

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 22 March 2019 that denied the appellant designation as a person with disabilities (PWD). The ministry determined that the appellant did not meet the legislated criteria for PWD designation as set out in section 2 of the *Employment and Assistance for Persons with Disabilities Act*. Specifically, the ministry determined that the information provided did not establish that the appellant has a severe mental or physical impairment that in the opinion of a prescribed professional

- (i) directly and significantly restricts her ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and,
- (ii) as a result of those restrictions, she requires help to perform those activities.

The ministry determined that the appellant satisfied the section 2 criterion of having reached 18 years of age. The ministry also found that she met the criterion set out in section 2(2)(a) of the *Act*, that her impairment in the opinion of a medical practitioner is likely to continue for at least 2 years.

The ministry did not address whether the appellant is in a prescribed class of persons eligible for PWD designation, as provided in section 2 of the *Act* and as listed in section 2.1 of the *Employment and Assistance for Persons with Disabilities Regulation*.

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

The evidence before the ministry at reconsideration consisted of the following:

1. The appellant's PWD Designation Application dated 22 January 2019. The Application contained:
 - A Self Report (SR).
 - A Medical Report (MR) dated 19 January 2019, completed by a general practitioner (GP) who has known the appellant for 25 years and indicates that he has seen her 2-10 times in the past year.
 - An Assessor Report (AR) dated 22 January 2019, completed by the same GP.
2. The appellant's Request for Reconsideration dated 02 March 2019.

In the MR, the specialist provides the following diagnoses related to the appellant's impairment: Neuroendocrine tumor (onset not given) and VHD [(Valvular heart disease] (onset not given).

The panel will first summarize the evidence from the MR and the AR as these relate to the PWD criteria at issue in this appeal.

Severity/health history

Physical impairment

MR:

Under Health History, the GP writes:

"She gets short of breath very easily."

Regarding functional skills, the GP reports that that the appellant is able to walk 2 to 4 blocks unaided on a flat surface (noting "with block"), climb 5+ steps unaided (adding "has to rest"), lift 5 to 15 lbs., and can remain seated for 1 to 2 hours.

The GP indicates that the appellant has not been prescribed any medication and/or treatments that interfere with her ability to perform DLA.

AR:

Under Mobility and Physical Ability, the GP provides no assessments as to the assistance required by the appellant for walking indoors or outdoors, climbing stairs, standing, lifting or carrying and holding.

Mental impairment

MR:

The GP indicates that the appellant has no difficulties with communication.

The GP provides no response to the question as to whether the appellant has a significant deficit with cognitive and emotional function, nor does he indicate any deficit in any of the listed areas.

AR:

The GP provides no information as to the appellant's level of ability for speaking, reading, writing or hearing.

The GP indicates that the appellant's impairment has no impact on daily cognitive or emotional functioning in the 14 listed areas.

Ability to perform DLA

MR:

The GP indicates that the appellant's impairment directly restricts her ability to perform DLA. The GP indicates that the appellant's ability to perform the following DLA is restricted: daily shopping, use of transportation, management of finances, and social functioning; he does not indicate whether these restrictions are continuous or periodic.

The GP indicates that the appellant's ability to perform the following DLA is not restricted: personal self-care, meal preparation, management of medications, basic housework, mobility inside the home, and mobility outside the home.

AR:

The GP provides the following assessments of the assistance the appellant requires in performing DLA (the GP's comments in parenthesis):

- Personal care – takes significantly longer than typical for bathing (Takes double the usual time); independent for all other aspects: dressing, grooming, toileting, feeding self, regulating diet, transfers in/out of bed, and transfers on/off chair.
- Basic housekeeping – takes significantly longer than typical for laundry and for basic housekeeping (Difficulty going up stairs).
- Shopping – takes significantly longer than typical for going to and from stores and for carrying purchases home (Needs frequent rest stops); independent for reading prices and labels, making appropriate choices, and paying for purchases.
- Meals – independent for all aspects: meal planning, food preparation, cooking, and safe storage of food.
- Pay rent and bills – independent for all aspects: banking, budgeting, and paying rent and bills.
- Medications – independent for all aspects: filling/refilling prescriptions, taking as directed, and safe handling and storage
- Transportation – independent for all aspects: getting in and out of a vehicle, using public transit and using transit schedules.

As to social functioning, the GP assesses the appellant as independent in all listed areas: making appropriate social decisions, ability to develop and maintain relationships, interacting appropriately with others, ability to deal appropriately with unexpected demands, and ability to secure assistance from others.

