

### **PART C – DECISION UNDER APPEAL**

The decision under appeal is the Ministry of Social Development and Poverty Reduction (ministry) reconsideration decision dated 26 July 2018, which determined that the appellant was not eligible for persons with disabilities designation (PWD) because she had not met all of the legislated criteria under section 2 the *Employment and Assistance for Persons with Disabilities Act*.

The ministry determined that the appellant had demonstrated that she has reached 18 years of age and that her impairment, in the opinion of a medical practitioner or nurse practitioner, is likely to continue for at least 2 years.

The ministry further determined that the appellant had not demonstrated that she has a severe mental or physical impairment; that her severe mental or physical impairment, in the opinion of a prescribed professional, directly and significantly restricts her ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and as a result of direct and significant restrictions, she requires help to perform those activities.

The ministry also found that the appellant is not one of the prescribed classes of persons who may be eligible for PWD designation on the alternative grounds set out in Section 2.1 of the EAPDR and the appellant did not appeal the decision on that basis.

### **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 appellant did not attend the hearing. After confirming that the appellant was notified, the hearing proceeded under section 86(b) of the *Employment and Assistance Regulation*.

Evidence before the ministry at reconsideration consisted of the following:

### 1. The appellant's PWD Application

The Application contained:

- A Medical Report (MR) dated 23 March 2018, completed by a general practitioner (GP) who has seen the appellant 2-10 times in the past 12 months and known the appellant for more than 5 years.
- An Assessor Report (AR) dated 6 April 2018, completed by the same GP who has seen the appellant 2-10 times in the past 12 months and known the appellant for more than 5 years.
- A Self Report (SR) dated 6 April 2018, completed and signed by the appellant.

The panel will first summarize the evidence from the PWD Application as it relates to the PWD criteria at issue in this appeal.

#### Diagnoses

In the MR, the GP provides the following diagnoses:

- Depression and anxiety –severe (onset 2013)
- Chronic back pain (onset 2017)

#### Severity of mental impairment

MR:

Under Health History, the GP writes: *[patient] reports being significantly affected with regards to her concentration and cognitive performance when her mood is low. She is having difficulty finding effective therapy although she is trying and following all recommendations.*

The GP has ticked 'no' in response to whether there are difficulties with communication other than lack of fluency in English.

The GP indicates that the appellant has significant deficits with cognitive and emotional functioning in the areas of emotional disturbance, motivation and attention. No comments are provided.

The GP has provided the following Additional Comments in Section F: *The patient has tried to work with her depression for many years but her mood means that she has difficulty keeping a job because there are days she can not motivate herself to leave her house or take care of herself. At times she has had trouble concentrating on her job due to depression.*

AR:

In the AR, the GP has responded to the question "What are the applicant's mental or physical impairments that impact his/her ability to manage Daily Living Activities?" as follows: *[Patient] has severe depression and has troubles with concentration.*

The GP assesses the appellant's cognitive and emotional functioning as having no impact in the areas of motor activity, language, psychotic symptoms, other neuropsychological problems and other emotional or mental problems. The GP assesses minimal impacts on daily functioning in the areas of bodily functions, consciousness, and insight and judgment. Moderate impacts on daily functioning are assessed in the areas of impulse control and memory. Major impacts are assessed in the areas of emotion, attention/concentration, executive and motivation. No comments are provided.

SR:

The appellant indicates that she suffers from PTSD (post traumatic stress disorder), depression and anxiety. She describes difficulty keeping a job for more than a few months due to her disability. She explains that there are times when she is unable to shower or clean her house. Her depression and anxiety cause her to feel as though she has *messed up anything good in [her] life*. She describes anxiety getting so bad that she cannot breathe or talk and gets angry without cause.

Severity of physical impairment

MR:

For functional skills, the GP indicates that the appellant can walk 2-4 blocks unaided, climb 5+ steps unaided, lift 5-15 pounds unaided and remain seated without limitation.

The GP states that the appellant's *back pain does flare at times making it harder for her to walk far distances.*

The GP indicates that the appellant does not require any aids or prostheses.

AR:

The GP indicates that the appellant is independent with all areas of mobility and physical ability, including: walking indoors and outdoors, climbing stairs, standing, lifting and carrying and holding. No comments are provided.

SR:

The appellant does not speak to a physical impairment in her self-report.

Ability to perform DLA

MR:

The GP indicates that the appellant has not been prescribed medication that interferes with her ability to perform DLA.

The GP indicates that the appellant's impairment does not restrict her ability to perform DLA. The GP goes on to indicate that the appellant is not restricted in relation to: personal care, meal preparation, management of medications, basic housework, daily shopping, mobility inside of the home, use of transportation and management of finances. The GP indicates that the appellant is restricted periodically with mobility outside of the home and restricted continuously with social functioning.

