

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 January 29, 2019, which held that the appellant did not meet 4 of the 5 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 requirement of having reached 18 years of age. However, the ministry was not satisfied that:

- a medical or nurse practitioner has confirmed that the appellant has an impairment that is likely to continue for at least 2 years;
- 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.

Additionally, the ministry determined that it has not been demonstrated that the appellant is one of the prescribed classes of persons who may be eligible for PWD designation on alternative grounds set out in section 2.1 of the EAPWDR.

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

Interpretation Act, section 29

PART E – SUMMARY OF FACTS

The appellant did not attend the hearing. After confirming delivery of the Notice of Hearing to the appellant, the panel proceeded with the hearing in the absence of the appellant in accordance with section 86(b) of the Employment and Assistance Regulation.

Information before the ministry at reconsideration

- The appellant's PWD application comprised of:
 - A Medical Report (MR) dated August 30, 2018, completed by a general practitioner (GP) who has seen the appellant 2-10 times in the past 12 months;
 - An Assessor Report (AR) dated September 17, 2018, also completed by the GP; and
 - The appellant's self-report (SR) section of the PWD application, dated July 2, 2018.
- The appellant's Request for Reconsideration form, date stamped as received by the ministry December 31, 2018. The appellant requests an extension and apologizes for his lateness in returning the form which was due by December 28, 2018, in accordance with legislated timeframes for requesting reconsideration.

Information and documentation provided on appeal and admissibility

- The appellant's Notice of Appeal (NOA), dated February 8, 2019, to which the appellant attached:
 - a 2-page February 6, 2019 letter from a naturopathic physician; and,
 - March and April 2018 lab reports.
- At the hearing, the ministry reviewed the reconsideration decision but did not provide additional evidence.

Also in the appeal record was a 1-page Certificate of Health Status dated December 6, 2018, completed by the GP who indicates that this "note" is in support of the appellant's reconsideration application. Noting in particular the ministry's rejection of "severity of impairment," the GP indicates that she is providing further clarification based on her ongoing observation of the appellant's progress. It is unclear to the panel when this note was received by the ministry as it does not appear together in the appeal record with the appellant's Request for Reconsideration, is not date stamped and is not mentioned in the reconsideration decision. No further clarification as to when the ministry received the note was provided at the hearing.

In accordance with section 22(4) of the *Employment and Assistance Act* (EAA), the panel may admit as evidence only (a) information and records that were before the minister when the decision being appealed was made, and (b) oral or written testimony that is in support of the information and records available at the time of reconsideration.

The ministry did not object to the admission of the appellant's appeal submission, noting that the new information from the naturopath did not confirm that the appellant's impairment would continue for 2 years. The panel determined that the information in the NOA and its attachments was admissible as it supported the information respecting the medical condition diagnosed in the MR – "Chronic Lyme-like." While uncertain as to when the GP's December 6, 2018 note was provided to the ministry, the panel finds that the information was

either before the ministry at reconsideration and therefore admissible on that basis or is admissible as being written testimony in support of the information respecting the appellant's functioning that was available at reconsideration.

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

Summary of relevant evidence

Diagnoses and Health History

The GP diagnoses "Chronic Lyme-like" with an onset date of February 2017.

- Severe fatigue. Widespread pain. Cognitive slowing.
- Condition is causing significant impairment but fluctuates from day-to-day and week-to-week.

In his SR, the appellant describes having severe weakness, anxiety and panic attacks, pain, IBS, easy fatigue and exhaustion, most of which he believes is caused by Lyme disease. He reports that he is being treated for Lyme disease but that it may take a while before he is feeling well enough to function and work. Pain, fatigue and anxiety sometimes are so bad he feels like he is barely holding on to life for many hours.

In his NOA, the appellant states that Lyme disease has affected him "physically and psychologically enough" that he has been unable to work and do very little besides barely taking care of himself. Treatment appears to be working. He is hoping for support until he is well.

Degree and Course of Impairment

When asked to indicate "Yes" or "No" in response to "Is the impairment likely to continue for two years or more from today?" the GP ticked the "No" box, commenting "Uncertain. Possibly over 1 year." The GP also comments "Symptoms are likely to show improvement" and "Exact time course uncertain."

