

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 January 30, 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 and duration requirements, but was not satisfied that:

- the appellant has a severe physical and/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 "Physician") dated September 28, 2017. The GP has known the since 2006 and saw the appellant 11 or more times in the past 12 months prior to completing the PWD application. The PWD also included the appellant's Self-Report (SR) dated September 6, 2017.

The evidence also included the appellant's Request for Reconsideration dated January 20, 2018 with an attached "questionnaire" (questionnaire) prepared by an advocate and which was addressed to the GP. The questionnaire provided a series of statements regarding the appellant's cognitive and emotional functioning, and ability to perform specific DLA independently. The GP is given the options of either agreeing or disagreeing with the statements and some space was provided for written comments from the GP. Some of the detail provided in this questionnaire included the following:

- the GP disagreed that the appellant finds it difficult to find the right words and express her thoughts clearly into words, and added the comment: "communicating very well";
- the GP agreed that the appellant takes a while when reading as she has difficulty concentrating to read and added the comment: "distracted and cannot remember";
- the GP agreed that the appellant's emotion, attention/concentration, language, and executive functioning had a major impact on the appellant's daily functioning and added the comment: "depression with anxiety PHQ-9 score is 15 and GAD-7 score is 13; and
- the GP agreed that the appellant requires continuous assistance with 'regulate diet', 'basic housekeeping' and added the comment "takes more time", 'budgeting' and 'social functioning. The GP disagreed that the appellant required continuous assistance with 'dressing', 'going to and from stores', 'making appropriate choices' and 'taking medication as directed' and added the comment "sometimes".

Diagnoses

In the MR, the GP diagnosed the appellant with Anxiety (onset December 2007) and Depression (onset December 2007).

Physical Impairment

In the MR and the AR, the GP indicated the following:

- The appellant does not require any prostheses or aids for her impairment.
- Functional skills are: can walk unaided 4+ blocks, can climb 5+ steps unaided, can lifting 15-35lbs and can remain seated for 1-2 hours.
- Mobility and physical ability is: walking indoors, walking outdoors, climbing stairs, standing, lifting and carrying/holding are all performed independently.

In the SR, the appellant indicated the following:

- "I am only able to lift up to 35 pounds and I am only able to sit for 1-2 hours at a time.

Mental Impairment

In the MR and AR, the GP indicated the following:

- Cognitive difficulties with communication, with the comment: "difficult to get the right words".
- Significant deficits with cognitive and emotional function in the areas of: executive, language, memory, emotional disturbances, motivation, motor activity and attention or sustained concentration, with the comment: "above systems as per patient request".
- "Long history of depression. On high doses of antidepressants to stabilize her mood, Very good compliance taking her medication. Receives no counselling through Mental Health. Never been hospitalized or any threats of suicide. On meds since 2007. Never employed in this time. Daily smokes cigarettes [illegible] and pot and often alcohol".
- Under impacts to manage DLA, the GP commented: "Panic attacks. Some days just low 'mood'".
- Speaking, writing and hearing are 'good' and reading is 'satisfactory' with the comment: "takes a while".
- Cognitive and emotional functioning: major impacts to emotion and attention/sustained concentration; moderate impacts to impulse control, executive, memory and motivation; all other listed items in this category are indicated as either minimal impact or no impact.

- “sleeping daytime thus gets only 6 hours sleep at night. Depressed mood with poor concentration and [illegible] and little motivation”.
- All listed tasks under ‘pay rent/bills’, and ‘medication’ are listed as performed independently with the comment beside ‘taking as directed’ “occ[assionlly] forgets – takes late”.
- Under the DLA of social functioning, all listed task are indicated as performed independently except ‘able to deal appropriately with unexpected demands’ and ‘able to secure assistance from others’ which are indicated as requires continued support/supervision.
- Immediate and extended social networks have marginal functioning.
- Under describe the support/supervision required to help maintain her in the community, the GP comments: “a close friend”.
- Additional comments: “aware what is safe and not”.

