

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 February 6, 2018, which held that the appellant did not meet 3 of the 5 statutory requirements of section 2 of the *Employment and Assistance for Persons with Disabilities Act* for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that a medical practitioner has confirmed that the appellant's impairment is likely to continue for at least 2 years.

However, the ministry 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 an assistive device, the significant help or supervision of another person, or the services of an assistance animal to perform DLA.

The ministry also determined that the appellant is not in any of the classes of persons set out in section 2.1 of the *Employment and Assistance for Persons with Disabilities Regulation* who may be eligible for PWD designation on alternative grounds.

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 and section 2.1

PART E – SUMMARY OF FACTS

Information before the ministry at reconsideration

- 1) The appellant's PWD application comprised of:
 - An October 26, 2017, Self-report from the appellant; and
 - An undated Medical Report (MR) and an Assessor Report (AR) dated October 26, 2017, which were both completed by a nurse practitioner (NP). The NP indicates that she has known the appellant for five months, has seen the appellant 2-10 times in the past 12 months, and relied on information obtained from an office interview with the appellant, file/chart information, and other professionals.
- 2) The appellant's Request for Reconsideration dated January 21, 2018.

Documents provided on appeal

- 3) The appellant's Notice of Appeal (NOA), received by the tribunal on February 15, 2018, in which the appellant writes that the severity of her anxiety was not understood by her NP and the ministry.

Oral testimony at hearing and admissibility

The appellant provided information that either reiterated or was consistent with information she had previously provided. Accordingly, the appellant's oral testimony was admitted under section 22(4) of the *Employment and Assistance Act* (EAA) which provides that panels may admit as evidence "oral and written testimony in support of the information and records" before the minister when the decision being appealed was made.

The ministry reviewed its reconsideration decision but did not provide additional evidence.

The arguments of both parties are set out in Part F of this decision.

Summary of relevant evidence

Diagnoses

In the MR, where asked to provide a specific diagnosis and provide health history, the NP writes:

- Severe Depression (onset 2014)
- Anxiety (onset 2007)

Physical Impairment

The NP does not diagnose a physical medical condition and reports as follows:

- Able to walk 4+ blocks unaided on a flat surface and climb 5+ stairs unaided.
- No limitations in the ability to lift or remain seated.
- Walking indoors and outdoors, climbing stairs, standing, lifting, and carrying/holding are managed independently.
- No aids, prostheses or assistive devices required.

Mental Impairment

In the MR, the NP reports:

- Severe depression and anxiety with panic at times.
- High score on depression and anxiety assessments.
- Significant deficit with cognitive and emotional function in 3 of 11 specified areas: psychotic symptoms, emotional disturbance, and motivation.
- Difficulties with communication are noted and described as “Anxiety with social dysfunction limits interaction with others.”

In the AR, the NP reports:

- Good ability to communicate in the areas of speaking, reading, writing, and hearing.
- Major impact on daily functioning for emotion and impulse control. Moderate impact for bodily functions, motivation, and motor activity. Minimal impact for consciousness, insight and judgement, attention/concentration, executive, and memory. No impact in the remaining four areas, which include psychotic symptoms. No additional commentary is provided.
- Social functioning:
 - Appropriate social decisions and ability to secure assistance from others are managed independently.
 - Continuous support/supervision required for ability to develop and maintain relationships (“Little social interaction. Support network minimal. Difficulty forming new relationships.”) and ability to deal appropriately with unexpected demands (“Extremely challenged when unexpected events occur as anxiety becomes more pronounced.”)
 - Interact appropriately with others requires periodic support/supervision (“Good social understanding re: behavior and response. Difficulty with unexpected events in a social setting.”).
 - Help is described as “Mental health support.”
- Marginal functioning with immediate social network (“Nurturing relationship with young daughter. Minimal social supports.”) Marginal functioning with extended social networks (“No community interactions at present. No organized groups.”)

In her SR, the appellant writes that leaving her house causes severe anxiety. She is always fearful something will happen to her if she doesn't do certain things. For example, when shopping, she always has to pick the second object as she fears something bad will happen if she takes the first one. Her anxiety happens almost every day and anxiety attacks are so severe she is not able to do anything for herself or others when they hit. She has lost friendships and can't follow through with goals because when anxiety or depression take over her mind she cannot do anything; she has to lay down, can't sleep, eat or drink, shower or do anything to take care of herself, and can't make phone calls or answer the phone. Her heart feels like it is racing and she feels like she is panicking about panicking. Sometimes she starts to feel nauseous and she sometimes sees objects that aren't really there. She cannot control when this happens; sometimes stress triggers it and at times anxiety attacks will wake her from a dead sleep.

