

PART C – DECISION UNDER APPEAL

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Poverty Reduction (the ministry) dated November 14, 2018, which held that the appellant did not meet 3 of the 5 statutory requirements of section 2 of the *Employment and Assistance for Persons with Disabilities Act* (EAPWDA) for designation as a person with disabilities (PWD). The ministry found that the appellant met the requirements of having reached 18 years of age and of a medical practitioner confirming that the appellant's impairment is likely to continue for at least 2 years.

However, the ministry was not satisfied that:

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

The ministry also determined that the appellant is not in any of the classes of persons set out in section 2.1 of the *Employment and Assistance for Persons with Disabilities Regulation* who may be eligible for PWD designation on alternative grounds.

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

Information before the ministry at reconsideration

- 1) The appellant's PWD application comprised of:
 - A Medical Report (MR) dated July 21, 2018, completed by a psychiatrist who has known the appellant since April 2011, and has seen the appellant between 2 and 10 times in the past 12 months (described by the psychiatrist as several phone sessions as patient moved);
 - An Assessor Report (AR) also dated July 21, 2018, completed by the same psychiatrist; and
 - The appellant's self-report (SR) section of the PWD application, dated June 24, 2018.
- 2) The appellant's Request for Reconsideration, dated November 7, 2018, which included a one-page submission written by the appellant.

Information provided on appeal and admissibility

- 1) The appellant's Notice of Appeal (NOA) dated December 7, 2018, in which the appellant describes her current physical and psychological situation.

In accordance with section 22(4) of the *Employment and Assistance Act* (EAA), the panel may admit oral and written testimony that is in support of the information and records available at the time of reconsideration. The panel admitted the information provided by the appellant in the NOA and at hearing as supporting information which primarily reiterated the information in the appellant's SR and reconsideration submission.

The arguments of both parties are set out in Part F of this decision.

Summary of relevant evidence

Diagnoses and Health History

In the PWD application, the psychiatrist reports:

- Specific diagnosis: Post-traumatic Stress Disorder (PTSD), with an onset date of 2012.
- The appellant's family fled to Canada from another country where their lives were at risk. The appellant spent years being constantly in fear of being deported. More than worried about her own safety, the appellant has been constantly concerned about her child's security and health. The appellant's PTSD is triggered by many things, and most dramatically by one particular incident.
- The appellant's most prominent symptoms interfering with daily functioning are: anxiety, fatigue, insomnia and poor concentration.
- Years of constant fearful hypervigilance, stemming from and exacerbating her PTSD, have been debilitating.

Physical Impairment

- The psychiatrist does not diagnose a physical medical condition.
- The psychiatrist assesses the appellant's physical functional skills as: able to walk 4+ blocks unaided on a flat surface; able to climb 5+ stairs unaided; able to lift 15 to 35 lbs.; and able to remain seated for 1 to 2 hours. No prostheses or aids are required.
- Mobility and physical ability - walking indoors and outdoors, climbing stairs, standing, lifting, and carrying and holding are managed independently.

In the SR and reconsideration submission, the appellant describes having had pneumonia, complicated with a heart attack from which she is still recovering. Her energy levels are no longer the same and when in stressful situations, she feels her arm weaken and her head starts to hurt. She also reports having developed arthritis in the past year.

At the hearing, the appellant stated that due to her physical conditions, including her past heart attack and arthritis, she does not feel strong enough to hold down a hard job, leaving her without stability for her family.

Mental Impairment

In the MR, the psychiatrist reports:

- Significant deficits with 2 of 11 listed areas of cognitive and emotional function – emotional disturbance and attention or sustained concentration.
- No cognitive difficulties with communication – lack of fluency is noted.
- Social functioning is not restricted.

In the AR, the psychiatrist reports:

- Anxiety, dysphoria, fatigue, and poor concentration are the impairments impacting the appellant's ability to manage DLA.
- Poor ability to communicate in the area of speaking related to fluency. Satisfactory ability with reading and writing. Good hearing ability.
- Where asked to assess the impact on daily functioning for listed aspects of cognitive and emotional functioning, the psychiatrist assesses a major impact for emotion (anxiety, depression), a moderate impact for bodily functions (sleep disturbance), and a minimal impact for attention/concentration. No impact is assessed for the remaining 10 listed aspects of functioning.
- The five listed areas of social functioning are managed independently – appropriate social decisions, ability to develop and maintain relationships, interact appropriately with others, ability to deal appropriately with unexpected demands, and ability to secure assistance from others.
- Good functioning with immediate social network. Marginal functioning with extended social networks.

