

### **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 December 7, 2017, which held that the appellant did not meet 2 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 and duration requirements, and that she had a severe impairment, but was not satisfied that:

- the appellant has a severe physical or mental impairment;
- the appellant's daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and
- as a result of those restrictions, 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**

The information before the ministry at the time of reconsideration included the appellant's PWD application comprised of a Medical Report (MR) and an Assessor Report (AR) both completed by the appellant's general practitioner (the GP dated September 11, 2017). The GP has been the appellant's doctor for 16 years and they have seen each other 2-10 times in the past 12 months. To complete the PWD application the GP used file/chart information, office interview with the appellant and the specialist's consultation.

Also included was the appellant's Self-Report (SR) dated September 19, 2017, which, in part, stated the following:

- 2012- attacked by her children's father and skin broke out in psoriasis.
- 2013- diagnosed with psoriatic arthritis.
- 2014- diagnosed with depression and anxiety.
- Have not been able to work since October 2015 due to severe pain in left hip and back. She developed tendonitis and enthesitis in the left hip, back, elbow, both wrists and left shoulder.
- Experiences severe pain in the neck.
- Cervical spine and left shoulder are painful and swollen, and she was unable to lift her arms for 2 weeks.
- Experiences muscle spasms in the areas of tendonitis.
- Arthritis and psoriasis are uncontrollable as is the pain.
- Wakes-up 4-5 hours after her medication wears off. She does not eat or sleep well. She sleeps during the day because of her pain at night.
- Daily tasks are harder to accomplish and she has to pace herself.
- Depression and anxiety worsen her condition.
- Swollen and tender wrists make typing and writing very difficult and she is unable to sit longer than 1 hour.

Additional evidence consisted of:

- Psychiatric consultation report dated October 11, 2017 from a psychiatrist the appellant saw once in emergency at a local hospital.
- 2 reports from the appellant's Rheumatologist, dated April 25, 2017 and July 18, 2017, which indicate that the appellant's test show "quite a lot of pain and difficulty with ADL's [activities of daily living]".

The evidence also included the appellant's Request for Reconsideration (RFR), dated November 24, 2017, which described her medical conditions as:

- Tendonitis in the left shoulder and both wrists. As a result, she does not lift objects and it is difficult to say if she can lift 2-5 lbs. Due to her herniated disc she cannot lift more than 2 lbs.
- She is unable to sit for a whole hour. If she has to sit in a chair longer than 15 minutes she gets up and moves around.
- She cannot sit still due to her herniated disc and tendonitis in her left hip.
- Her 16 and 13 year old sons do all the lifting and carrying.
- She is unable to walk upstairs and when in extreme pain she holds on to the railing.
- She has had depression and anxiety for 3 years and 2 years ago a psychiatrist instructed her GP to increase the dosage of her medication. For the last year the depression and anxiety has been worse.
- To relieve her anxiety and pain she began cutting herself about 4 months ago.
- She has re-pressed memories of being molested by her father between the ages of 5-7.
- She needs help with grocery shopping and cleaning because she physically and mentally cannot do these things.

### ***Diagnoses***

In the MR, the GP diagnosed the appellant with Anxiety (onset 2015), and psoriatic arthritis (onset 2012).

### ***Physical Impairment***

In the MR and AR, the GP reported:

- The appellant has been suffering from chronic pain in back, neck and multiple joints. Her arthritis is not under control and self-care is suboptimal.
- She has difficulties with all ADL and requires assistances from her children with laundry, shopping and cleaning.
- Medication and treatments do not interfere with the ability to perform DLA .
- Functional abilities: able to walk 2-4 blocks and climb 5+ stairs unaided, she can lift under 5 lbs and she can remain seated for less than 1 hour (with no indication as to how long).
- The appellant “has difficulty with prolonged sitting, standing, [and] walking due to chronic pain. Grip strength is also impaired. All jobs require some of these above skills therefore she is not employable currently”.
- “Daily functioning significantly impaired by combination of chronic pain, anxiety, and social circumstances of single parent to 3 children”.
- Walking indoors and outdoors, climbing stairs and standing are performed independently. Lifting and carrying/holding require continuous assistance (“unable to carry/hold more than 5kg”).