Physical Impairment

The GP reports:

- Can walk 4+ blocks unaided on a flat surface.
- Can climb 5+ steps unaided.
- Is limited to lifting 5 to 15 lbs.
- No limitation for remaining seated.
- Walking indoors and outdoors, climbing stairs, standing, lifting, and carrying and holding are managed independently with the GP explaining "Fluctuates/ intermittently reduced capacity related to fatigue."

In the SR, the appellant reports that he often has only a few hours each day where he has enough strength, energy and mental clarity to function or do anything. He tires easily and it takes a long time to recover. Pain and inflammation in his joints make it hard to walk sometimes.

In the note, the GP states that "It is her opinion that due to [the appellant's] fatigue and pain, he has restricted hours of normal function outside of the house before he requires rest. This fluctuates depending on the day, but is typically in the order of 4-7 hours. That functional time is inclusive of transport, activities and essential tasks."

The naturopath describes the appellant's functioning in January 2018, when the appellant was first seen by the naturopath. At that time the appellant was unable to efficiently get up in the morning, shower or dress himself and contacted the naturopath daily about panic attacks, severe pain and extreme exhaustion. "Although he was just capable of living on his own he required full financial support from his mother and was incapable of any work whatsoever." Over the course of the year, many of the appellant's symptoms have improved and he is more capable of looking after himself. He has gained a small amount of weight and has a broader diet without severe digestive symptoms. His energy has increased to the point he is able to help his mother with small aspects of her care. "Without any doubt at all I can say [the appellant] has been disabled for the year I have been seeing him. He is still unable to work with any consistency despite some 'good' days but he is desperately hoping that he will be able to return to work in the next 6-12 months."

Mental Impairment

The GP reports:

- Significant deficits with 5 of 11 listed areas of cognitive and emotional function – executive, memory, emotional disturbance, motivation, and attention or sustained concentration.
- In the MR, the appellant is assessed as having no cognitive, motor, sensory or other difficulties with communication. In the AR, speaking and hearing are reported to be good with reading and writing assessed as satisfactory. "Difficulty retaining information. Limited by concentration."
- A major impact on daily cognitive and emotional functioning is reported for consciousness, attention/concentration, executive, and memory. A moderate impact is reported for bodily functions and emotion. A minimal impact is reported for insight and judgement and motivation. No impact is reported for the remaining six listed areas.
- In the MR, social functioning is reported as not being restricted.
- In the AR, the appellant is reported as independently managing 4 of 5 listed areas of social functioning - appropriate social decisions, ability to develop and maintain relationships, interact appropriately with others, and ability to secure assistance from others. The remaining area – ability to deal appropriately with unexpected demands – requires periodic support/supervision. The appellant has good functioning with immediate and extended social networks. Where asked to describe support/supervision required which would help maintain the applicant in the community and to identify any safety issues, the GP did not respond.

In his SR, the appellant reports that anxiety can make it hard to do very much.

DLA

The GP reports:

- The appellant has not been prescribed medication and/or treatments that interfere with the ability to perform DLA.
- In the MR, use of transportation is reported as being restricted, with the GP commenting "Can't drive when feeling unwell." The appellant is not restricted with all other listed DLA, with the GP commenting "No specific assistance required."
- In the AR, all listed aspects of mobility and physical ability (relates to DLA move about indoors and outdoors) are reported to be managed independently, with the GP commenting

"Fluctuates/intermittently reduced capacity related to fatigue." All listed tasks of personal care, basic housekeeping, shopping, meals, pay rent and bills, medications and transportation are managed independently. As noted above, for social functioning, one area requires periodic support/supervision, while the other four areas are managed independently.

Need for Help

In the MR, the GP writes "No specific assistance required" where asked to describe the help needed with DLA. In the AR, the GP did not provide a response to any of the questions in section D "Assistance Provided for Applicant."

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 requirements of 2(2) of the EAPWDA were not met because:

- a medical or nurse practitioner has not confirmed that the appellant's impairment is likely to continue for at least two years;
- 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?

Additionally, was the ministry reasonable when determining that the appellant did not meet the alternative eligibility criteria of section 2.1 of the EAPWDR?

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).

Interpretation Act

Expressions defined

29 "medical practitioner" means a registrant of the College of Physicians and Surgeons of British Columbia entitled under the *Health Professions Act* to practice medicine and to use the title "medical practitioner".