In her reconsideration submission, the appellant confirms information provided in her SR, adding that her anxiety or panic attacks do not last all day long, so there are periods throughout the day when her motivation and psychotic state are okay, but when they happen her motivation and psychotic state are completely disabling her from living a 'normal life' because of the severity of the attacks. The attacks happen 2-3 times a day and last from 1 to 3 hours. These attacks also completely disable her from any means of communication.

At the hearing, the appellant stated that her daily life is completely affected by her anxiety, which is severe. Just recently she obtained a job and every day of the week she had panic attacks and had to take medication. She has had to take this week off. She has been referred to see a psychologist but until then she doesn't know if her anxiety will get better. Her attacks happen randomly – social or stressful situations can be a trigger but she will also have a panic attack when asleep. She becomes almost paralyzed and can't do anything. It affects her work, friendships and home life. There will be days she doesn't have them, but for the most part they are every day. She always has her anxiety medication with her but it makes her groggy and tired, impacting her functioning. The appellant hopes that her statements are considered as well as those of the NP.

DLA

The NP reports the following:

- The appellant has not been prescribed any medication and/or treatments that interfere with the ability to perform DLA.
- Anxiety and depression frequently impact ability to manage basic activities of daily living including grooming. Experiences heightened anxiety when leaving home. Does manage to keep medical appointments and pick daughter up at pre-school.
- The physical or mental impairment that impacts the appellant's ability to manage DLA is described as: "Significant depression and anxiety with possible obsessive compulsive disorder traits. Minimal social interaction. Difficulty with goal setting and direction."
- All listed tasks of the DLA personal care (includes grooming), basic housekeeping, meals, medications, and transportation are managed independently, as are walking indoors and outdoors and climbing stairs (relate to the DLA move about indoors and outdoors).
- For the DLA shopping, going to and from stores ("Anxiety frequently restricts activities outside the home.") and making appropriate choices ("Frequently overwhelmed impacting decision-making.") require periodic assistance from another person. Reading prices and labels, paying for purchases, and carrying purchases home are managed independently.
- All listed tasks of the DLA pay rent and bills require periodic assistance from another person. ("Strained finances. Has required support to manage household budget.")
- The ability to manage the DLA social functioning is as described above under Mental Impairment.

In her reconsideration submission, the appellant writes that she requires help on a daily basis. Her daughter is in full-time daycare because when the appellant's anxiety or panic attacks happen throughout the day, she cannot get off the ground. Her mother also helps care for the appellant's daughter throughout the week.

At the hearing, the appellant stated that she needs help with DLA. Her family helps with her daughter. If she has an anxiety attack she can't take care of herself, grocery shop or go out and do anything, so her mom helps.

Need for Help

The NP reports that assistance is provided by Health Authority Professionals.

PART F – REASONS FOR PANEL DECISION

Issue on Appeal

The issue on appeal is whether the ministry's decision to deny the appellant designation as a PWD was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. That is, was the ministry reasonable when determining that the appellant is not a person described in section 2.1 of the EAPWDR and that the requirements of section 2(2) of the EAPWDA were not met because:

- a severe physical or mental impairment was not established;
- the appellant's DLA are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and
- as a result of those restrictions, in the opinion of a prescribed professional, the appellant does not require an assistive device, the significant help or supervision of another person, or the services of an assistance animal to perform DLA?

Relevant Legislation

EAPWDA

2 (1) In this section:

"**assistive device**" means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform;

"**daily living activity**" has the prescribed meaning;

"**prescribed professional**" has the prescribed meaning.

(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person has a severe mental or physical impairment that

- (a) in the opinion of a medical practitioner or nurse practitioner is likely to continue for at least 2 years, and
- (b) in the opinion of a prescribed professional
 - (i) directly and significantly restricts the person's ability to perform daily living activities either
 - (A) continuously, or
 - (B) periodically for extended periods, and
 - (ii) as a result of those restrictions, the person requires help to perform those activities.