### ***Mental Impairment***

In the MR and AR, the GP reported:

- No difficulties with communication.
- Significant deficit with cognition and emotional function in the area of emotional (“chronic anxiety – panic attacks and difficulty coping”).
- Speaking, reading, writing, and hearing are all indicated as ‘good’.
- Of the listed items under cognitive and emotional functioning all indicated as ‘no impact’ with the exception of emotion which is indicated at ‘moderate impact’.
- “Anxious mood frequently, panic attacks, difficulty coping with chronic pain [and] frustrated by disabilities”.
- All listed DLA items listed under pay rent/bills and medication are indicated as performed independently.
- All listed items under social function are listed as performed independently, and immediate and extended social networks are indicated as ‘good functioning’.
- In terms of help required with social functioning, the GP stated “none”.
- “Anxiety disorder compounds [physical conditions] leading to decreased overall capacity to cope”.

### ***Daily Living Activities***

In the AR, the GP reported:

- The appellant’s impairment impacts her ability to manage her DLA because “Chronic pain secondary to psoriatic arthritis, enthesitis, combined with anxiety”.
- The appellant needs continuous assistance with laundry, basic housekeeping and carrying purchases home and comments “requires assistance from children to carry laundry, clean house, and carry groceries from store to car and home”.
- The appellant also needs continuous assistance with using public transportation and comments “[appellant] finds her anxiety too high on public transit”.
- The appellant requires periodic assistance with food preparation and commented “children prepare breakfast and lunch. [The appellant] prepares simple, not time consuming dinners”.

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

In the MR and AR, the GP reported:

- Any prostheses or aids are not required for impairment.
- The help required for DLA is provided by family and commented “children and occasionally mother”.
- The help required if none was available is “transportation to hospital”.
- Under equipment or devices routinely used to help compensate the impairment, the GP indicated “none”.
- The appellant does not require assistance from assistance animals.

**Additional information**

In her Notice of Appeal (NOA), dated January 2, 2018, the appellant stated that she is “mentally and physically unable to work. [She] need[s] to be physically and mentally ready to work because [she] can’t afford to be on welfare and [she] has 2 disabilities”.

**Evidence at the Hearing**

At the hearing the appellant’s witness, her mother, stated the following:

- The appellant has been suffering for 5 years with her arthritis getting worse in the legs, back, wrists, and heels.
- Mentally the appellant was worse this past Christmas and has more anxiety attacks lately.
- She supports the appellant financially and cannot do so much longer as she will retire soon.
- The appellant liked working and was a hard worker but cannot do it anymore.
- She supports the appellant with the children, laundry, cleaning, and cooking, and she comes every Friday and stays until Sunday evening. This has been the practice for the past 1 year but she was away for the past summer and briefly when her father passed away.
- The appellant calls when she has an anxiety attack. At those times the appellant has an unrealistic view of life, wants to end her life and has scary facial expressions. This happens about once per month.

At the hearing the appellant reiterated her evidence and arguments that were presented in her SR, RFR and NOA. To this the appellant added the following:

- She suffers from chronic fatigue.
- She experiences a ‘brain-fog’ and her memory is getting worse.
- She has permanent damage in her left shoulder.
- That her medication is a sedative and does impact her ability to perform DLA.
- Her depression and anxiety causes her to isolate herself from others.
- Her antidepressants are not helping and reducing her cannabis intake also did not improve her condition.
- Work Safe BC deemed her unemployable.
- She does not have good relationships with others and she does not know why the GP indicated that she did have good relationships.
- The GP has not accurately reported her medical conditions and is not ‘on her side’.
- She can lift 1ltr of milk if she uses both hands but does not lift, carry or bend.
- Any work involving the wrists is difficult (writing, doing up buttons, grooming).

At the hearing the ministry relied on its reconsideration decision and added that the rheumatologist’s report mentions that the appellant has difficulties with DLA but failed to show how the arthritis impacts or restricts DLA.