In the SR, the appellant describes the circumstances of her family fleeing to Canada for safety. The culmination of this struggle resulted in a severe trauma syndrome that causes paralyzing anxiety, which is the main reason she has such difficulty getting through an ordinary day. Her employers have noticed that she doesn't work well because she is so stressed, anxious and scared.

In her reconsideration submission, the appellant provides additional detail respecting seeking refuge in Canada and states that the most permanent symptoms interfering with her daily functioning are insomnia, fatigue, and

paralysing anxiety.

In her NOA, the appellant reports that her trauma symptoms are aggravated by her physical medical conditions, resulting in a lack of energy, depression symptoms and anxiety. At the hearing, the appellant reiterated that her physical conditions lead to a lot of stress, making her PTSD worse.

DLA

The psychiatrist reports the following:

- The appellant has not been prescribed any medication and/or treatments that interfere with the ability to perform DLA.
- All DLA (personal self-care, meal preparation, management of medications, basic housework, daily shopping, mobility inside and outside the home, use of transportation, management of finances, and social functioning) are not restricted and are managed independently.

Need for Help

The psychiatrist indicates that the appellant requires assistance for DLA from family and health authority professionals.

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. That is, was the ministry reasonable when determining that the appellant is not a person described in section 2.1 of the EAPWDR and that the requirements of section 2(2) of the EAPWDA were not met because:

- a severe physical or mental impairment was not established;
- 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?

Relevant Legislation

EAPWDA

2 (1) In this section:

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

"**daily living activity**" has the prescribed meaning;

"**prescribed professional**" has the prescribed meaning.

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

- (a) in the opinion of a medical practitioner or nurse practitioner is likely to continue for at least 2 years, and
- (b) in the opinion of a prescribed professional
 - (i) directly and significantly restricts the person's ability to perform daily living activities either
 - (A) continuously, or
 - (B) periodically for extended periods, and
 - (ii) as a result of those restrictions, the person requires help to perform those activities.

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

- (a) a person who has a severe mental impairment includes a person with a mental disorder, and
- (b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires
 - (i) an assistive device,

- (ii) the significant help or supervision of another person, or
- (iii) the services of an assistance animal.

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

EAPWDR

Definitions for Act

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

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

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

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

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

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

(a) authorized under an enactment to 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.

Alternative grounds for designation under section 2 of Act

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

- (a) a person who is enrolled in Plan P (Palliative Care) under the Drug Plans Regulation, B.C. Reg. 73/2015;
- (b) a person who has at any time been determined to be eligible to be the subject of payments made through the Ministry of Children and Family Development's At Home Program;
- (c) a person who has at any time been determined by Community Living British Columbia to be eligible to receive community living support under the Community Living Authority Act;
- (d) a person whose family has at any time been determined by Community Living British Columbia to be eligible to receive community living support under the Community Living Authority Act to assist that family in caring for the person;
- (e) a person who is considered to be disabled under section 42 (2) of the Canada Pension Plan (Canada).

Panel Decision

In the absence of any evidence or argument respecting eligibility for PWD designation under section 2.1 of the EAPWDR, the panel finds that the ministry reasonably determined that it has not been established that the appellant falls within the prescribed classes of persons under that section. The panel's discussion below is limited to eligibility for PWD designation under section 2 of the EAPWDA and section 2 of the EAPWDR.

Physical Impairment

The appellant's position is that she is not strong due to medical conditions including heart disease and arthritis. At the hearing, the appellant stated that as the most impactful condition is trauma, the psychiatrist doesn't see her other problems.

The ministry's position is that a severe physical impairment is not established based on the available information. The ministry finds the appellant's information compelling but notes that the medical conditions of arthritis and heart attack have not been confirmed by a physician. The ministry acknowledges that the appellant may have some limitations to her physical functioning due to the fatigue she experiences, but concludes that the information provided by the psychiatrist does not establish the presence of a severe physical impairment.

The panel acknowledges the appellant's self-reporting of medical conditions that may impact her functioning.

