

| |
|---------------------------------------|
| |
| 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 March 7, 2019, 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 having a medical practitioner confirm 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 August 20, 2018, completed by the appellant's general practitioner (GP) who has known the appellant since 2009 and has seen the appellant once in the past 12 months;
 - An Assessor Report (AR) also dated August 20, 2018, completed by the same GP; and
 - The appellant's self-report (SR) section of the PWD application, dated August 19, 2018.
- 2) The appellant's Request for Reconsideration, with the following attachments:
 - i) PHQ-Depression and GAD-7 Anxiety Questionnaires completed by the appellant on August 20, 2018;
 - ii) Undated 2-page handwritten letter from the appellant; and,
 - iii) The Medical and Assessor Report sections of a second PWD application with a heading identifying the document as a Self-Report (SR2). At the hearing the appellant confirmed that this document was completed by an advocate based on the appellant's information.

Information provided on appeal

The appellant's Notice of Appeal (NOA) dated March 11, 2019.

At the hearing, the appellant confirmed the information she had provided in her initial and reconsideration submissions and also provided argument. The ministry explained the reconsideration decision but did not provide additional evidence.

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

Summary of relevant evidence

Diagnoses and Health History

In the MR, the GP diagnoses:

- Chronic pain
- Thoracic outlet syndrome
- Anxiety
- Depression
- Mechanical low back pain (? Sciatica)

The GP notes two motor vehicle accidents (MVA), with ongoing chronic pain since the first MVA in 2009. Current issues are chronic pain at left shoulder, low back, left upper limb, buttocks and right thigh. Unable to tolerate antidepressants and most prescription medications.

Physical Impairment

The GP reports:

- How far the appellant can walk is unknown.
- Able to climb 5+ stairs unaided.
- Able to lift 5 - 15 lbs.
- Can remain seated for less than 1 hour.
- No prostheses or aids are required.
- Walking indoors and outdoors, climbing stairs, standing, lifting, and carrying and holding are managed independently. None of the activities are identified as taking significantly longer than typical.

In the SR, the appellant describes both of her MVAs and reports that she hurts 80% of the day and night. She describes pain in her left and right arms, numbness in her left arm and fingers, and reduced range of motion of her left arm. She also reports reinjuring her right ankle, sciatic nerve damage causing pain in her buttocks and down her legs, and that she has a hard time standing, sitting and laying down, and with mobility. Sometimes her pain gets better when walking. When she slows down, the pain gets worse and she gets stiff. She had blood ulcers removed from her left leg and had to get polyps removed from her feet. She cannot do her job because of physical and mental pain. She has had an MRI and was seen by specialists and has an upcoming appointment with another specialist.

In her reconsideration letter, the appellant also reports that she has a hard time climbing stairs. In SR2, the appellant's physical functioning is reported as being restricted to 1 to 2 blocks for walking, 2 to 5 steps using a railing, lifting under 5 lbs., and remaining seated for less than 1 hour. Except walking indoors, for which the appellant holds on to furniture, all aspects of physical ability and mobility require continuous assistance from another person due to pain.

In her NOA, the appellant writes that she cannot do her job or hold a job because of pain, mobility, stress, and reliability. At the hearing, the appellant described having constant arm and leg pain that makes it a struggle to do chores around the house and makes her unable to work. She has been experiencing new medical problems, with everything going downhill and is awaiting further testing and appointments with specialists.

Mental Impairment

The GP reports:

- A significant deficit in 1 of 11 listed areas of cognitive and emotional function – emotional disturbance. A moderate impact on daily functioning for attention/concentration, executive, and memory, with a minimal impact for emotion, impulse control, insight and judgement, and motivation. The remaining 7 listed aspects of cognitive and emotional functioning are not impacted. No additional commentary is provided.
- No difficulties with communication.
- All listed aspects of social functioning are managed independently. Good functioning with immediate and extended social networks.

In the SR, the appellant writes that she has very bad depression.

In the Depression and Anxiety Questionnaires, the appellant reports impacts for most listed areas of function as

occurring several days, more than half the days or nearly every day in the last 2 weeks. In SR2, significant deficits with consciousness, memory, emotional disturbance, motivation and motor activity are reported with either a major or moderate impact on daily functioning reported for all but 2 of 14 listed areas of cognitive and emotional functioning. Sensory and cognitive problems are reported for communication, with speaking, reading and writing abilities reported as poor.

At the hearing, the appellant stated that her depression is so bad that she doesn't let anyone see her cry.

DLA

The GP reports the following:

- The appellant has not been prescribed any medication and/or treatments that interfere with the ability to perform DLA.
- Independent with "ADLs" when asked "What are the applicant's mental or physical impairments that impact his/her ability to manage Daily Living activities?"
- All listed aspects of mobility and physical ability (relates to the DLA move about indoors and outdoors), personal care, basic housekeeping, shopping, meals, pay rent and bills, medications, transportation, and social functioning are managed independently.

