

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the ministry) reconsideration decision dated May 3, 2018 which found that the appellant did not meet one of the five statutory requirements of Section 2 of the *Employment and Assistance for Persons with Disabilities Act* for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement, that she has a severe physical impairment, her daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods, and that, as a result of these restrictions, she requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

However, the ministry was not satisfied the evidence establishes that:

- in the opinion of a medical practitioner or nurse practitioner, her severe physical impairment is likely to continue for at least 2 years.

PART D – RELEVANT LEGISLATION

Employment and Assistance for Persons with Disabilities Act (EAPWDA), Section 2

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), Sections 2 and 2.1

PART E – SUMMARY OF FACTS

The ministry did not attend the hearing. After confirming that the ministry was notified, the hearing proceeded under Section 86(b) of the Employment and Assistance Regulation.

The evidence before the ministry at the time of the reconsideration decision included the Persons With Disabilities (PWD) Application comprised of the appellant's information and self-report dated February 1, 2018, a medical report (MR) and an assessor report (AR) both dated February 8, 2018 and completed by a neurologist who has known the appellant for one month and has seen her 2 to 10 times in that time.

The evidence also included the following documents:

- 1) Letter dated April 6, 2018 completed by an advocate, with responses from the neurologist who completed the MR and the AR; and,
- 2) Request for Reconsideration dated April 6, 2018.

Diagnoses

In the MR, the neurologist diagnosed the appellant with Herpes Myelitis, with an onset in January 2018. Asked to describe the appellant's mental or physical impairments that impact her ability to manage her daily living activities, the neurologist wrote in the AR: "no impairment."

In the reconsideration decision, the ministry found that the appellant met the age requirement, that she has a severe physical impairment, that her daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods, and that, as a result of these restrictions, she requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

Duration

In the MR and the AR, the neurologist reported:

- When asked if the impairment is likely to continue for 2 years or more, the neurologist indicated "no." In response to the request to explain the estimated duration of the impairment, the neurologist wrote: "6 to 12 months."
- For additional comments to the MR, the neurologist wrote: "gradual improvement over 6 to 12 months anticipated although there is a risk for relapse."

In the letter dated April 6, 2018, the neurologist indicated:

- In response to the question whether he agrees that the listed restrictions to DLA are likely to continue longer than 2 years, that he "disagrees" and wrote: "I am unable to predict how long symptoms will last. She may experience a gradual improvement in next 6 to 12 months. However, it is possible that there may be relapse and worsening of symptoms as well."

In her self-report, the appellant wrote:

- Her disability consists of inflammation on her spine, discovered by an MRI, and a viral infection, discovered from a spinal tap. This has resulted in full numbness from her waist to the bottom of her feet.
- Her disability has affected all of her DLA as her mobility has become very limited and, at times, she has experienced moments of zero mobility, needing to have someone help her walk or have an assistance aid while outside of her home, and needing to hold onto walls while moving around her home.

Additional information

In her Notice of Appeal dated May 14, 2018, the appellant expressed her disagreement with the ministry's reconsideration decision and wrote that she has to take medication for the rest of her life due to her illness being incurable constitutes having a disability that affects every aspect of her life.

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

- 1) Undated letter from the appellant's teen-aged daughter who wrote that:
 - On January 1, 2018 the appellant woke up with what she thought was back pain.
 - The neurologist said the appellant had an uncommon disease that was attacking her spine. The appellant went onto intravenous antibiotics for 2 weeks and this helped with some of the numbness, but not all of it.
 - After more tests, the neurologist told the appellant that there was nothing more to do other than to give her medication to take daily.
 - The doctors said that the appellant will need to take this medication every day for the rest of her life and that she has a small possibility of getting a bit better.
 - The appellant everyday lives in a lot of pain and she helps her out a lot.
- 2) Undated letter in which the appellant wrote that:
 - She has been diagnosed with a lifelong physically crippling disease.
 - On January 1, 2018, she woke up with what she thought was an extremely sore back from either muscle pain or a pinched nerve. She had pain and lack of feeling from her waist to the tip of her toes and went to the hospital.
 - The neurologist diagnosed her with an uncommon viral disease that has affected her spinal cord. This caused a form of paraplegia which leaves her with no feeling from her waist down to her toes.
 - She was told that there was nothing more that could be done, after a 2-week round of intravenous antibiotics and a life time of oral medications.
 - She has been told by the neurologist that she will live with this disease for life, with the risk of flare-up again without warning or end results. He said that the next flare-up could cause more severe paralysis.
 - She lives every day with no feeling in her lower body.
 - The medication that she takes daily makes her nauseous and chronically fatigued, but without the medication the pain is unbearable.
 - She has no end in sight for recovery and she has been told by the neurologist that full recovery is unlikely.