Panel Decision

Alternative Grounds for PWD Designation – section 2.1 of the EAPWDR

Finding that no evidence or argument has been provided to suggest or establish that the appellant falls within one of the classes of persons described in paragraphs (a) through (e) of section 2.1 of the EAPWDR, the panel concludes that the ministry reasonably determined that the appellant is not eligible for PWD designation under this section.

Eligibility for PWD Designation – section 2 of the EAPWDA

Duration of Impairment

The legislation requires that in the opinion of a medical or nurse practitioner, a severe mental or physical impairment is likely to continue for at least 2 years. In this case, the GP, a medical practitioner ticked the “No” box when asked if the impairment is likely to continue for two years or more. Additionally, respecting duration the GP comments “Uncertain. Possibly over 1 year,” “Symptoms are likely to show improvement” and “Exact time course uncertain.” While the appellant self-reports and provides information from his naturopath confirming impairment for the past year, the legislation requires a future or prospective prognosis – that is, a medical or nurse practitioner must confirm that going forward the impairment “is likely to continue for at least 2 years.” Based on the GP’s information, the panel concludes that the ministry reasonably determined that his legislative criterion was not met.

Severe Physical or Mental Impairment

The legislation provides that the determination of severity of impairment is at the discretion of the minister, taking into account all of the evidence including that of the appellant. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a prescribed professional respecting the nature of the impairment and its impact on daily functioning. While the legislation does not define “impairment”, the MR and AR define “impairment” as a “loss or abnormality of psychological, anatomical or physiological structure or functioning causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration.” While this is not a legislative definition, and is therefore not binding on the panel, in the panel’s opinion, it reflects the legislative intent and provides an appropriate analytical framework for assessing the degree of impairment resulting from a medical condition.

When considering the evidence provided respecting the severity of impairment, the ministry must exercise its decision-making discretion reasonably by weighing and assessing all of the relevant evidence and cannot simply defer to the opinion of a prescribed professional as that would be an improper fettering of its decision-making authority.

In his written submissions, the appellant argues that as a result of Lyme disease he experiences symptoms including severe pain and fatigue that impair his physical and cognitive functioning. He often has only a few hours each day where he has enough strength, energy and mental clarity to function or do anything and although he is improving as a result of treatment, he is barely able to take care of himself, is not able to work, and needs support until he is well.

The ministry’s position is that while the information establishes that the appellant experiences some degree of restriction due his impairments, the combination of functional skills and mobility and physical abilities does not establish severe impairment. Commenting that the GP has provided little narrative throughout the PWD application, the ministry concludes that the GP’s six words “severe fatigue, widespread pain and cognitive slowing” do not establish a severe impairment. The ministry notes that despite the fatigue and pain experienced by the appellant, no significant restrictions with functional skills are identified by the GP and no assistive aids are required. Additionally, with the exception of being unable to drive when feeling unwell, with no description of how often this occurs, the appellant is reported as not restricted with DLA. The ministry also notes that the GP reports that symptoms are likely to show improvement over time. Despite stating that the appellant’s condition

causes significant impairment, fluctuating from day to day and week to week, as the GP indicates independence with DLA, the minister concludes that the appellant is not significantly impaired a majority of the time.

Respecting mental impairment, the ministry comments that although reduced cognition is reported, the GP did not diagnose a mental health condition. Additionally, despite the reported impacts on cognitive and emotional functioning, the GP does not indicate any impacts to DLA and social functioning with both immediate and extended social networks is good. The ministry also notes that the PWD application is not intended to assess employability or vocational abilities and that a medical barrier to engaging in paid employment is not a legislated criteria for severity.

The panel concludes that the ministry has reasonably determined that the information does not establish either a severe physical or a severe mental impairment. In reaching this conclusion, the panel acknowledges the information respecting the appellant's inability to work but notes that the legislation does not specifically address the ability to engage in employment, which is typically more demanding in terms of duration and/or sustained effort than managing routine activities like the DLA defined in the legislation.

Respecting physical impairment, the ministry was reasonable in concluding that the functional skills assessed by the GP in the MR, which are either at the mid (lifting 5 to 15 lbs.) or highest level of functioning (walking, climbing stairs and remaining seated), do not reflect a severe degree of impairment. In the AR, the GP does identify some limitations, noting that the appellant's mobility and physical ability fluctuates intermittently, and in the note, the GP further explains that typically the appellant has normal daily functioning outside of the house for 4-7 hours. As the GP does not describe limitations to functioning within the home, except the limit with lifting, and assesses the ability to function outside the home for between 4 and 7 hours daily, the panel finds that this information does not reflect severe impairment of functioning. Furthermore, the GP indicates that the appellant's symptoms are likely to show improvement. This is confirmed by the appellant in his NOA and by the naturopath who reports that many of the appellant's symptoms have improved making him "more capable of looking after himself", whereas before "he was just capable of living on his own."