The GP assesses how the appellant's impairment impacts her relationships with her immediate social network as good functioning, and with her extended social networks as marginal functioning.

Help provided/required

MR:

The GP indicates that the appellant does not require any prostheses or aids to compensate for her impairment.

AR:

Regarding the use of assistive devices, the GP indicates that the appellant requires the use of "other," specifically "extra time."

The GP indicates that the appellant does not have an assistance animal.

The GP does not provide any information as to assistance provided by other people.

Self Report

In her self-report, the appellant describes her disability by writing:

"I had open heart surgery for a mechanical valve and ASD repair and a dual chamber pacemaker implant. I am waiting to have surgery on my stomach for tumours. They are going to try and take them out. And I have sleep apnea."

In describing how her disability affects her life, the appellant writes that she cannot walk more than half a block and is always out of breath. She lives where there are three sets of stairs. She can do one set, then she has to stop and wait a little bit, then do the next and wait, then do the last set.

Request for Reconsideration

In requesting a reconsideration of the ministry's decision, the appellant writes that she can walk only a half a block and she needs to stop for 15 minutes: if she tries to walk more than that she will lose her balance and fall. She can do five or less stairs and she then has to stop and sit down because she has a hard time breathing.

The appellant explains that she can sit only for an hour or less at a time, because if she sits too long she can get blood clots in her legs. She has blood clots in her right leg and in her left arm. As a result she has very little use of her left arm and hand. She states that she has days when she cannot hold things, and has dropped things.

She writes that it takes her up to 45 minutes to an hour to have a shower, because of her left arm. She cannot hold her left arm up over her head for more than a couple minutes then the arm just drops.

The appellant explains that she is waiting for surgery on her stomach, to have some tumours taken out. The tumours are in the lining of your stomach and they are very painful – some days the pain is so bad that she cannot move.

She writes that it takes her and 45 minutes to just sweep the floor.

She writes that she takes medication to thin her blood so she doesn't get blood clots. As a result, if she gets a cut she bleeds a lot more.

She explains that it takes her longer to walk to get her blood work done and she has to go to get it done once a week. She also has to go to the cardiologist every 3 to 6 months to get her pacemaker checked, and go to the hospital cancer centre for cancer tests once a year. She also has to see a gastroenterologist and an endoscopic specialist every six months. All these doctors have said that she cannot work anymore.

Notice of Appeal

In her Notice of Appeal, dated 01 April 2019, the appellant gives as her reasons for appeal:

"As I said and my [doctors] have said I cannot work. I have a mechanical valve and a pacemaker and I have cancerous tumours that I waiting for surgery on my stomach. [Doctor's name] is my specialist that I see for my stomach and I see my cardiologist in [city] and I go to the [hospital] cancer clinic for tests every six months and I have to go for blood work once a week to see if my blood is too thick or too thin. I have a blood clot in my left arm caused by my heart surgery which I lose feeling in my arm which causes [remaining text unreadable]."

The hearing

At the hearing, the appellant stated that she could not understand why her application for PWD designation had been denied. She said that her doctors had made it clear that she could not work any longer and that she could not rely on her daughter to continue to support her. She reviewed how she has to worry about blood clotting and whether her blood is too thick or too thin. She also described how it takes her forever to do things and that everything she used to engage in is now gone.

In answer to a question, the appellant stated that she is in receipt of a CPP disability pension, has been for 2 years, and that she reports this income to the ministry monthly. She receives a monthly CPP disability pension of approx. \$500; this is topped up with approx. \$200 in income assistance from the ministry.

After a brief recess, during which the ministry accessed the appellant's file, the ministry confirmed that the appellant reports monthly CPP income. The ministry noted that since the appellant is under 60 years of age, such income could not be an "early" CPP retirement pension. The appellant's ministry file was opened in December 2018.

The ministry representative undertook to mail to the appellant a copy of the Persons with Disabilities Designation Application – Prescribed Class form (HR3642).

Admissibility of additional information

The panel finds that the information provided by the appellant in her testimony at the hearing regarding that she is in receipt of CPP income is in support of the information and records before the ministry at reconsideration. While this information was not in the Record of Ministry

Decision, it was readily available in the appellant's file. Accordingly, the panel admits this information as evidence under section 22(4) of the *Employment Assistance Act*.

