

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the “Ministry”) reconsideration decision, dated May 29, 2018 (the “Reconsideration Decision”) which determined that Appellant did not meet three of the five statutory requirements of Section 2 of the *Employment and Assistance for Persons with Disabilities Act* (“EAPWDA”) for designation as a person with disabilities (“PWD”). The Ministry determined that the appellant met the age requirement and has an impairment that is likely to continue for at least two years. However, the Ministry was not satisfied that the evidence established that:

- the appellant has a severe physical or mental impairment;
- the appellant's daily living activities (“DLAs”) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and,
- as a result of these restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLAs.

PART D – RELEVANT LEGISLATION

EAPWDA, section 2(1)

Employment and Assistance for Persons with Disabilities Regulation (“EAPWDR”), Section 2

PART E – SUMMARY OF FACTS

The evidence before the Ministry at the time of the Reconsideration Decision included the Appellant's PWD application, dated November 22, 2017 (the "Application"), which consisted of:

- The Applicant Information ("AI"); and
- A medical report (the "MR") and an assessor report (the "AR"), both dated March 12, 2018 and both completed by the Appellant's doctor (the "Doctor") who began seeing the Appellant as a patient in February, 2018.

The evidence before the Ministry at the time of the Reconsideration Decision also included:

- a letter, dated April 16, 2017, from an endocrinologist that the Appellant had seen while living in Ontario (the "Endocrinologist") ;
- a letter, dated August 9, 2017 from a specialist in Ontario that the Appellant had seen in regards to her diabetes;
- a letter, dated October 18, 2016, from the Endocrinologist ;
- a letter, dated April 22, 2016, from the Endocrinologist ;
- letter from the Ministry, dated May 8, 2016, advising the Appellant that her application for PWD status had not been accepted;
- the Appellant's Request for Reconsideration, dated May 16, 2018 ("RFR"), which included a self report ("SR").

Diagnoses

In the MR, the Doctor diagnosed the Appellant as suffering from

- Type 1 Diabetes, with an onset of 2009;
- Diabetic Neuropathy, with an onset of 2017; and
- visual impairment from cataracts, with an onset of 2017.

The Doctor did not make any diagnoses of conditions that fell within the mental disorders diagnostic category on the MR.

In the AR, the Doctor described only the Appellant's Type 1 Diabetes as impacting her ability to manage DLAs, noting that her blood sugar was "difficult to control" and "can go very high or low in a short period of time."

Physical Impairment

In the MR and the AR, the Doctor reported that:

- the Appellant's diabetes is "extremely difficult to control" and that she cannot "feel a low blood sugar and can end up unconscious";
- the Appellant needs to have people around to check on her due to the extreme lows in her blood sugar;
- the Appellant's blood sugar can also go extremely high, resulting in hospitalization a number of times in the past;
- the Appellant is at risk of further complications due to the poorly controlled nature of her diabetes;
- with respect to her functions skills, the Appellant is limited to walking 2 to 4 blocks on a flat surface, can climb 5+ stairs unaided, and is able to lift 7 to 16 kg (15 to 35 lbs);
- because of her illness, the Appellant "can become very ill + unable to manage any activities of daily living. This degree of illness can develop very quickly"
- the Appellant "requires support of people around her who are able to help at short notice" because of the unpredictability of her abilities to look after herself;

- the Appellant requires periodic assistance from another person with walking indoors, climbing stairs, standing, lifting, and carrying but notes that assistance is required when she is “not well”; and
- the Appellant requires continuous assistance from another person or is unable to walk outdoors (the doctor notes that the Appellant “does not go out alone as may have a severe hypoglycemic episode”);

In the AI portion of the Application, the Appellant wrote that:

- She has been diabetic for 8 year and has had many medical issues arising from her diabetic condition;
- She has been admitted to hospital in excess of 25 times in the last 6 years;
- Her diabetic condition prevents her from working as she is unable to stand for long periods of time;
- She has nerve pain in both legs which is made worse by being in the cold for a few minutes; and
- She has cataracts in both eyes.

In the SR portion of her RFR, the Appellant wrote that:

- She has had many complications from her diabetic condition since 2009, including DKA (Diabetic ketoacidosis) on more than fifteen occasions;
- She has problems with her blood sugar being too high;
- When her blood sugar is too low, she is normally unaware of it until it goes below 2.0 or lower;
- Since she has been diagnosed with cataracts, she has difficulty seeing;
- She has been unable to afford her insulin and test strips on the basic income assistance which she is receiving; and
- She had been receiving disability benefits in Ontario.