In her SR, the appellant indicated, in part, the following:

- Communication: “I have difficulty explaining/expression myself. I have difficulty putting my thoughts into words. I have to read things over and over to comprehend”.
- Cognitive and emotional functioning: “I have difficulty with eating problems, as I have no appetite and will skip meals. I suffer from sleep disturbances and only get an average of 6 hours of sleep a night. I get confused. I suffer from depression and anxiety with panic attacks. I have poor awareness of myself and my health conditions. I get easily distracted and have difficulty concentrating. I have difficulty with both my short and long term memory. I have a lack of motivation.”
- Paying rent/bills: “I am impulsive with money and get myself into financial difficulties”.
- Medications: “I forget to take my medication at correct times”.
- Social Functioning: “I stick to the people I already know. I get anxious and overwhelmed when met with unexpected demands”.

Daily Living Activities

In the AR, the GP indicated the following:

- The prescribed medication and/or treatments do not interfere with the appellant’s ability to perform her DLA.
- All listed task under Personal Care are performed independently, except ‘regulating diet’ which is left blank with the comment: “often misses meals and [illegible]”.
- All listed task under Basic Housekeeping are performed independently with the comment beside basic housekeeping: “gets help to”.
- All listed task under Shopping are performed independently.
- All listed task under Meal are performed independently.
- All listed task under Transportation are performed independently.

In the SR, the appellant indicated the following:

- Personal care: “I am unable to get dressed at least 2 days per week due to my depression and lack of motivation. I am unable to regulate my diet as I have not appetite and skip meals”.
- Basic Housekeeping: “I have no motivation to do my housework. Then the job becomes so overwhelming that I am unable to complete it”.
- Shopping: “I have to take someone with me as I have anxiety (panic attacks) in busy places. I am impulsive with choice when shopping”.

Help

In the AR, the GP indicated the following:

- No equipment or devices are used by the appellant for assistance.
- Assistance is not provided by an assistance animal.
- Help with DLA is provided by family and friends.

In the SR, that appellant did not speak to the need of help or if she gets help other than to state that she takes someone with her when she goes shopping (as indicated above).

Evidence on Appeal

Notice of Appeal (NOV), signed and dated February 10, 2018, which stated “yes disagree with being denied”.

Evidence at the Hearing

At the hearing the appellant’s witness stated, in part, the following:

- She has known the appellant for 6 years.
- The appellant has been on Persons with Persistent Multiple Barriers (PPMB) for 10 years and is not expected to get better.
- The appellant’s anxiety is getting worse as she is afraid and does not speak up.
- When asked if the appellant would have spoken up in the past, the witness stated no.

At the hearing the appellant stated, in part, the following:

- She takes time to face the day.
- She can walk and do a little lifting but then her body starts to ache. She must rest but will only struggle when she is up again
- Issues regarding her children cause her stress.
- She used to be a high jumper in school but was injured. She worked as a cleaner. She now has bursitis in her knees.
- She suffers from pain in the tailbone and lower back.
- She suffered a head injury when she was hit in the face 10 years ago.
- When she stands she feels a burning sensation across her neck and shoulders.
- Her right hand wrist has carpal tunnel and tendinitis.
- Depression makes her feel low about herself.
- Anxiety makes her feel tight when asked questions and she cannot find the words.
- Insomnia – not enough or regular sleep. She maybe gets 6 hours of sleep at night.
- Eating – only eats once per day.
- The GP is aware of all of her medical conditions.
- On bad days, which are half of the days, she lounges around. Weather is a factor in how she feels. When it is sunny she is in better spirits.
- She does not require assistance from other people but takes longer to complete housekeeping.

At the hearing the appellant presented a letter from her house-mate, signed and dated March 6, 2018. In it, the house-mate stated, in part, the following:

- For 4 years he has observed the appellant struggle with ongoing physical pain as well as emotional depression that can be debilitating.
- In his opinion, a registered social worker, the appellant meets the criteria for disability benefits.
- The appellant’s situations, conditions and therefore quality of life have deteriorated over the course of time.
- The appellant’s income is a source of stress and anxiety in her daily functioning.
- The appellant’s GP is aware that the appellant continues to struggle but the GP feels the medication is enough to address the issues.

When asked, the appellant stated that the house-mate has not conducted formal cognitive, emotional or physical assessments regarding her conditions.