- 3) Undated letter in which the appellant's mother wrote:
- The appellant has been diagnosed with an uncommon viral infection which has left her unable to have feeling and very little mobility from her waist down.
 - The appellant is in daily pain and is taking medication daily that leaves her ill.
 - She and the appellant's father and her daughter have all had to pull together to help the appellant.
- 4) Undated letter from the appellant's sister who wrote:
- The appellant was born with a hearing deficiency that has left her partially deaf in one ear and almost completely deaf in the other. The appellant was diagnosed with hip dysplasia at a young age. She has struggled with physical ailments most of her childhood and adult life.
 - In January 2018, the appellant woke to find that she was losing feeling to the lower part of her body. After many hospital visits, CT scans, MRI and a spinal tap, she was diagnosed with a viral disease that has attacked her spine.
 - As a result, in 6 months and 2 weeks of medications, and now a life time of medications, she has been given no guarantee of full recovery.
 - The doctors have told the appellant that she will never be rid of the virus and that she is at risk at any time for it to flare-up and she could end up with further paralysis.
 - The appellant has severe pain in her lower body, to the point that some days she cannot leave her house.
 - The neurologist was not able to say with certainty that the appellant will [experience] the paralysis, numbness and pain beyond the 2 years, but he was very clear that she will live with this virus for the rest of her life. A virus that has no treatment, no warning signs of flare-up, and a virus that could potentially make the appellant a paraplegic. This is a lifetime disease that the appellant did not receive as a result of her social life choices.

At the hearing, appellant's advocate stated:

- She has known the appellant since they were children, and they are like sisters.
- The appellant did not bring this disease upon herself and now she is in a position where she can no longer support herself and her daughter. She is going into debt by \$200 per month to pay her expenses, and that is without food. The money she receives barely pays her rent. She is obligated by service contracts that she entered into when she was working full-time. Her daughter needs school lunches, to be able to go on school trips, and her pets need to eat. She is a single mother, which is challenging.
- The appellant used to enjoy cleaning her home, and now she cannot do it at all. She is almost not capable of walking her daughter to school, a short distance.
- The medications that the appellant has to take every day are making her sick. She sometimes gets calls from the appellant with her hyperventilating because she is in so much pain.
- The appellant had just started a secure job when she got sick and they tried to hold the job for her but the appellant is not able to push through this condition.
- When the appellant tries to do something, she is worse the next day and can be bedridden for 2 days. The nerve block medications make the appellant "loopy." Her reactions to the medication are 'heavy-duty,' but if she does not take the medications she has numbness from her waist to her feet. She has a "pins and needles" sensation and the symptoms only go away for a little bit with the medications.
- The appellant was stepping on an extension cord and she could not even feel it under her feet.

- She will do anything to help the appellant, and the appellant's parents also help her.
- The appellant cannot wait another year and a half to apply again for the PWD designation. The appellant is continuing to deteriorate. It has been 6 ½ months, and there is no improvement in her condition. If she misses her medication, the symptoms come back right away. She cannot commit to doing anything because if she pushes herself too much, the next day will be a "bad day."
- The doctor said "I don't know" or "I can't tell you for certain" but she sees the appellant every day. The doctor acknowledged that the appellant will never be fully normal, that she will always have some numbness. The underlying condition will never go away.
- She cannot believe the change in the appellant as 8 months ago she was running with her dogs. Now, she is supposed to be resting her body.
- The appellant is to go back to the neurologist every 6 months but he is only available in the community once per month so it is difficult to get in to see him.

At the hearing, the appellant stated:

- She used to cook for her employment, and now she cannot cook for herself and her daughter. She needs to sit down to do anything and it is depressing. The stress makes her symptoms flare up as the condition becomes more inflamed.
- When she takes the medication, she waits for them to "kick in," as they still make her ill. She vomits and has to take over-the-counter medication to alleviate the nausea.
- Swimming helps but she cannot feel when she hits the wall and she has become overwhelmed with stress.
- Her daughter brings her the medication before she gets up in the morning so that she can move. She feels so helpless and it is heart breaking for her.
- The doctor has told her that she needs to take medication for the rest of her life and there could be more of an impact if the virus flares up. She has already experienced 2 relapses of numbness.
- When she first went to her family doctor, he thought that she had a pinched nerve. The family doctor said she has to discuss this condition with the neurologist because he has no expertise in this area.

The ministry relied on the reconsideration decision and did not attend the hearing.

The panel considered that there was no additional information for which a determination of admissibility was required under Section 22(4)(b) of the *Employment and Assistance Act*.

PART F – REASONS FOR PANEL DECISION

The issue on appeal is whether the ministry's reconsideration decision, which found that the appellant is not eligible for PWD designation, was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. The ministry found that the evidence does not establish that, in the opinion of a medical practitioner or a nurse practitioner, the appellant's severe physical impairment is likely to continue for at least 2 years.

The criteria for being designated as a PWD are set out in Section 2 of the EAPWDA as follows:

Persons with disabilities

2 (1) In this section:

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

"daily living activity" has the prescribed meaning;

"prescribed professional" has the prescribed meaning.

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

(a) in the opinion of a medical practitioner or nurse practitioner is likely to continue for at least 2 years, and

(b) in the opinion of a prescribed professional

(i) directly and significantly restricts the person's ability to perform daily living activities either

(A) continuously, or

(B) periodically for extended periods, and

(ii) as a result of those restrictions, the person requires help to perform those activities.