Mental Impairment

In the MR and AR, the Doctor reported that:

- The Appellant has difficulty with communication and cognition “if her blood sugar is either too high or too low”;
- The Appellant has significant deficits with consciousness, executive functions; language, memory, perception, and attention or sustained concentration “when blood sugar is too low”;
- There was a minimal impact on the Appellant’s daily functioning in the areas of bodily functions, emotion, impulse control, motivation, motor activity, and other neuropsychological problems and a moderate impact on the Appellant’s consciousness, insight and judgment, attention and concentration, executive function, memory and language, which the Doctor indicates varies over time, noting that “she can think clearly at times but when her blood sugar goes very low she is totally unable to comprehend or function”;
- The Appellant was described as having good speaking, writing, and hearing ability and “satisfactory” reading ability due to “cataracts impairing vision”;
- The Appellant requires periodic assistance with some aspects of social functioning, particularly making appropriate social decisions choices, developing and maintaining relationships, interacting appropriately with others, dealing with unexpected demands, and securing assistance from others, noting that the Appellant “spends most of the time at home as she feels it is unsafe to go out alone” and that her “isolation makes relationships difficult;”
- The Appellant has marginal functioning in respect of both her immediate and extended social networks; and
- The Appellant “requires supportive people (friends or others) who understand her illness.

DLAs

In the MR and AR, the Doctor opined that:

- The insulin prescribed to the Appellant can “cause her to have very/dangerously low blood sugar”;
- With respect to personal care, the Appellant is independent with respect to dressing, grooming, bathing, toileting, transferring in and out of bed and on and off chairs but required periodic assistance with feeding self and regulating her diet (“regulates her diet unless she has very low blood sugar – needs assistance then”);
- As far as basic housekeeping goes, the Appellant needs periodic assistance with laundry and basic housekeeping;
- With respect to shopping, the Appellant needs periodic assistance with making appropriate social choices and paying for purchases and continuous support with going to and from stores, reading prices and labels, and carrying purchases home, noting that “she always has someone with her to shop”, “is unable to walk far due to pain from neuropathy”, and “requires someone with her in case she develops severely low blood sugar”;
- the Appellant requires periodic assistance with all aspects of meals including meal planning, food preparation, cooking, and safe storage of food;
- the Appellant requires periodic assistance with all aspects of paying rent and bills including banking, budgeting, and paying rent and bills;
- with respect to medication, the Appellant is independent with safe handling and storage, requires periodic assistance with taking medication as directed, and requires continuous assistance with filling and refilling prescriptions, noting that she needs “supervised transportation”;
- with respect to transportation, the Appellant requires periodic assistance with getting in and out of a vehicle, using public transit, and using transit schedules and arranging transportation;
- when “severely unwell”, the Appellant would be unable complete any of the functions described in the meals, paying rent and bills, medications, and transportation aspects of DLAs.

In the AI included with the Application and the SR included with her RFR, the Appellant wrote that:

- She is not allowed to have a driver’s licence due to her diabetic condition;
- Her cataracts make it hard to read things that are not close up and that her eyes are sensitive to sun and bright lights; and
- She is not fit to work.

Need for Assistance

In the AR, the Doctor commented that the Appellant “currently has a friend whose place she stays at that takes her out” but did not identify any assistive devices that were required by the Appellant. The Doctor did note that the Appellant would benefit from “supervised transportation.”

Additional Information

In the Notice of Appeal, the Appellant advised that she disagreed with the Reconsideration for the reasons set out in supporting documents, which included:

- A handwritten submission (the “Submission”) in which the Appellant restates the previous information about the Appellant’s history of diabetes, her past DKA hospitalizations, the nerve damage in her legs, her current situation with respect to cataracts, the extreme fluctuation in her blood sugar and the impact of extremely low blood sugar (confusion, disorientation, cold sweats, passing out, and the risk of coma, that her basic income assistance does not cover the cost of her insulin and test strips and also describes impacts to her teeth (rotting from the inside) and increased depression resulting from the complications she is experiencing; and

- Copies of statements (the “Statements”) from the Ontario Ministry of Community and Social Services which describe the assistance the Appellant had received in Ontario from January, 2017 through September, 2017.

At the hearing of the Appeal, the Appellant stated that:

- her blood sugar remains unpredictable, even with seeing doctors and taking medications as directed;
- she needs someone with her and can't be alone because of the variability in her blood sugar levels and the fact that low blood sugar, in particular, can come on with no warning until her blood sugar level dips below 2.0 other than someone telling her that she doesn't look good;
- when her blood sugar goes too low, she can experience nausea and cold sweats;
- her blood sugar can go too low as often as 8 times in the space of a 2 week period and that that it typically takes between 15 and 45 minutes to regulate her symptoms from low blood sugar;
- she has developed cataracts in both of her eyes since her move to British Columbia from Ontario;
- she has pain in both legs and is unable to stand for 6 to 8 hours that she would need to in order to be able to work;
- her legs can turn blue, keeping her from standing or sitting and that walking makes her toes go numb;
- she recently was able to obtain coverage for her insulin and test strips;

At the hearing of the Appeal, the Ministry relied on the Reconsideration Decision, which was summarized at the hearing of the appeal.