In explaining 'periodic' the GP comments: *back pain does flare at times making it harder for her to walk far distances.*

The GP provides the following additional comments in relation to the prompt, "If social functioning is impacted, please explain: *severe depression makes it hard to concentrate or be motivated to interact with others.*

In relation to assistance needed with DLA, the GP comments: *no assistance for activities of daily living although she needs somebody to motivate her to get out of the house daily.*

AR:

The GP indicates that the appellant is independent in all personal care activities, all basic housekeeping activities, all shopping activities, all meals activities, all pay rent and bills activities, all medications activities and all transportation activities. The GP provides the comments: *Does have friend to encourage her to get out and get her shopping done. Has not paid rent on time as too depressed to get things together. Not showering as often or brushing her teeth due to lack of motivation. As before need friend to motivate her and stay on top of her to make sure she pays rent and shops. But can physically do these things herself.*

Section 2(1)(b) of the EAPWDR

The following DLA are applicable to a person who has a severe mental impairment:

*Make decisions about personal activities, care or finances*

MR:

The GP indicates that the appellant is not restricted in her ability to manage personal self-care, meal preparation, medications, finances and transportation.

AR:

The GP indicates that the appellant is independent with the personal care activities of regulating her diet; the shopping activities of readings labels, making appropriate choices, and paying for purchases; the meals activities of safe storage of food and meal planning; the pay rent and bills activities of budgeting, banking and bill payment; the medications activities of filling/refilling prescriptions, taking as directed and safe handling and storage; and the transportation activities of using transit schedules and arranging transportation.

The GP reports that the appellant is independent with making appropriate social decisions as part of her social functioning.

*Relate to, communicate or interact with others effectively*

MR:

The GP indicates that the appellant has no difficulties with communication and is continuously restricted in relation to social functioning.

AR:

The GP assesses the appellant's ability to communicate as good in all listed areas (reading, writing, hearing and speaking).

In assessing social functioning activities, the GP indicates that the appellant requires periodic assistance with developing and maintaining relationships and interacting appropriately with others. The GP indicates that the appellant requires continuous assistance dealing appropriately with unexpected demands and securing assistance from others (*able to seek medical assistance as needed but needs partner/friend to get her out of house and to get shopping done*). The GP indicates that the appellant has very disrupted functioning in her immediate social network (*no interactions with siblings or her own children*) and marginal functioning in her extended social networks.

In response to the prompt to indicate help required, the GP comments: *applicant needs partner/friend to motivate and get her to look after herself.*

Help required

MR:

The GP indicates that the appellant does not require any aids or prostheses.

AR:

The GP indicates that the appellant receives assistance from friends.

The GP indicates that the appellant does not receive assistance from assistance animals.

## **2. Request for Reconsideration**

The appellant submitted a handwritten submission with her signed Request for Reconsideration, dated 21 July 2018. This submission is largely illegible to the panel due to poor copy/fax quality. The submission is summarized in the reconsideration decision as follows: *You provide a written submission with your Request for Reconsideration (4 pages) in which you provide information regarding the difference between Complex PTSD vs. PTSD, symptoms which you indicate happen every day and on some days are a lot worse. You also indicate that you require years of therapy at lease twice a week and psychiatric medications. If a traumatic memory or trigger happens, you feel worse for many days, weeks, and months. It increases your physical ails, affects long term healing and makes work, school and interacting with others difficult. You indicate you are at high risk of trauma, re-victimization and abuse happening again.*

The panel asked the ministry representative at the hearing to read the appellant's reconsideration submission and finds that the reconsideration decision provides a reasonable summary of the content of this submission.

Included with the Request for Reconsideration are a psychiatry consultation report, dated 22 May 2018 and a letter from the appellant's GP dated 20 July 2018. The GP indicates that she supports the appellant's application and that the appellant has recently been diagnosed with chronic PTSD/Borderline Personality Disorder as well as Mixed Anxiety with elements of Generalized Anxiety, Social Anxiety and Panic Attacks in addition to a diagnosis of Major Depression, which is currently stable.

Additional information before the panel on appeal consisted of the following:

### **Notice of Appeal**

In the Notice of Appeal dated 13 August 2018, the following reasons for appeal are provided *I have been told it is in my best interest to be on disability by both my doctor and psychiatrist. Due to my mental health I am unable to work for the foreseeable future.*

### **Appeal Submissions**

The appellant did not attend the hearing.

The ministry relied on the reconsideration decision.