At the hearing the ministry relied on its reconsideration decision.

Admissibility of Additional Information

The ministry did not object to the admission of the letter from the house-mate.

The panel considered the information from the house-mate, for the most part, as being in support of, and tending to corroborate, the information referred to in the PWD application, the Request for Reconsideration and questionnaire, which were before the ministry at reconsideration. Therefore, the panel admitted the letter from the house-mate in accordance with Section 22(4)(b) of the *Employment and Assistance Act*.

The panel considered the information from the appellant and found that reference to the appellant's knees, tailbone, lower back pain, head injury, standing, and wrist is not in support of or corroborates the information referred to in the PWD application, the request for reconsideration and questionnaire. Therefore, the panel did not admitted any reference to the appellant's knees, tailbone, lower back pain, head injury, standing, and wrists in accordance with Section 22(4)(b) of the *Employment and Assistance Act*.

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

- the appellant has a severe physical and/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 an impairment, the ministry must consider the nature of the impairment and the extent of its impact on daily functioning.

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

Physical Impairment

The appellant’s position is that she has a physical impairment.

In the reconsideration decision, the ministry noted that the GP indicated the following information:

- no diagnoses of a medical condition that would cause an impairment to the appellant’s physical functioning;
- physical functioning is: able to walk 4+ blocks unaided on a flat surface, climb 5+ steps unaided, lift from 15-35 lbs, and remain seated for 1-2 hours;
- the appellant independently manages all aspects of mobility and physical ability as they are indicated in the AR; namely walking indoor/outdoor, climbing stairs, standing, lifting and carrying/holding; and
- the questionnaire does not speak to physical functioning.

The ministry concluded that the information provided by the GP does not establish that the appellant has a physical impairment.

Given the assessments of the appellant’s functional ability, and mobility and physical ability in the PWD application and SR, and the fact that a medical condition that would cause impairment to physical functioning has not been diagnosed, 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.

Mental Impairment

The appellant’s position is that mental conditions of depression and anxiety constitute a severe impairment that has a major impact on her daily functioning, and that her health is deteriorating.

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 the following information:

- the GP diagnosed the appellant with Anxiety (onset 2007), Depression (onset 2007);
- in the MR the GP stated that when communicating “difficult to get the right words” but in the AR the GP indicated that speaking, writing and hearing abilities are ‘good’ and reading is ‘satisfactory’ with the comment “takes a while”. In the questionnaire, the GP stated “communicating very well” and disagreed that the appellant has difficulty finding words or expressing her thoughts;
- in the MR, the GP indicated significant deficits in the areas of executive function, language, memory, emotional disturbance, motivation, motor activity and attention/sustained concentration, and wrote “above symptoms as per patient’s report”. *The ministry concluded that this statement implies that the assessment is not the GP’s medical opinion but the appellant’s self-assessment,*
- in the AR, the GP indicated that in terms of cognitive and emotional functioning, there are major impacts to emotion and attention/sustained concentration, and moderate impacts to impulse control, executive, memory and motivation. The GP commented “Sleeping daytime then gets only 5 hours sleep at night. Depressed mood with poor concentration, memory and little motivation. *The ministry concluded that overall the majority of impacts are classified as moderate to minimal and that the GP suggests that if the appellant reduces her daytime sleeping it may improve her nighttime sleep;*

In regards to the questionnaire, the ministry noted the following:

- in the questionnaire, the GP agreed with the statement that there are major impacts to emotion, attention/concentration, language and executive. *The ministry found that the GP confirmed in the PWD application that there are major impacts to the areas of emotion and attention/sustained concentration. However it is unclear why the GP confirmed a major impact to language when he has already stated that the appellant is “communicating very well”. Ministry also found that there is no explanation provided for the elevation of an impact to executive functioning from moderate to major;*
- in the questionnaire the GP provided tests score for the appellant’s degree of depression and anxiety. The depression score indicates moderately severe depression and the anxiety score indicates moderate to severe anxiety;
- in the questionnaire the GP is asked to agree or disagree that there are impacts to bodily functions, consciousness, impulse control, insight/judgement, memory, motivation and motor activity. *The ministry found that the GP confirmed moderate impacts to impulse control, executive memory and motivation in the PWD application. The GP did not confirm moderate impacts in the areas of insight/judgement or motor activity in the questionnaire. The ministry also found that there is no explanation provided for the elevation of impacts to bodily function and consciousness from minimal in the PWD application to moderate in the questionnaire;*
- in terms of regulating diet, *the ministry found that there is no evidence that the appellant is diagnosed with an eating disorder;*