Admissibility

The panel observes that the Submission was mostly argument and admits it on that basis. The panel finds that the Statements are documents in support of information that was before the Ministry at the time of the Reconsideration and admits them on that basis under section 22(4) of the *Employment and Assistance Act* (“EAA”). The panel admits the Appellant's oral evidence at the hearing as oral testimony in support of information that was before the Ministry at the time of the Reconsideration under section 22(4) of the EAA.

PART F – REASONS FOR PANEL DECISION

The issue in this appeal is whether the Ministry determination that Appellant did not meet 3 of the 5 statutory requirements of Section 2 of the EAPWDA for designation as a PWD was reasonably supported by the evidence before the Ministry or was a reasonable application of the relevant statutory provisions in the Appellant's circumstances.

The statutory requirements for designation as a PWD are set out in sections 2 of the EAPWDA and section 2 of the EAPWDR as follows:

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).

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.

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).

Severe Physical Impairment

In the Reconsideration Decision, the Ministry determined that the Appellant had not provided information that established a severe physical impairment.

The Ministry acknowledged the diagnoses of Type 1 Diabetes, Diabetic Neuropathy, and Visual Impairment due to cataracts.

For a physical impairment to be severe, as per section 2 of the EAPWDA, it must directly and significantly restrict a person's ability to perform DLAs in the opinion of a "prescribed practitioner" described in section 2(2) of the EAPWDR. In this case, the prescribed practitioner is the Doctor who completed both the AR and the MR.

In the case of the Appellant, the Doctor assessed the Appellant's functional skills in the MR being able to walk unaided on a flat surface for 2 to 4 blocks, climb 5+ stairs, and lift 7 to 16 kilograms. The Appellant also described restrictions in walking at the hearing due to pain in her legs from the neuropathy and developing numbness in her toes when walking. Although in the AR, the Doctor, describes the Appellant as needing continuous assistance with walking outdoors and periodic assistance with walking indoors, climbing stairs, standing, lifting, and carrying and holding, the opinion was qualified with the statement that "as long as she is well at the time, otherwise she requires assistance." The Doctor does not describe the frequency that the Appellant "is unwell" or the durations for which she is unwell and in need of the assistance described in the AR. The Appellant described experiencing episodes of high blood sugar as occurring 2-3 times per week and episodes of having low blood sugar approximately 4 times per week. She advises that her symptoms will ordinarily take approximately 15 minutes to 45 minutes to regulate.

The Appellant was also assessed in the AR as being independent with most aspects of physical functioning, with the exception of performing laundry and basic housekeeping where the Doctor indicated a need for periodic assistance.

While the above information does indicate some restrictions in the Appellant's ability to carry out some DLAs, it is not clear that the Appellant's impairment *significantly* restricts her ability carry out DLAs due to a physical impairment, which is one of the criteria for a finding of a severe impairment under section 2 of the EAPWDA. In the result, the panel finds that the Ministry was reasonable in its determination that the Appellant has not established that she has a severe physical impairment as per section 2(2) of EAPWDA.

Severe Mental Impairment

The Ministry was likewise not satisfied that the Appellant had established a severe mental impairment. In this case, there was no diagnosis of any impairment that fell within the mental disorders diagnostic categories set out in the MR. However, the Doctor did describe a number of cognitive and mental deficits arising from the Appellant's Type I Diabetes, particularly when the Appellant was experiencing episodes of extremely low blood sugar.

The impairment resulting from episodes of low blood sugar were described in both the MR and the AR. In the MR, the Doctor describes problems significant cognitive deficits, including consciousness, executive function, language, memory, perception, and attention but all of these deficits are described as occurring "when blood sugar is too low." The Appellant did not describe these deficits in the AI portion of her Application or in the SR included with the RFR. She did describe these types of deficits in an attachment to her Notice of Appeal, however. While, at the hearing, the Appellant described the frequency with which she experiences low blood sugar, she did not indicate with which the above-described deficits occur. Likewise, the Doctor did not describe the frequency with which the Appellant experiences the above-described cognitive deficits.

In the AR, the Doctor described the Appellant's ability to communicate as being good for speaking, writing, and hearing and "satisfactory" for reading but this was described as being due to cataracts impairing her vision and not to any mental impairment.

As with the Doctor's description of the Appellant's physical impairment, the opinion is qualified in that the Doctor notes that the Appellant "can think clearly at times but when her blood sugar goes very low, she is totally unable to comprehend or function. The Doctor does not describe the frequency with which this occurs and, while the Appellant described, at the hearing, the frequency with which she experiences low blood sugar, she did not describe the frequency with which she experiences the cognitive deficits described in the MR and AR.