**Admissibility of New Information**

With the exceptions noted below, the panel has admitted the information in the appellant’s Notice of Appeal and oral testimony regarding her medical conditions and ability to perform DLA as it is evidence that is in support of information and records that were before the ministry at the time of reconsideration, in accordance with section 22(4) of the *Employment and Assistance Act*.

The panel did not admitted the information in the appellant’s oral testimony regarding chronic fatigue and memory (or brain-fog) as it is not evidence that is in support of information and records that were before the ministry at the time of reconsideration, in accordance with section 22(4) of the *Employment and Assistance Act*.

## **PART F – REASONS FOR PANEL DECISION**

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. In particular, was the ministry reasonable when concluding it was not satisfied that

- the appellant has a severe physical or mental impairment;
- the appellant's daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and
- as a result of those restrictions, in the opinion of a prescribed professional, the appellant requires help, as it is defined in the legislation, 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 practice the profession of

- (i) medical practitioner,
- (ii) registered psychologist,
- (iii) registered nurse or registered psychiatric nurse,
- (iv) occupational therapist,
- (v) physical therapist,
- (vi) social worker,
- (vii) chiropractor, or
- (viii) nurse practitioner, or

(b) acting in the course of the person's employment as a school psychologist by

- (i) an authority, as that term is defined in section 1 (1) of the [Independent School Act](#), or
- (ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the [School Act](#),  
if qualifications in psychology are a condition of such employment.

(3) The definition of "parent" in section 1 (1) applies for the purposes of the definition of "dependent child" in section 1 (1) of the Act.

### **Alternative grounds for designation under section 2 of Act**

**2.1** The following classes of persons are prescribed for the purposes of section 2 (2) [*persons with disabilities*] of the Act:

- (a) a person who is enrolled in Plan P (Palliative Care) under the Drug Plans Regulation, B.C. Reg. 73/2015;
- (b) a person who has at any time been determined to be eligible to be the subject of payments made through the Ministry of Children and Family Development's At Home Program;
- (c) a person who has at any time been determined by Community Living British Columbia to be eligible to receive community living support under the [Community Living Authority Act](#);
- (d) a person whose family has at any time been determined by Community Living British Columbia to be eligible to receive community living support under the [Community Living Authority Act](#) to assist that family in caring for the person;
- (e) a person who is considered to be disabled under section 42 (2) of the [Canada Pension Plan](#) (Canada).

### **Panel Decision**

#### **Severe Impairment**

In the reconsideration decision, the ministry was not satisfied that the information provided establishes a severe physical or mental impairment. Determining a severe physical or mental impairment requires weighing the evidence provided against the nature of the impairment and its reported functional skill limitations. A diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment. An

“impairment” is a medical condition that results in restrictions to a person’s ability to function independently or effectively or for a reasonable duration. To assess the severity of impairment, the ministry must consider the nature of the impairment and the extent of its impact on daily functioning.

Employability is not a consideration for eligibility for PWD designation because employability is not a criterion in section 2(2) of the EAPWDA nor is it listed among the prescribed daily living activities in section 2 of the EAPWDR.

### Severe Physical Impairment

In the MR, the GP diagnosed the appellant with psoriatic arthritis.

The appellant argued that she cannot lift, carry or hold. She cannot climb stairs without using the handrails, sit for more than 15 minutes at which point she must stand and move around, and she cannot stand for prolonged periods. She argued that she cannot walk outdoors. She argued that her arthritis is getting worse and that she has been suffering from severe pain which restricts her mobility.

The ministry argued that, based on the assessment provided by the GP, the SR and RFR, although the appellant is limited in her ability to lift heavy weight, a severe impairment of her physical functioning has not been established.

The ministry noted that the appellant is independent with walking indoors and outdoors, climbing stairs and standing. The ministry noted that the ability to walk 2-4 blocks unaided and climb 5+ steps unaided is not considered indicative of a severe impairment of physical functioning. The GP does not note how much less than 1 hour the appellant can remain seated or describe how long the appellant can remain standing. The ministry also noted that the GP indicated that continuous assistance is required for lifting and carry/holding as the appellant is “unable to carry/lift more than 5 kg”.