(3) For the purposes of subsection (2),

- (a) a person who has a severe mental impairment includes a person with a mental disorder, and
- (b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires
 - (i) an assistive device,

- (ii) the significant help or supervision of another person, or
- (iii) the services of an assistance animal.

(4) The minister may rescind a designation under subsection (2).

EAPWDR

Definitions for Act

2 (1) For the purposes of the Act and this regulation, "**daily living activities**",

(a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:

- (i) prepare own meals;
- (ii) manage personal finances;
- (iii) shop for personal needs;
- (iv) use public or personal transportation facilities;
- (v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
- (vi) move about indoors and outdoors;
- (vii) perform personal hygiene and self-care;
- (viii) manage personal medication, and

(b) in relation to a person who has a severe mental impairment, includes the following activities:

- (i) make decisions about personal activities, care or finances;
- (ii) relate to, communicate or interact with others effectively.

(2) For the purposes of the Act, "**prescribed professional**" means a person who is

(a) authorized under an enactment to practise the profession of

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

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

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

[Act](#),

if qualifications in psychology are a condition of such employment.

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

Alternative grounds for designation under section 2 of Act

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

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

Panel Decision

As the appellant has not provided any information or argument respecting eligibility for PWD designation under section 2.1 of the EAPWDR, the panel finds that the ministry reasonably determined that it has not been established that the appellant falls within the prescribed classes of persons under that section. The panel's discussion below is limited to eligibility for PWD designation under section 2 of the EAPWDA and section 2 of the EAPWDR.

Severe Physical or Mental Impairment

The legislation provides that the determination of severity of impairment is at the discretion of the minister, taking into account all of the evidence including that of the appellant. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a prescribed professional respecting the nature of the impairment and its impact on daily functioning. While the legislation does not define "impairment", the MR and AR define "impairment" as a "loss or abnormality of psychological, anatomical or physiological structure or functioning causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration." While this is not a legislative definition, and is therefore not binding on the panel, in the panel's opinion, it reflects the legislative intent and provides an appropriate analytical framework for assessing the degree of impairment resulting from a medical condition.

When considering the evidence provided respecting the severity of impairment, the ministry must exercise its decision-making discretion reasonably by weighing and assessing all of the relevant evidence and cannot simply defer to the opinion of a prescribed professional as that would be an improper fettering of its decision-making authority.

Physical Impairment

The appellant is not diagnosed with a physical medical condition by the NP who assesses the appellant as independently managing all aspects of physical ability and mobility. In view of this information, and noting that the appellant does not argue that she has a severe physical impairment, the panel concludes that the ministry reasonably determined that the information does not establish a severe physical impairment.

Mental Impairment

The NP diagnoses the appellant with depression – severe and anxiety. The appellant argues that while her anxiety and panic attacks do not last all day, they occur 2-3 times a day and last for 1-3 hours, and are so severe that she cannot do anything during these periods resulting in her being completely disabled from living a normal life. She argues that her information was not understood by the ministry. The ministry argues that while the information establishes that the appellant has limitations to her cognitive, emotional and social functioning, the information provided by the NP speaks to a moderate not severe mental impairment.

As was noted by the ministry, the information from the NP respecting cognitive and emotional functioning is not entirely clear. In particular, for 2 of the 3 significant deficits with cognitive and emotional function identified in the MR, motivation and psychotic symptoms, a major impact on daily functioning is not reported in the AR. Rather, motivation is reported to have a moderate impact and psychotic symptoms is reported to have no impact on daily functioning. Also, in the MR, a significant deficit is not identified for impulse control, whereas a major impact on daily functioning is reported in the AR. Accordingly, it was reasonable for the ministry to conclude that these discrepancies make it difficult to obtain a clear and coherent picture of mental functioning. Additionally, as noted by the ministry, while the overall number of impacts on daily cognitive and emotional functioning is notable, the majority of impacts are moderate to minimal. The panel also notes that the appellant's own information indicates that she has periods of good functioning every day. The ministry has also reasonably concluded that the assessment of the ability to manage DLA does not indicate that the ability to make decisions about personal activities, care or finances is severely restricted given that, with the exception of making appropriate shopping choices, decision-making tasks for DLA are managed independently. In reaching this conclusion, the panel finds that the assistance as described for the DLA relating to finances appears to relate to financial constraints, not mental impairment.