PART F – REASONS FOR PANEL DECISION

The issue in this appeal is whether the ministry decision that determined that the appellant did not meet the legislated criteria set out in Section 2 of the EAPWDA for designation as a person with disabilities (PWD) is reasonably supported by the evidence or is a reasonable application of the legislation in the circumstances of the appellant.

The ministry decision addressed whether the information provided in the appellant's application met the severity of impairment and sections 2(2) and 2(3) criteria of the EAPWDA. The ministry determined that the information provided did not establish that the appellant has a severe physical or mental impairment that, in the opinion of a prescribed professional,

(i) directly and significantly restricts her ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and,

(ii) as a result of those restrictions, she requires help to perform those activities.

The ministry determined that the appellant satisfied the other 2 criteria: she has reached 18 years of age; and her impairment in the opinion of a medical practitioner is likely to continue for at least 2 years.

The ministry did not address whether the appellant is in a prescribed class of persons eligible for PWD designation, as provided in section 2 of the *Act* and as listed in section 2.1 of the Employment and Assistance for Persons with Disabilities Regulation.

The following section of the EAPWDA applies to this appeal:

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 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.

The following sections of the EAPWDR apply 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.

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) 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).

Analysis

In the reconsideration decision, the ministry determined that the appellant is not eligible for PWD designation. The ministry stated that sections 2(2) and (3) of the EAPWDA lists five criteria that must be met in order for the minister to grant the designation. Based on a review of

the information provided in the appellant's PWD Designation Application and Request for Reconsideration, the ministry found that she has not met all of the legislated criteria, as explained in Appendix A of the reconsideration decision.

Under the circumstances discussed below, the panel will not make determinations regarding the reasonableness of the ministry's findings that the information provided did not establish that she met the criteria addressed by the ministry in the reconsideration decision – i.e. those relating to severity of impairment, direct and significant restrictions in the ability to perform DLA, and help required.

The evidence is that the appellant is a recipient of a CPP income. If, upon verification with Service Canada, this income proves to be a CPP disability pension, she would then be in a class of persons who meet the requirements of EAPWDR section 2.1, specifically that class described in subsection (e) – i.e. a person who is considered to be disabled under section 42 (2) of the *Canada Pension Plan* (Canada). This section reads in part:

(a) a person shall be considered to be disabled only if he is determined in prescribed manner to have a severe and prolonged mental or physical disability, and for the purposes of this paragraph,

(i) a disability is severe only if by reason thereof the person in respect of whom the determination is made is incapable regularly of pursuing any substantially gainful occupation, and

(ii) a disability is prolonged only if it is determined in prescribed manner that the disability is likely to be long continued and of indefinite duration or is likely to result in death;

Note that the determination must first be made, not by the ministry, but "in prescribed manner" – that is, through the federal CPP application and adjudication process prescribed by federal regulation. In effect, this legislation provides for incapacity of employment (provided CPP contribution requirements are first met) as one of the alternative grounds for PWD designation.

The status of an applicant as being in a prescribed class of persons is not covered in the PWD Designation Application provided to the appellant by the ministry (the booklet to be completed by the applicant and her medical practitioner/prescribed professional) and submitted for adjudication by the appellant. It appears that, for reasons not clear to the panel, the ministry provided the appellant with the incorrect form – the PWD Designation Application booklet instead of the Persons with Disabilities Designation Application – Prescribed Class form. As a result, the ministry assessed her eligibility for PWD against criteria that might not be applicable.

The panel has considered the following factors:

- The legislation provides alternative grounds for PWD designation, and
- The evidence that:
 - a) the appellant is a recipient of CPP income, and
 - b) the appellant has a history of previous employment for which she is no longer capable (statement in the Request for Reconsideration that her doctors have said that she cannot work anymore).

Taking these factors into account, the panel finds that the ministry was unreasonable in applying the severity of impairment and sections 2(2) and (3) criteria as described in the reconsideration decision without first a) reviewing the appellant's file, b) recognizing the possibility that she

might be in a prescribed class of persons eligible for PWD designation, and c) providing her with the Persons with Disabilities Designation Application – Prescribed Class form in order to secure her consent to verify with Service Canada that her CPP income is a CPP disability pension.

Conclusion

Based on the foregoing, the panel finds that the ministry's reconsideration decision that determined that the appellant was not eligible for PWD designation was not a reasonable application of the legislation in the circumstances of the appellant. The panel therefore rescinds the ministry's decision. The appellant is thus 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
Richard Roberts

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)
2019 April 26

PRINT NAME
Kulwant Bal

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)
2019 April 26

PRINT NAME

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)