

PART C – DECISION UNDER APPEAL

The issue on appeal is the Ministry of Social Development and Poverty Reduction (the “Ministry”) reconsideration decision made May 7, 2018 which held that the appellant was not eligible for a Persons with Disabilities (“PWD”) designation on the basis that she did not meet two of the five statutory requirements of section 2 of the Employment and Assistance for Persons with Disabilities Act (“EAPWDA”). Specifically, the Ministry was satisfied that the appellant met the age requirement and that a medical practitioner had confirmed that the appellant has a severe mental impairment that is likely to continue for at least two years. However, the Ministry was not satisfied that:

- in the opinion of a prescribed professional, the appellant’s severe impairment directly and significantly restricts her daily living activities (“DLA”) either continuously or for extended periods; and
- as a result of those restrictions, the appellant requires an assistive device or the significant help or supervision of another person, or the services of a service animal to perform DLA.

PART D – RELEVANT LEGISLATION

Employment and Assistance Act Regulation (EAAR), section 85-86

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

On February 14, 2018 the Ministry received the appellant's application for PWD which was comprised of a medical report (MR) and an assessor report (AR) completed on January 22, 2018 by the same physician (the "Physician"). The Physician has known the appellant since December 11, 2017 and has met with the appellant two-ten times since that time. Also included with the appellant's application was:

- An excerpt from a medical assessment from a second physician dated June 22, 2016 listing the appellant's medical conditions of depression, osteoarthritis, and concussion. The letter states that the appellant requires a high protein and high fibre diet. The letter describes the appellant's employment limitations.
- A prescription note from a third physician commenting that the appellant cannot work;
- A letter to a hospital dated May 11, 2016 requesting information related to Bursitis;
- An emergency outpatient record (date illegible) which describes the appellant's medical condition and treatment provided; and
- A self report dated January 18, 2018 (SR) describing the appellant's personal history, medical condition, and impacts to her physical and mental functioning

The Ministry denied the appellant's application. The appellant requested reconsideration of the decision on March 27, 2018. The appellant included the following additional evidence with her request for reconsideration:

- A request for reconsideration dated April 24, 2018 stating the issue at reconsideration and citing the case of *Hudson v. Employment and Assistance Appeal Tribunal*, 2009 BCSC1461. It is unclear who author of the written argument is, however, an advocate appeared to assist the appellant with her request for reconsideration so it appears that the author is likely an advocate;
- A second self report from the appellant dated April 19, 2018 (the "Second SR") where the appellant describes her personal history, medical conditions, impacts to cognitive and emotional functioning, and impacts to social functioning. The appellant's Physician notes on the Second SR that she considers the appellant's notes to be credible and that she recognizes that the appellant's DLA are affected as the appellant has described in her own statement and that she expects a person with the appellant's medical condition to experience the limitations in her life that she has described;
- A letter from a local resource centre dated April 4, 2018 stating that the appellant has been a resident since November, 2017 and that she is engaging in counselling services;
- A letter from a Psychologist (the "Psychologist") dated June 3, 2016 to the resource centre outlining the clinical impression of the appellant;
- CT scan report dictated by a fourth physician and dated March 27, 2017 which describes the appellant's medical condition; and
- Emergency Outpatient Record (date illegible) describing the appellant's medical condition and treatment provided.

The Appellant's Notice of Appeal dated May 11, 2018 ("NOA") states that she feels her impairments do restrict her ability to perform daily living activities and she does require significant help to perform daily living activities restricted by her impairments. The NOA references a written submission to follow however no written submission was included with the appellant's submission.

The Appellant did not attend the hearing.

Summary of Relevant Evidence

Diagnosis

In the MR the Physician identifies the following diagnoses: depression/PTSD (onset unspecified), post-concussion syndrome (onset unspecified), and chronic mild osteoarthritis/bursitis (onset unspecified). The letter from the Second Physician confirms medical conditions of depression, osteoarthritis, and concussion.

In her SR the applicant states she has depression, post-traumatic stress disorder, and post-concussion syndrome, osteoarthritis and bursitis in her letter dated April 19, 2018.

The Psychologist confirms that she suffers from mild to moderate depression with generalized anxiety-stress symptoms similar to (illegible) person syndrome.