In her reconsideration letter, the appellant writes that due to physical and mental pain she struggles with daily living. She is unable to do activities that normal people can do. She is not reliable for work. "Household duties I do when capable." In SR2, the vast majority of listed tasks of all DLA are reported as requiring continuous assistance/support from another or unable – only toileting, reading prices and labels, safely storing food, using transit schedules/arranging for transportation, and interacting appropriately with others are managed independently.

At the hearing, the appellant stated that she does household chores when she is able and that it is always a struggle.

Need for Help

The GP responds "N/A" when asked to describe equipment currently used or required by the appellant. The GP also indicates that help required for DLA is provided by family.

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

Eligibility under section 2.1 of the EAPWDR

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.

Eligibility under section 2 of the EAPWDA

Physical and Mental Impairment

The appellant is diagnosed by a medical practitioner, the GP, with chronic pain, thoracic outlet syndrome, anxiety, depression, and mechanical low back pain [which the GP queries may be sciatica].

The appellant argues that the fact that she is unable to work should demonstrate that she is disabled. Additionally, as her doctor has said that he cannot provide an assessment because he doesn't see the appellant in her home, the ministry should rely on the other information provided. She is in constant physical and mental pain

and needs help.

The ministry's position is that while the appellant experiences some functional limitations, the evidence provided does not sufficiently describe or portray a severe impairment. Noting that the legislation provides that the determination of severity is at the discretion of the minister taking into account all of the information provided, the ministry stated that determining severity of impairment requires weighing the evidence against the nature of the impairment and its reported functional skill limitations. The ministry also states that the ability to engage in paid employment is not a legislated criterion for severity. At the hearing, the ministry explained that while the information provided by the appellant and her advocate can be considered, it cannot be substituted for the GP's information when it is contradictory.

Respecting physical impairment, the ministry notes that the appellant's walking capabilities are "unknown" to the GP, no assistive devices are required, and that the appellant is capable of lifting 5-15 lbs. which the ministry argues does not reflect severe impairment. The ministry also notes that the GP assesses the appellant as independently managing all DLA and that SR2, which is not signed by a medical practitioner and was presumably completed by the appellant, is drastically different than the MR and AR, and that the information therein cannot be confirmed. Additionally, respecting mental impairment, the ministry notes the GP's assessment of no major impacts on cognitive and emotional daily functioning.

The panel concludes that the ministry was reasonable when determining that the information does not establish a severe impairment. In reaching this conclusion, the panel notes that the legislation does not address an applicant's ability to work which is typically more demanding in terms of task frequency, duration and/or sustained effort than managing the DLA defined in the legislation.

The panel finds that the information respecting physical functional skills, including the functional skills assessment in SR2, indicates that although there are limitations, the appellant independently manages mobilizing and lifting. The appellant reports that the limitations are more significant than those identified by the GP. Respecting mental impairment, the GP reports that emotion has a minimal impact on daily functioning and that there are no major impacts on daily functioning in any of the listed aspects of cognitive and emotional function. The appellant reports that her depression is very bad and provides her Depression and Anxiety Questionnaires in support of her position. While the appellant's evidence must be considered when assessing severity of impairment, the legislation is clear that the fundamental basis for the analysis is the evidence from prescribed professionals, in this case, the GP. While acknowledging that the appellant experiences limitations to both physical and mental functioning, given that the GP does not identify any restrictions in the ability to perform DLA arising from the appellant's physical or mental impairments, the panel concludes that the ministry's determination that a severe physical or mental impairment has not been established on the evidence is reasonable.

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.

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 does her chores around the house when she is able but it is always a struggle and that her GP does not know she struggles because he does not see her in her home.

The ministry notes that the legislation requires that restrictions with DLA be both significant and either continuous or periodic for extended periods and that this assessment be in the opinion of a prescribed professional. The ministry argues that as the GP writes and indicates that the appellant is independent in all aspects of her DLA, the legislated requirements are not met.

The panel notes that the legislation expressly requires the opinion of a prescribed professional when assessing an applicant's ability to perform DLA. Accordingly, the ministry has reasonably given greater weight to the GP's assessment of DLA than the appellant's self-reported information. The evidence of the GP is that the appellant manages all listed tasks within all prescribed DLA without any assistance from another person, the use of an assistive device, and without taking significantly longer than typical. The GP also comments that the appellant is independent with "ADLs." Based on this information, the panel concludes that the ministry is reasonable in concluding that the evidence does not 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)

2019/04/17

PRINT NAME

Joan Cotie

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/04/17

PRINT NAME

Keith Lacroix

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/04/17