Respecting mental impairment, the only impact on the ability to manage DLA identified by the GP is the need for periodic support/supervision with 1 of 5 aspects of social functioning. The appellant independently manages all other listed cognitive and decision-making tasks, including making appropriate shopping choices and managing medications and finances, and has good social functioning with immediate and extended social networks. Based on this information, the panel concludes that although deficits and restrictions with cognitive and emotional functioning are reported in a number of areas, the degree with which the appellant independently manages his DLA, and in particular, DLA tasks related to cognitive, emotional and social functioning, the ministry has reasonably concluded that the evidence does not establish a severe mental impairment.

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 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 must 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.

While the appellant does not address his ability to perform specific DLA, in his SR he reported that he often has only a few hours each day where he has enough strength, energy and mental clarity to function or do anything. On appeal, the appellant reports that although he is improving, he remains unable to work and is in need of support.

The ministry’s position is that although the appellant experiences certain limitations as a result of his medical conditions, the information provided does not establish that an impairment *significantly restricts DLA continuously or periodically for extended periods*. The ministry points to the GP’s assessment in the MR of no restrictions for any DLA except one – transportation – and that there is no explanation as to how often the appellant is unable to drive due to feeling unwell. Furthermore, the GP reports “no specific assistance required.” The ministry notes that mobility and physical abilities fluctuate intermittently and reduced capacity due to fatigue, but that the appellant remains independent. Finally, the ministry notes that the GP does not identify impacts on DLA arising from the identified major impacts on daily cognitive and emotional functioning and that social functioning is minimally impacted.

The panel notes that section 2(b)(i) of the EAPWDA requires that a person’s severe physical or mental impairment directly and significantly restricts the person’s ability to perform the DLA defined in the legislation. While, as previously noted, there is potentially some crossover between restrictions impacting the ability to work and those impacting the ability to perform DLA, only restrictions on the ability to perform the DLA set out in the legislation are considered under section 2(b)(i) of the EAPWDA. And, as noted above, the restriction is to be in the opinion of a prescribed professional, which in this case is the GP. The panel notes that naturopathic physicians are not “medical practitioners” as defined in the *Interpretation Act* and are not included in the definition of “prescribed professional” in section 2(2)(a) of the EAPWDR.

In the PWD application, the GP assesses the appellant as independently managing all listed tasks relating to the DLA move about indoors and outdoors, personal care, basic housekeeping, meals, pay rent and bills, medications, and transportation. Most areas of social functioning are also managed independently. However, the GP also reports that the appellant’s medical condition is causing significant impairment and that despite being independent, there are intermittent fluctuations in the appellant’s mobility and physical abilities. The GP also reports that the appellant is unable to drive when feeling unwell and requires periodic support/supervision from another person when faced with unexpected demands but does not explain how often these circumstances arise. Clarification as to the appellant’s functioning is provided in the subsequent December 6, 2018 note, with the GP explaining that fatigue and pain typically limit the appellant to 4-7 hours of daily “normal function outside of the house.” Based on the GP’s information, the panel finds that the appellant can independently manage DLA within the home with minimal or no restriction and typically has 4-7 hours of good functioning per day outside the home within which to manage DLA outside the home.

Accordingly, the panel concludes that the ministry was reasonable to determine that, while the appellant experiences some restrictions to DLA as a result of his medical condition, the information from a prescribed

professional does not establish that impairment significantly restricts the 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 daily living “activities” is a precondition of requiring “help to perform those activities.” Having found that the ministry was reasonable to conclude that this precondition was not met, the panel also finds that the ministry reasonably concluded that it cannot be determined that the appellant requires help to perform “those activities” as a result of direct and significant restrictions with daily living “activities” 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 had not met all requirements set out under section 2(2) of the EAPWDA for designation as a PWD, was reasonably supported by the evidence. The ministry’s decision is confirmed and 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)

2019/03/07

PRINT NAME

Pat Munroe

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/03/07

PRINT NAME

Margarita Papenbrock

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/03/11