Physical Impairment

Section 2-B of the MR states the appellant has mild osteoarthritis in multiple joints with greater trochanteric bursitis of her left hip and bilateral bursitis of both knees that affect her mobility. She uses a cane to mobilize over longer distances and takes regular pain medications. The appellant has a history of 6 concussions the most recent of March of 2017 was associated with a retinal detachment.

Section 2-D of the MR states the appellant can walk 1 to 2 blocks unaided, climb 5+ steps unaided, is limited in lifting 2 to 7 kg (5 to 15 lbs), has no limitation with remaining seated.

Section 3-B of the AR states the appellant takes significantly longer than typical with walking outdoors ("twice slow as an average person"), uses an assistive device with climbing stairs ("uses handrail, and sometime cane"), requires periodic assistance from another person with lifting ("avoids this") and carrying / holding ("weak grip, osteoarthritis in wrist"), is independent with walking indoors and standing.

The appellant's SR states that she has a broken bursa on her hip that causes pain to walk or stand for any length of time. Her arthritis causes pain in her joints.

The appellant confirms in her Second SR that osteoarthritis and bursitis causes pain in her joints. She has pain all the time every day. She has pain in her left hip, left wrist, and knees.

Mental Impairment

Section 2-B of the MR states that the appellant has a history of chronic depression and PTSD with a history of previous abusive relationships. She takes medication currently to help with her conditions and receives regular counselling. She is currently living in safe housing after escaping a more recent abusive relationship. She has ongoing issues with anxiety that impair her ability to interact with others. Her Depression and PTSD affect her sleep and motivation. She has a history of 6 concussions the most recent of which in March of 2017. She continues to suffer with post-concussion syndrome, symptoms of headaches, difficulty with ability to recall and periodic confusion, and difficult planning.

Section 2-D of the MR states that the appellant has ongoing issues with recall secondary to post-concussion syndrome, depression and PTSD affect the appellant's emotions and motivation. The appellant has significant deficits with cognitive and emotional functioning in the areas of executive, memory, emotional disturbance, and motivation.

Section 2B of the AR states that the appellant has a poor ability with reading ("Aggravates 6x of concussion, gets a headache") and good ability with speaking, writing, and hearing. The appellant has Depression, PTSD, Post-concussion syndrome." "Difficulty sleeping secondary to pain. Suffers from post-concussion syndrome - periods of being very confused or disoriented, very poor memory. Had ADHD as a child and a learning disability." There are major impacts to cognitive and emotional functioning in the areas of consciousness, attention / concentration, executive, and memory. The appellant has moderate impacts to cognitive and emotional functioning in the areas of emotion and motivation. The appellant has minimal impacts to cognitive and emotional functioning in the areas of bodily functions and other neuropsychological problems. The appellant has no impacts to the remaining six listed areas of cognitive and emotional functioning.

Section 3-C of the AR states the following with regards to social functioning: The appellant requires continuous support / supervision with being able to deal appropriately with unexpected demands ("Gets very stressed by this, needs help from family or friends"). Is independent with making appropriate social decisions, being able to develop / maintain relationships, interacting appropriately with others, and being able to secure assistance from others. Has marginal functioning with her immediate and extended social networks ("More withdrawn since concussion" / "Doesn't know too many people in community"). In describing the support / supervision required to help her maintain in the community, the Physician writes: "works with a psychologist on cognitive and social functioning skills." There is no indication of safety issues with regards to social functioning.

In her SR the appellant confirms that she has PTSD which causes her confusion and anxiety and she has trouble dealing with people. She has suffered a concussion which caused some detaching of her retina for a while which causes blurry vision once in a while also the concussion has caused her memory loss. She is on medication for anxiety and PTSD and she suffers from non-stop questions and worries which cause her insomnia. She suffers from memory loss

In her Second SR the appellant states that she “gets confused and anxious and has trouble dealing with people”. “she is scared to be around people and is very scared of men”. She has panic attacks, flashbacks, nightmares, and anxiety without warning due to abuse she suffered as a child and due to abusive relationships. The appellant states that her depression affects her every day and that she hides from people and the world under her covers three times a day to sleep. Her relationships are strained, and her emotions are all over the place. She is worried all of the time and when she leaves her house she has to go back sometimes 2-3 times to check to ensure she has turned off the stove and locked the door. She experiences memory loss, confusion, and headaches and she can’t remember what she is saying during a conversation. She has headaches that are recurrent and severe. She states that she does not trust people and her immediate network is very marginal and her extended network is disrupted and leaves her socially isolated. She has thoughts of suicide 1-2 times per month.