The panel notes that the evidence provided by the GP does not corroborate the appellant’s written and oral testimony. According to the appellant, the GP has failed to accurately present her physical conditions, restrictions and limitations, and has not been ‘on her side’.

Given the assessments of the appellant’s functional ability as reported by the GP, including the GP’s written comments, the panel finds that the ministry was reasonable in its determination that the evidence does not support a finding that the appellant suffers from a severe physical impairment pursuant to section 2(2) of the EAPWDA.

### Severe Mental Impairment

In the MR, the GP diagnosed the appellant with anxiety. The panel notes that the GP did not diagnose the appellant with depression and in the October 11, 2017 assessment, the psychiatrist indicated that the appellant has an unspecified depressive disorder which may be major depressive disorder or a substance-induced mood disorder.

The appellant argued that she has depression and anxiety, which causes an inability to cope or carry out DLA. She argued that her depression and anxiety have been getting worse in the last 1 year and her GP has not been able to help.

In the reconsideration decision, the ministry was not satisfied that the information provided established that the appellant suffered from a severe mental impairment.

The ministry noted that the appellant has no difficulties with communication and has significant deficit with cognitive and emotional functioning in the area of emotional disturbance. The ministry noted that in the AR, the GP indicated that emotion disturbance had only a moderate impact and all other listed areas of cognitive and emotional functioning were listed as no impact. The ministry also noted that the appellant was assessed as:

- Has good ability in all listed areas of communication.
- Is independent with all listed areas of social functioning.
- Has good functioning with both immediate and extended networks.
- There is no indication of safety issues with regards to social functioning.

- The support/supervision required to help maintain her in the community is “none”.

Section 2(2) of the *EAPWDA* requires that the minister must be satisfied that a person has a severe mental impairment. The panel notes that the appellant experiences limitations due to her diagnosed mental condition. However the evidence given by the GP is that there is only one moderate impact to cognitive and emotional functioning and no impact in the remaining listed areas. In addition, the GP reported no difficulties with communication and that speaking, reading, hearing and writing, are good. The GP indicated that the appellant does not require support with social functioning. The panel notes that under the DLA, areas specific to mental impairment (making decision about personal activities, care or finances) are indicated as performed independently. Therefore the panel finds that the ministry was reasonable in its determination that the evidence does not support a finding that the appellant has a 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 that the legislative criteria are met, 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 how frequently the activity is restricted. 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 argued that she cannot perform her DLA due to her medical and mental conditions. She argued that her tendonitis in her wrists, hip, back, shoulder and elbow, and chronic uncontrollable pain from her arthritis prevent her from functioning in her daily life.

The ministry argued that based on the evidence provided by the GP regarding DLA and because a severe impairment has not been established, it is difficult to establish significant restrictions to DLA.

The ministry noted that the medications and treatments prescribed to the appellant do not interfere with her ability to perform DLA. The ministry noted that although the GP stated that the appellant “has difficulties with all ADL requiring assistance from her children with laundry [and] cleaning as well as shopping”, the GP also indicated that appellant independently performs the majority of her DLA. The ministry also noted that the GP did not describe the frequency or duration of the periodic assistance required.

The panel notes that the GP indicated that the appellant is independent with 28 of 33 of the listed aspects of DLA. Considering all the information together the panel finds that the ministry reasonably concluded that the appellant's impairment does not, in the opinion of a prescribed professional, directly and significantly restrict the appellant's ability to perform DLA as required by the legislation.

#### 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*, 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 appellant's position is that she cannot function without assistance from her children and mother. The assistance she requires is with lifting, carrying/holding, cleaning, laundry, shopping and food preparation, as well as emotional support from her mother.

The ministry argues that because it has not been established that DLA are significantly restricted, it cannot be determined that help is required.

The panel finds that the information provided indicates that the appellant requires some help with some aspects of DLA. However, given that confirmation of direct and significant restrictions with DLA is a precondition of the need for help criterion and as the panel found that the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established, 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 is a reasonable application of the applicable enactment, and therefore confirms the decision. The appellant is not successful on appeal.