While the above information does indicate some restrictions in the Appellant's ability to carry out some DLAs, it is not clear that the Appellant's impairment *significantly* restricts her ability carry out DLAs due to a mental impairment. In the result, the panel finds that the Ministry was reasonable in its determination that the Appellant has not established that she has a severe mental impairment as contemplated by section 2(2) of EAPWDA.

Restrictions in Ability to Perform DLAs

Pursuant to section 2(2)(b) of the EAPWDA, the ministry must assess whether, in the opinion of a prescribed practitioner, such as the Doctor, DLAs are directly and significant restricted. This does not mean that other evidence is discounted, particularly where it may provide clarification to the information from the prescribed professional, but the legislative language makes it clear that a prescribed professional's evidence is fundamental to the ministry's determination as to whether it is "satisfied" that DLAs are directly and significantly restricted.

The application for PWD designation directs the practitioners who complete the Medical Report and the Assessor Report to explain in as much detail as possible the nature of any continuous restrictions to an applicant's DLAs and the nature, frequency and duration of any periodic restrictions to an applicant's ability to perform DLAs. In the result, the prescribed professional completing the reports has the opportunity to indicate which, if any, DLAs are significantly restricted by the appellant's impairments, either continuously or periodically for extended periods.

In the Reconsideration Decision, the Ministry noted that the Doctor stated in the MR that the Appellant had been prescribed insulin to treat her Type 1 Diabetes which can cause dangerously low blood sugar. The Doctor also noted that the Appellant is sometimes "unable to manage any" DLAs when she becomes very ill. The Doctor, however, did not describe the frequency with which this happens nor the nature or extent of any restrictions in the Appellant's ability to perform DLAs as a result of having dangerously low blood sugar. While the Appellant did address the frequency with which she experiences low blood sugar at the hearing, it was less clear how frequently such episodes restricted her ability to perform DLAs and for how long her ability to perform DLAs is restricted when she experiences dangerously low blood sugar.

In the AR, the Doctor stated that the Appellant was independent with most aspects of personal care DLAs. Where she required periodic assistance from another person with feeding herself and regulating her diet, the Doctor included the caveat that the Appellant "regulates her diet unless she has very low blood sugar – needs assistance then." According to the Doctor, it is only shopping and filling or refilling prescriptions with which the Appellant requires continuous assistance from another person. Although the Doctor did opine that the Appellant requires periodic assistance from another person in all aspects of basic housekeeping, meals, paying rent and bills, and transportation portions of the AR, the Doctor did not indicate the frequency with which such assistance is required and qualifies her opinion by noting that if the Appellant was "severely unwell, she would be unable to complete any of the above." With respect to social functioning, the Doctor describes the Appellant as requiring periodic support or supervision in all aspects, noting that the Appellant is isolated as she "feels it is unsafe to go out alone."

Given that the Doctor has:

- assessed the Appellant as requiring only periodic assistance with most DLAs;
- not indicated the frequency or duration with which such assistance is required; and
- notes that such assistance is typically only required when the Appellant's blood sugar is extremely low, something that the Appellant stated occurs approximately 3 to 4 times per week, requiring between 15 and 45 minutes to regulate

the panel finds that the Ministry was reasonable in its determination that there was insufficient evidence to establish that the Appellant's ability to carry out DLAs is significantly restricted, either continuously or periodically for extended periods, as required by section 2(2)(b)(i) of the EAPWDA.

Help with Performing DLAs

Section 2(2)(b)(ii) of the EAPWDA sets out that one of the requirements for designation as a PWD is that a person require assistance continuously or periodically for extended period with carrying out DLAs. Help is defined in section 2(3) of the EAPWDA describes the requirement of an assistive device, significant help or supervision of another person, or the services of an assistance animal as requiring "help."

In the AR, the Doctor describes the Appellant as receiving help from a friend with whom she stays and indicates that supervised transportation would be necessary for the Appellant if it was available. The Doctor does not describe the extent to which the Appellant's friend is required to provide assistance to the Appellant with DLAs and mentions no assistive devices or assistance animals required by the Appellant in order to carry out her DLAs.

In the absence of information establishing that the Appellant requires assistance continuously or periodically for extended periods of time, the panel finds that the Ministry reasonably determined that the Appellant had not met the criteria set out in section 2(2)(b(ii) of the EAPWDA.

Conclusion

In view of all of the foregoing, the panel finds that the Ministry's Reconsideration Decision, which determined that the Appellant had not satisfied the criteria of section 2(2) of the EAPWDA for designation as a PWD was reasonably supported by the evidence and Confirms the Reconsideration Decision. The Appellant is not successful in this 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

Adam Shee

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2018/07/03

PRINT NAME

Mel Donhauser

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018/07/03

PRINT NAME

Marilyn Mellis

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018/07/03