**Admissibility**

The panel finds that the information provided in the appellant's Notice of Appeal consists of argument, which does not require an admissibility determination in accordance with section 22 (4)(b) of the *Employment and Assistance Act*.

## PART F – REASONS FOR PANEL DECISION

The issue in this appeal is whether the ministry reconsideration decision that determined that the appellant did not meet three of the five statutory requirements of Section 2 of the *EAPWDA* for PWD designation is reasonably supported by the evidence or is a reasonable application of the legislation in the circumstances of the appellant. Specifically, the ministry determined that the information provided did not establish that:

- the appellant has a severe mental or physical impairment,;
- the appellant's severe mental or physical impairment, in the opinion of a prescribed professional, directly and significantly restricts her ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and
- as a result of those restrictions, she requires significant help or supervision of another person to perform those activities.

The following section of the *EAPWDA* applies to this appeal:

### 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 following section of the *EAPWDR* applies to this appeal:

**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.

**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).

### **Severity of impairment**

The legislation requires that for PWD designation, the minister must be "satisfied" that the person has a severe mental or physical impairment. The legislation makes it clear that the determination of severity is at the discretion of the minister, considering all the evidence, including that of the appellant. Diagnosis of a serious medical condition or the identification of mental or physical deficits does not in itself determine severity of impairment.

#### Severity of physical impairment

In the reconsideration decision, the ministry determined that a severe impairment of physical functioning had not been established. In making this determination, the ministry noted that the GP has indicated that the appellant does not require aids or prosthesis. The ministry considered the functional skills assessment by the GP noting that the appellant is able to walk 2-4 blocks unaided, climb 5+ steps unaided, lift 5 to 15 lbs. and has no limitation with remaining seated. The ministry argued that the appellant is independently able to manage walking indoors and outdoors, climbing stairs, standing, lifting and carrying and holding. The ministry concluded that the assessments provided by the GP did not establish a severe physical impairment.

The panel finds that the ministry's determination was reasonable. The panel notes that the assessments of the appellant's functional capacity and mobility and physical ability assessments in the MR and AR provide a reasonably clear picture of the appellant's ability to function independently at the mid-high end of the assessment scales without any aids, albeit with flares of back pain that can make it harder for her to walk far distances. However, the panel notes, there is no information provided as to the frequency, duration or severity of back pain 'flares' experienced by the appellant nor what the GP considers to be 'far distances'. As well, the panel notes the absence of an assertion by the appellant herself of a physical basis for her PWD application. The panel finds that the ministry's determination, that a severe physical impairment has not been established, is reasonably supported by the evidence.

#### Severity of mental impairment

In the reconsideration decision, the ministry determined that the information provided does not establish a severe mental impairment. The ministry noted that the GP's assessments do not indicate that the appellant has difficulties with communication and her abilities with speaking, reading, hearing and writing are good. The ministry considered that, in the MR, the GP indicates significant deficits in the areas of emotional disturbance, motivation and impulse control; the panel notes that the GP indicated a significant impact in the area of attention or sustained concentration and not in the area of impulse control as erroneously written by the ministry. The ministry noted that the GP indicated 4 major impacts in these three areas of significant impact and added a major impact in the area of executive functioning, 2 moderate impacts and 2 minor impacts to cognitive and emotional functioning with no impacts in the remaining areas. As well, the ministry considered the GP's assessment of the appellant's social functioning abilities. In this consideration, the ministry took note of the GP's MR assessment of continuous restrictions with social functioning and noted that the GP has indicated in the AR a need for continuous assistance with 2 of the 5 listed areas of social functioning and periodic support/supervision with 2 of 5 areas and

independence with making appropriate social decisions. The ministry also considered the GP's indication of the appellant's very disrupted function in her immediate social networks and marginal functioning in her extended social networks. Ultimately, the ministry concluded that the information provided had not established a severe impairment in mental functioning.

The panel finds that the ministry's determination that a severe mental impairment has not been established was reasonable. The panel notes the presence of a number of diagnoses along with indications of deficits in the GP's assessments and psychiatrist's letter but the accompanying assessments in the MR and AR do not reflect restrictions in the appellant's ability to function effectively or independently. The panel also notes that both of the GP's assessments relating to decision-making indicate that the appellant is independent in these areas. The panel notes that there is some suggestion of restriction in the appellant's social functioning ability but finds that the ministry reasonably concluded that the totality of the information provided is not sufficiently coherent, consistent and detailed to establish a severe mental impairment.