DLA

Section 2-B MR states that the appellant is not prescribed any medications or treatments that interfere with her ability to perform daily living activities.

Section 3-C of AR states: “no specific safety issues, difficulty walking longer distances, reliant on public transportation (has no car).” Independent with all listed areas of personal care, independent with laundry and basic housekeeping, requires periodic assistance from another person with going to / from stores (“If distance increased needs assistance”) and carrying purchases home (“If heavy”), and independent with the remaining three listed areas of shopping. Independent with all listed areas of meals. Independent with all listed areas of paying rent / bills. Independent with all listed areas of medications. Requires periodic assistance from another person with using public transit and using transit schedules / arranging transportation. “Needs help to work out transportation schedules, unable to do consistently on her own.” You are independent with getting in / out of vehicles.

In her SR the appellant describes that she does not have a vehicle and that walking is difficult because of her hip, back and knees. The medication that she takes bothers her stomach.

In her Second SR the appellant states she can walk a couple of blocks and go up a few stairs but the appellant is limited in lifting up to 5 lbs. The Physician confirms in writing that she agrees that the appellant’s DLA’s are affected in the way the appellant describes in her Second SR. The appellant states that she is not able to take care of herself and that is why she needs to remain in the transition house where staff can make sure she has what she needs. She states she does not deal well when things come up unexpectedly.

The Psychologist states that the appellant’s presenting symptoms are sufficient to significantly interfere with her quality of life, physical health, and positive participation in the daily routines of her personal life employment

Help

Section 2B of the MR states that the appellant requires prostheses or aids for her impairment: “uses a knee brace” / “Walks with the aid of a cane for longer distances.”

Section 3-D of the AR states that the appellant is provided assistance by family, Health Authority Professionals, and Community Service Agencies. The Physician further indicates appellant is provided assistance through the use of a cane, braces, and shower stool: “She sometimes wears a knee brace and uses a cane for ambulating longer distances. She uses a shower stool in the shower.”

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 in determining that:

- 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.

The Legislation Provides

EAR

Time period for scheduling and conducting hearing

85 (1)A hearing must be held within 15 business days after the appeal form is delivered under section 84, unless the chair of the tribunal and the parties consent to a later date.

(2)The chair of the tribunal must notify the parties of the date, time and place of a hearing described in subsection (1) at least 2 business days before the hearing is to commence.

Procedures

86 The practices and procedures of a panel include the following:

- (a)a party to an appeal may be represented by an agent;
- (b)the panel may hear an appeal in the absence of a party if the party was notified of the hearing;
- (c)the parties may call witnesses to give evidence before the panel;
- (d)a witness may not be present at the hearing before giving evidence unless the witness is
 - (i)an expert witness in the proceedings,
 - (ii)a party to the appeal, or
 - (iii)an agent representing a party to the appeal;
- (e)the chair of the tribunal may
 - (i)consolidate 2 or more appeals involving the same parties, and
 - (ii)direct that 2 or more appeals involving different parties will be heard together if the appeals involve substantially similar factsonly if
 - (iii)the appeals involve substantially similar facts, and
 - (iv)each of the parties to each of the appeals agrees to the appeals being consolidated or heard together;
- (f)the chair and the members of a panel must send to the chair of the tribunal all documents submitted to the panel respecting an appeal within 5 business days

after that panel makes its determination under section 24 (1) of the Act respecting the appeal.

EAPWDA

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).

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.

[am. B.C. Regs. 196/2007; 197/2012, Sch. 2, s. 2; 70/2013.]

Panel Decision

The appellant did not attend the hearing. The panel reviewed the Canada Post tracking information and determined that the appellant was sent the notice of hearing on May 24, 2018 to the appellant's address for service and that on May 31, 2018 the notice of hearing was returned to the Tribunal. The panel finds that pursuant to s.85(2) EAAR the appellant was notified of the hearing and the panel proceeded with the hearing pursuant to 86(b) EAAR.

The appellant did not submit additional evidence after reconsideration. The NOA contained argument in support of the appellant's position. The NOA referenced a written submission that was never provided.