However, the psychiatrist does not diagnose any physical medical conditions and assesses the appellant as independently managing all listed aspects of mobility and physical ability, with only minimal to moderate limitations for lifting and remaining seated. No additional narrative is provided by the psychiatrist to explain the cause of these limitations. Additionally, the panel notes that the appellant's own evidence did not identify limitations with mobility. For these reasons, the panel concludes that the ministry is reasonable in determining that the information does not establish a severe physical impairment.

Mental Impairment

The appellant's position is that her trauma, which is made worse by her physical medical conditions, results in insomnia, fatigue, and paralysing anxiety, which interfere with her daily functioning. Altogether, her medical conditions make her not strong enough to have a job that gives her family stability.

The ministry's position is that while the appellant experiences deficits to cognitive and emotional functioning as a result of PTSD, the information provided does not establish a severe impairment of mental functioning. Noting that the psychiatrist describes anxiety and depression as having a major impact on daily functioning, he also indicates that no assistance is required to complete any DLA, even those that would typically be difficult for someone who suffers from significant anxiety and depression. The ministry finds this discrepancy makes it difficult to determine the appellant's overall level of functioning. Acknowledging that English is the appellant's second language, making communication more difficult, the ministry concludes that this in itself does not establish a severe impairment. The ministry also notes that no assistance is required for social functioning or decision-making.

The panel notes that while the appellant has provided information respecting the impact of her PTSD on her ability to work, the legislated requirements for PWD designation do not specifically address the ability to function in a work environment. Rather, the requirements relate to the ability to manage specific DLA. As the ministry notes, the psychiatrist indicates that the appellant is independently able to manage all listed tasks of all the prescribed DLA, including the two DLA that relate only to mental impairment – the ability to make decisions about personal activities, care or finances and the ability to relate to, communicate or interact with others effectively. There are no reported difficulties with decision-making and while there are some communication difficulties associated with fluency issues, no difficulties relating to mental impairment are identified. Functioning with extended social networks is marginal, rather than good, but that alone does not establish a severe mental impairment. For these reasons, the panel finds that the ministry was reasonable in concluding that a severe mental impairment was not established.

Restrictions in the ability to perform DLA

Section 2(2)(b)(i) of the EAPWDA requires that the minister be satisfied that in the opinion of a prescribed professional, a severe mental or physical impairment directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods. While other evidence may be considered for clarification or support, the ministry's determination as to whether or not it is satisfied, is dependent upon the evidence from prescribed professionals. The term "directly" means that there must be a causal link between the severe impairment and the restriction. The direct restriction must also be significant. Finally, there is a component related to time or duration – the direct and significant restriction may be either continuous or periodic. If periodic, it must be for extended periods. Inherently, any analysis of periodicity must also include consideration of the frequency. All other things being equal, a restriction that only arises once a year is less likely to be significant than

one that occurs several times a week. Accordingly, in circumstances where the evidence indicates that a restriction arises periodically, it is appropriate for the ministry to require evidence of the duration and frequency of the restriction in order to be “satisfied” that this legislative criterion is met.

DLA are defined in section 2(1) of the EAPWDR and are listed in both the MR and the AR sections of the PWD application with the opportunity for the prescribed professional to check marked boxes and provide additional narrative. DLA, as defined in the legislation, do not include the ability to work.

The appellant’s position is that she is impacted on a daily basis by the combination of her physical and mental health conditions.

The ministry argues that the psychiatrist’s assessment of no restrictions in the ability to manage DLA, all of which are managed independently, does not establish a direct and significant restriction in the ability to perform DLA that is continuous or periodic for extended periods.

The legislation expressly requires the opinion of a prescribed professional when assessing an applicant’s ability to perform DLA. As the appellant is reported as independently managing all DLA tasks, the ministry is reasonable in concluding that there is not enough evidence to establish that in the opinion of a prescribed professional the appellant’s impairment significantly restricts her ability to perform DLA either continuously or periodically for extended periods.

Help to perform DLA

Section 2(2)(b)(ii) of the EAPWDA requires that, *as a result of direct and significant restrictions in the ability to perform DLA*, a person requires help to perform those activities. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform DLA.

The 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 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

Jane Nielsen

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2019/01/02

PRINT NAME

Joan Cotie

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/01/02

PRINT NAME

Glenn Prior

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/01/02