The ministry concluded that the assessment provided in the questionnaire regarding cognitive and emotional functioning does not differ substantially from the assessment provided in the PWD application and that the assessment in the PWD application is indicative of a moderate, rather than a severe impairment.

In terms of social functioning, the ministry noted the following information:

- continuous support/supervision is required with dealing appropriately with unexpected demands and securing assistance from others;
- all other aspects of social functioning are performed independently;
- there is marginal functioning with immediate and extended social networks;
- the support of a close friend is required to maintain self in the community;
- there are not any safety issues; and
- in the questionnaire the GP agreed to the statement that the appellant is anxious/overwhelmed when met with unexpected demands, sticks to people she already knows and does not go out to make new friends.

The ministry found that the assessments provided by the GP in the PWD application and questionnaire speak to a moderate, rather than a severe, impairment and therefore the ministry concluded that the information submitted does not establish a severe mental impairment.

Section 2(2) of the *EAPWDA* requires that the minister must be satisfied that a person has a severe mental. The panel notes that the appellant experiences limitations due to her diagnosed mental condition. However the evidence given by the GP in the PWD application and questionnaire, and the information in the SR, the panel finds that it is reasonable to conclude that the impairment that the appellant suffers from is moderate impairment.

The evidence given by the GP in the PWD application indicated only 2 major impacts to cognitive and emotional function, that there are 4 moderate impacts and remaining areas have minimal or no impacts. The GP indicated that speaking, hearing and writing, are good, and the appellant does not require support with social functioning with the exception of with dealing appropriately with unexpected demands and securing assistance from others. In addition, the GP reported cognitive difficulties with communication and stated “difficult to get the right words but in the questionnaire the GP indicated that the appellant “communicates very well”. Both the GP and appellant indicated problems with concentration but despite this information the appellant is assessed as having good functioning in the DLA areas specific to mental impairment in the PWD application, (making decision about personal activities, care or finances, and relate to, communicate). The panel notes that no explanation is provided by the GP for any difference in his assessment of the appellant’s mental functioning that is found in the questionnaire. Therefore 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 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 due to depression and anxiety she is easily overwhelmed by her DLA and that it takes longer to complete her DLA.

The ministry's position is that not enough evidence is provided by the GP to establish that the appellant's overall ability to manage DLA is significantly restricted and as a result the appellant requires significant assistance from others to manage her DLA.

In the reconsideration, the ministry noted the following information:

- in the PWD application, the GP indicated that all DLA (with the exception of 2 tasks under social functioning) are performed independently;
- in the questionnaire the GP did not confirm that the appellant needs continuous assistance with dressing, going to and from stores, making appropriate choices when shopping or taking medication as directed; and
- in the questionnaire the GP did confirm that the appellant takes more time to manage basic housekeeping, difficulty regulating diet and budgeting.

The ministry concluded that the assessment provided in the questionnaire regarding DLA does not differ substantially from the assessment provided by the GP in the PWD application.

The panel considered the assessment by the GP in the PWD application of independence with all DLA with the exception of dealing appropriately with unexpected demands and securing assistance from others, for which there is a need of continuous assistance. The panel also considered that in the questionnaire the GP indicated that basic housekeeping takes more time and regulating diet and making appropriate choices require continuous assistance. The panel notes that, in the questionnaire, the GP did not give an explanation for changing his assessment of the ability to complete the specific DLA mentioned above. Given this evidence, the panel finds that the ministry reasonably determined that there was insufficient evidence from the GP of significant restrictions to the performance of DLA. Therefore, the panel finds that the ministry reasonably concluded that the evidence is insufficient to demonstrate 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

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 manages her DLA on her own but she takes longer to complete them.

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 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.