able to do her own meal preparation, personal self-care, and housework due to severe alcoholism, anxiety and depression; however, in the AR the GP only reported that the appellant requires periodic assistance with these aspects of DLA when she is in an alcoholic stupor and noted that the appellant is probably not able to handle her own money as she would squander it on alcohol. The ministry wrote that while the ministry acknowledged that the appellant requires periodic help with all of her functioning due to her mental health and addiction, as these are not continuous restrictions and the GP provided no information to establish that the periodic assistance is required for extended periods, the ministry concluded that the information provided does not establish that the appellant has a severe mental impairment that significantly restricts her ability to perform DLA either continuously or periodically for extended periods.

Again, the appellant's advocate argued that there is nothing in the ministry's analysis in the reconsideration decision, regarding the significance of the restrictions to DLA, which indicates that the ministry considered the two-page "checklist" document that was submitted by the appellant at reconsideration. In the checklist, for example, the GP indicated that the appellant is unable to do her daily shopping due to her anxiety of being in public places and the appellant gets her friends to do the shopping for her as she will not go into the stores. The advocate stated at the hearing that the appellant requires someone else to get her groceries for her 100% of the time since the appellant has difficulty going out into the community. The advocate argued that the ministry did not refer to the GP's new assessment with respect to the shopping DLA.

The panel notes that in the AR, the GP reported that the appellant requires periodic assistance from another person with all tasks of the transportation DLA; however, in the checklist, the GP indicated that the appellant is unable to use public transportation as she does not feel comfortable, gets paranoid, and has constant panic attacks being around people, which the panel finds indicates a change in the GP's original assessment. In the reconsideration decision, the ministry does not refer to these noted changes in the GP's assessment, nor to any of the other evidence provided by the GP in the checklist that relates to the significance of the restrictions to DLA, which was available to the ministry at reconsideration.

As previously discussed, the ministry may have concluded that the GP's assessment in the checklist did not warrant any weight as evidence; however, the ministry did not express this finding in the reconsideration decision. The ministry failed to comment about the GP's information in the checklist. As the ministry unreasonably failed to demonstrate that the evidence of the GP in the checklist was considered as evidence put before the ministry by the appellant, the panel finds that the ministry's conclusion that the evidence is insufficient to show that the appellant's overall ability to perform her DLA is significantly restricted, pursuant to Section 2(2)(b)(i) of the EAPWDA, was unreasonable.

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.

As the panel found the ministry's conclusion regarding the lack of direct and significant restrictions in the appellant's ability to perform DLA to be unreasonable as a result of the ministry not properly considering evidence before it, the panel also finds on this basis that the ministry unreasonably 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 not reasonably supported by the evidence. The panel rescinds the ministry's decision. The appellant's appeal, therefore, is successful.