Respecting social functioning, despite indicating the appellant has marginal functioning with her immediate social network, the NP also reports that the appellant has a nurturing relationship with her daughter and the appellant reports receiving assistance from her mother throughout the week. As was noted by the ministry, the ability to communicate is impacted by anxiety, and marginal functioning with extended social networks is reported, but otherwise the appellant is assessed as having good abilities to communicate via speaking, reading, and writing and as interacting appropriately with others ("good social understanding re: behaviour and response"). Continuous support/supervision, described as support from Mental Health professionals, is required for developing and maintaining relationships and dealing appropriately with unexpected demands, with the NP's narrative indicating the greatest challenges are with unexpected events. Heightened anxiety when leaving home is reported, though as the ministry notes, the NP also reports that the appellant is still able to keep medical appointments and pick up her daughter from pre-school, and periodic rather than continuous assistance is required for going to and from stores. No safety issues are identified. While the information from the NP and the appellant indicates that social functioning is impacted by the appellant's anxiety, given the level of functioning maintained, the ministry was reasonable to conclude that the assessment of social functioning speaks to a moderate, not severe restriction.

Based on the above analysis, the panel concludes that the ministry was reasonable to determine that the impairment of cognitive, emotional and social functioning established by the information provided is moderate and that a severe mental impairment is not established.

Restrictions in the ability to perform DLA

Section 2(2)(b)(i) of the EAPWDA requires that the minister be satisfied that in the opinion of a prescribed professional, a severe mental or physical impairment directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods. While other evidence may be considered for clarification or support, the ministry's determination as to whether or not it is satisfied, is dependent upon the evidence from prescribed professionals. The term "directly" means that there must be a causal link between the severe impairment and the restriction. The direct restriction must also be significant. Finally, there is a component related to time or duration – the direct and significant restriction may be either continuous or periodic. If periodic, it must be for extended periods. Inherently, any analysis of periodicity must also include consideration of the frequency. All other things being equal, a restriction that only arises once a year is less likely to be significant than one that occurs several times a week. Accordingly, in circumstances where the evidence indicates that a restriction arises periodically, it is appropriate for the ministry to require evidence of the duration and frequency of the restriction in order to be "satisfied" that this legislative criterion is met.

DLA are defined in section 2(1) of the EAPWDR and are listed in both the MR and the AR sections of the PWD application with the opportunity for the prescribed professional to check marked boxes and provide additional narrative. DLA, as defined in the legislation, do not include the ability to work.

The appellant's position is that she requires daily assistance due the frequency and severity of her anxiety attacks. The ministry's position is that not enough evidence is provided by the NP to establish that the appellant's overall ability to manage DLA is significantly restricted. In the appellant's case, the NP is the only prescribed professional who has provided information respecting the ability to manage DLA.

The NP comments that the appellant's anxiety frequently impacts her ability to manage basic activities of daily living including grooming, which is not sufficient to establish the significance of the restrictions or that they are either continuous or periodic for extended periods. Furthermore, as the ministry notes, when given the opportunity to provide detailed information respecting each DLA in the AR, the NP assesses the appellant as being able to independently manage all listed tasks of most DLA, including personal care, basic housekeeping, meals, medications, and transportation. Additionally, for those tasks of the DLA shopping that require periodic assistance from another person, due to both anxiety and decision-making problems, there is no information as to the frequency, duration or nature of the assistance in order to establish the periodic restrictions as being significant or for extended periods. And, as noted by the ministry, the need for periodic assistance with all listed tasks of paying rent and bills appears, given the narrative, to relate to financial need and is not established as having a direct causal relationship to a medical condition. Additionally, for the reasons previously provided, the ministry reasonably concluded that social functioning not severely impaired.

Accordingly, the panel considers that the ministry reasonably determined that it has not been established that in the opinion of a prescribed professional the appellant's impairment *significantly* restricts his ability to perform DLA either *continuously or periodically for extended periods*.

Help to perform DLA

Section 2(2)(b)(ii) of the EAPWDA requires that, *as a result of direct and significant restrictions in the ability to perform DLA*, a person requires help to perform those activities. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform DLA.

The establishment of direct and significant restrictions with DLA is a precondition of the need for help criterion. 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 a reasonable application of the applicable enactment, and therefore confirms the decision. The appellant is not successful on appeal.