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

(a) a person who has a severe mental impairment includes a person with a mental disorder, and

(b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires

(i) an assistive device,

(ii) the significant help or supervision of another person, or

(iii) the services of an assistance animal.

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

The EAPWDR provides as follows:

Definitions for Act

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

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

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

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

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

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

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

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

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

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

if qualifications in psychology are a condition of such employment.

Part 1.1 — Persons with Disabilities

Alternative grounds for designation under section 2 of Act

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

- (a) a person who is enrolled in Plan P (Palliative Care) under the Drug Plans Regulation, B.C. Reg. 73/2015;

- (b) a person who has at any time been determined to be eligible to be the subject of payments made through the Ministry of Children and Family Development's At Home Program;
- (c) a person who has at any time been determined by Community Living British Columbia to be eligible to receive community living support under the Community Living Authority Act;
- (d) a person whose family has at any time been determined by Community Living British Columbia to be eligible to receive community living support under the Community Living Authority Act to assist that family in caring for the person;
- (e) a person who is considered to be disabled under section 42 (2) of the Canada Pension Plan (Canada).

The ministry found that there was sufficient information to establish that the appellant met the age requirement, that she has a severe physical impairment, her daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods, and that, as a result of these restrictions, she requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

However, the ministry was not satisfied the evidence establishes that, in the opinion of a medical practitioner or nurse practitioner, the appellant's severe physical impairment is likely to continue for at least 2 years.

Duration

In the reconsideration decision, the ministry wrote that the neurologist reported in the MR that the appellant's impairment is not likely to continue for 2 years or more from the date of the report, and the neurologist commented "6 to 12 months." The ministry reasonably considered the additional comments to the MR, where the neurologist wrote: "gradual improvement over 6 to 12 months anticipated although there is a risk for relapse." The ministry also considered the information from the neurologist in the letter dated April 6, 2018, where he reported in response to the question whether he agrees that the listed restrictions to DLA are likely to continue longer than 2 years, that he "disagrees." The ministry considered that the neurologist wrote that he is "unable to predict how long symptoms will last" and that the appellant "may experience a gradual improvement in next 6 to 12 months. However, it is possible that there may be relapse and worsening of symptoms as well."

In her self-report, the appellant wrote that her disability consists of inflammation on her spine and a viral infection that has resulted in full numbness from her waist to the bottom of her feet. The appellant wrote that her disability has affected all of her DLA as her mobility has become very limited and, at times, she has experienced moments of zero mobility, needing to have someone help her walk or have an assistance aid while outside of her home, and needing to hold onto walls while moving around her home. At the hearing, the appellant stated that the neurologist has told her that she needs to take medication for the rest of her life, that there could be more of an impact if the virus flares up, and she has already experienced 2 relapses of numbness. At the hearing, the appellant's advocate stated that it has been 6 ½ months and there is no improvement in the appellant's condition as, if the appellant misses taking her medication, the symptoms come back right away. The advocate stated that the doctor said "I

don't know" or "I can't tell you for certain" but she sees the appellant every day and the doctor acknowledged that the underlying condition will never go away, that the appellant will always have some numbness.

In the letters provided prior to the hearing, the appellant and her family argue that the appellant has been diagnosed with a lifelong physically crippling disease. The appellant's daughter wrote that the neurologist told the appellant that there was nothing more to do other than to give her medication to take daily for the rest of her life and that she has a "small possibility of getting a bit better." The appellant's sister wrote that the neurologist was not able to say with certainty that the appellant will [experience] the paralysis, numbness and pain beyond the 2 years, but he was very clear that she will live with this virus for the rest of her life. The appellant's sister wrote that this is a virus that has no treatment and no warning signs of flare-up and which could potentially make the appellant a paraplegic.

Section 2(2)(a) of the EAPWDA stipulates that the ministry must be satisfied that the appellant's severe physical impairment is, in the opinion of a medical practitioner or nurse practitioner, likely to continue for at least 2 years. Although the neurologist has confirmed a diagnosis in January 2018 with Herpes Myelitis, the panel finds that the ministry reasonably concluded that the neurologist, as the medical practitioner, has not provided an opinion that the *impairment* of the appellant's physical functioning is likely to continue for at least 2 years. The neurologist indicated in the MR that he anticipated "gradual improvement over 6 to 12 months" and also acknowledged that "there is a risk for relapse." Given an opportunity to modify or update his prognosis in the April 6, 2018 letter, the neurologist disagreed that the listed restrictions to the appellant's DLA are likely to continue longer than 2 years. Therefore, the panel finds that the ministry reasonably concluded that there was insufficient evidence to establish that, in the opinion of the medical practitioner, her severe physical impairment is likely to continue for at least 2 years.

Conclusion

The panel finds that the ministry's reconsideration decision, which determined that the appellant was not eligible for PWD designation pursuant to Section 2(2) of the EAPWDA, was reasonably supported by the evidence. The panel confirms the ministry's decision. The appellant's appeal, therefore, is not successful.

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

S. Walters

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2018-06-05

PRINT NAME

Jennifer Armstrong

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018-06-05

PRINT NAME

Sanjay Gulati

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018-06-05