In particular, the panel notes that the GP has assessed deficits in relation to cognitive and emotional function but does not indicate that the appellant's impairment restricts her ability to perform DLA either continuously or periodically for extended periods. The GP commented in the MR that the appellant reported her concentration and cognitive performance are significantly affected "when her mood is low"; however, there was insufficient information to indicate how often an exacerbation of her low mood occurs. As well, the panel notes the sparse commentary accompanying the tick boxes in the GP's assessment, which indicate that the appellant requires some assistance with motivation, but provides no indication as to how often or to what extent assistance is required. The panel further notes that the appellant has emphasized her inability to work consistently as has her GP. However, the panel notes that employability or vocational ability is not a criterion for PWD designation nor is it a DLA set out in the regulation. Given the limited detail provided in the information before the ministry, the panel finds that the ministry's conclusion that the information provided does not establish a severe mental impairment and that this criterion was not met is reasonably supported by the evidence.

At the hearing, the ministry relied on the reconsideration decision and was not able to assist the panel by explaining the process and considerations undertaken in assessing a severe mental impairment with respect to the various sections of the MR and AR and the interaction between these sections.

#### **Direct and significant restrictions in the ability to perform DLA**

The legislation specifies that the minister assess direct and significant restrictions in the ability to perform DLA in consideration of the opinion of a prescribed professional, in this case the GP. This does not mean that other evidence should not be considered, but it is clear that a prescribed professional's evidence is fundamental. At issue in this assessment is the degree of restriction in the appellant's ability to perform the DLA listed in section 2(1)(a) and (b) of the EAPWDR applicable to a person with a severe mental or physical impairment. The panel notes that, according to the legislation, the direct and significant restriction in the ability to perform DLA must be due to a severe mental or physical impairment.

The ministry was not satisfied that the appellant has a severe impairment that, in the opinion of a prescribed professional, directly and significantly restricts her ability to perform DLA. In reaching this conclusion, the ministry noted that the appellant has not been prescribed medication that impacts her ability to perform DLA. The ministry noted that the GP's MR assessment indicates periodic restrictions with mobility outside of the home. The ministry also considered the GP's assessment in the AR that the appellant is not restricted with any DLA except for social function. The ministry argued that while the appellant has some limitations resulting from a lack of motivation, the information provided does not indicate the frequency or duration of these periods, which is needed to determine if they represent a significant restriction to the appellant's overall functioning. The ministry concluded that the assessments provided did not establish that a severe impairment significantly restricts the appellant's DLA continuously or periodically for extended periods.

The panel finds that the ministry's determination that the assessments provided do not establish that a severe impairment significantly restricts the appellant's ability to perform DLA continuously or periodically for extended periods was reasonable. The panel notes that the legislation specifies that direct and significant restrictions to DLA must be in the opinion of a prescribed professional. The panel notes that the GP has indicated that the appellant's impairment does not restrict her ability to perform DLA and has assessed her as being predominantly independent in the DLA set out in the MR and AR. The panel finds that, in relation to the DLA areas where some periodic restriction is assessed, the GP has not provided sufficient information in relation to the nature, degree and duration to establish that there are significant restrictions for extended periods. As well, the panel finds that the only area in which the MR and AR are relatively consistent with respect to the presence of any restriction is social function. Although the appellant is restricted with respect to social functioning, this restriction has been assessed by the GP to be continuous in some aspects and periodic in others, with the overall significance of the restriction remaining



somewhat unclear. The panel concludes that the ministry's determination that the evidence is insufficient to show that the appellant's overall ability to perform her DLA is significantly restricted either continuously or periodically for extended periods is reasonable.

### **Help required**

The legislation requires that, as a result of being directly and significantly restricted in the ability to perform DLA either continuously or periodically for extended periods, a person must also require help to perform those activities. The establishment of direct and significant restrictions under section 2(2)(b)(i) is a precondition of meeting the need for help criterion. Help is defined in subsection (3) as the requirement for an assistive device, significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

In the reconsideration decision, the ministry determined that as it had not been established that the appellant's ability to perform DLA were significantly restricted, it cannot be determined that significant help is required. While the information provided demonstrates that the appellant does receive assistance from friends in relation to motivation, encouragement and reminders to do some activities, such as getting out, paying rent and doing shopping, the panel has concluded that the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established. As such, the panel finds that the ministry reasonably concluded that under section 2(2)(b)(ii) of the EAPWDA it cannot be determined that the appellant requires help to perform DLA.

### **Conclusion**

The panel finds that the ministry's reconsideration decision, determining that the appellant had not met all of the legislated criteria for PWD designation, was a reasonable application of the legislation in the circumstances of the appellant and was reasonably supported by the evidence. The panel confirms the ministry's reconsideration 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

Jennifer Smith

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2018/08/29

PRINT NAME

Tina Ahnert

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018/08/29

PRINT NAME

Sandra Walters

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018/08/29