Severe Impairment

Section 2(2)(a) of the EAPWDA provides that when addressing the issue of a severe physical or mental impairment in the context of a person applying for a PWD designation, that person must be found to have a severe physical or mental impairment that, in the opinion of a medical practitioner, is likely to continue for at least 2 years.

A diagnosis of a serious medical condition or conditions 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.

To assess the severity of an impairment one must consider the nature of the impairment and the extent of its impact on daily functioning. In making its determination, the ministry must consider all the relevant evidence, including that of the appellant. However, the legislation is clear that the fundamental basis for the analysis is the evidence from prescribed professionals – in this case, the Physician and the Psychologist.

Severe Physical Impairment

Based on the available information, the panel finds that while the information from the appellant, and her Physician indicate ongoing mobility limitations in her physical functioning due to her osteoarthritis and bursitis, the Physician has not provided sufficient additional comments as to the significance of the appellant's physical condition that support a finding that the impairment is severe in nature. The panel finds that on review of the entire body of evidence, the Ministry was reasonable in its determination that the evidence did not support a finding that she suffers from a severe physical impairment as provided by section 2(2) of the EAPWDA.

Severe Mental Impairment

The AR, the Second SR (endorsed by the Physician), and the letter from the Psychologist all contain substantive evidence that the appellant suffers a serious medical condition that impacts her daily. She suffers from suicidal ideation, depression, battered-person syndrome, defensive avoidance strategies, anxiety, hyper-arousal, hypervigilance, pain management issues. Many of the conditions that the appellant suffers are as a result of serious traumas that the appellant has experienced in her life.

The appellant herself states she is affected in some way every day, all of the time. Her Physician endorses her statement. The Psychologist also agrees in stating that her symptoms significantly interfere with her quality of life, physical health and positive participation in life. The panel finds that it was reasonable for the Ministry to determine that this appellant suffers from a severe mental impairment pursuant to section 2(2) EAPWDA.

DLA

The appellant describes her limits to social functioning in her SR and Second SR. She states that she seldom leaves her home and describes marginal functioning with her immediate social network and disruptions to your extended social network, causing social isolation.

In Section 3-C of the PWD application, the Physician states that the appellant is independent with four of five listed areas of social functioning (i.e., making appropriate social decisions, being able to develop / maintain relationships, interacting appropriately with others, and being able to secure assistance from others). Apart from general stated limits to social functioning, the Physician nor the appellant describe the specific restrictions that she face with respect to DLA.

The panel notes that there are two DLA specific to severe mental impairment found in s.2(1)(b) of EAPWDR: make decisions about personal activities, care or finances; and relate to, communicate or interact with others effectively. Neither the appellant, the Physician or Psychologist describe how the appellant manages these DLA either continuously or periodically for extended periods. The appellant describes that she needs to be in the transition house as she relies on persons there to assist her. The panel notes however, that the appellant is no longer living there.

Considering the appellant's ability to perform DLA as a whole, and the insufficient evidence to demonstrate that the appellant requires continuous or periodic assistance in completing her DLA, the panel finds that the Ministry reasonably concluded that the evidence is insufficient to demonstrate that the appellant's DLA are significantly restricted either continuously or periodically for extended periods pursuant to section 2(2)(b) of the EAPWDA.

Help to perform DLA

The appellant reports that she needs daily assistance from the transition house to take care of herself. Her Physician indicates she obtains assistance from family, health authority professionals, and community service agencies. Her Physician states that the appellant requires prostheses or aids for impairment (a knee brace and a cane for longer distances, shower stool).

The Ministry's position is that because it has not been established that DLA are significantly restricted, it cannot be determined that help is required.

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.

PART G – ORDER

THE PANEL DECISION IS: (Check one)

 UNANIMOUS BY MAJORITY

THE PANEL

 CONFIRMS THE MINISTRY DECISION RESCINDS THE MINISTRY DECISION

If the ministry decision is rescinded, is the panel decision referred back to the Minister
for a decision as to amount? Yes No

LEGISLATIVE AUTHORITY FOR THE DECISION:*Employment and Assistance Act*Section 24(1)(a) or Section 24(1)(b)

and

Section 24(2)(a) or Section 24(2)(b) **PART H – SIGNATURES**

PRINT NAME

MEGHAN WALLACE

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2018-06-07

PRINT NAME

CHRIS MCEWAN

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018-06-07

PRINT NAME

DAVID KENDRICK

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018-06-07