

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 19 March 2019 that denied the appellant designation as a person with disabilities (PWD). The ministry determined that the appellant did not meet one of 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 her impairment in the opinion of a medical practitioner or nurse practitioner is likely to continue for at least 2 years.

The ministry determined that the appellant satisfied the other criteria set out in the legislation: she has reached 18 years of age and she has a severe 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 also found that it has not been demonstrated that the appellant is in one of the prescribed classes of persons who may be eligible for PWD designation on the alternative grounds set out in section 2.1 of the *Employment and Assistance for Persons with Disabilities Regulation*. As there was no information or argument provided by the appellant regarding alternative grounds for designation, the panel considers this matter not to be at issue in this appeal.

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 10 October 2018. The Application contained:
 - A Self Report (SR).
 - A Medical Report (MR) dated 23 October 2018, completed by a general practitioner (GP) who has known the appellant since 2009.
 - An Assessor Report (AR) dated 15 October 2018, completed by a registered nurse (RN) who has known the appellant for 1 week and seen her 2-10 times during that period.

2. The appellant's Request for Reconsideration is dated 25 January 2019. On 14 February 2019 she requested an extension. In the reconsideration decision, the ministry noted that on the morning of the due date for any further submission, she and a representative of her advocacy organization confirmed that she would not be providing any follow-up information by the end of the day.

In the MR, the GP provides the following diagnoses related to the appellant's impairment:

- Addiction (onset 1984)
- Depression (onset 2016)
- Anxiety (onset 2016)
- C-spine herniated disc (onset unspecified)
- Scoliosis (onset 2015)

In the AR, the RN describes the appellant's impairment as unresolved grief, addiction, anxiety, depression, history of childhood abuse, and back injury – 3 herniated discs and spinal fusion.

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

Duration

MR:

When asked to indicate whether the appellant's impairment is likely to continue for two years or more, the GP did not tick either the "Yes" or "No" box. The GP comments, "Not sure."

AR:

Under additional information, the RN writes:

"[The appellant] has had struggles with mental health issues. [She] was in foster care. She has a history of anxiety & depression and unfortunately self-medicated the pain and distress with inappropriate substances. She also has significant back problems. Her condition is severe & prolonged. She will need 24 to 36 months to get recovery well established."

SR:

In her SR, the appellant describes her history of addiction, particularly in the context of her upbringing and her relationships. She concludes by writing:

"Recently I hit rock bottom. I was lucky enough to be able to get into [a recovery facility]."

I've been sober for a short time now but it takes my full attention and effort to stay that way. In order to stay [there], I follow a strict program that has me attending meetings every day. I work with a sponsor and several counsellors and [participate in a number of recovery programs]. My entire welfare check goes to paying the program fee for staying at [the recovery facility]. So I feel pressure to work so I can have a little bit of money to pay for personal items that I need. That's not good because right now I need to focus 100% of my time towards recovery.

I also need to work with a doctor to decide if I will have surgery on my back. The surgery is risky and there's a 50/50 chance I will lose my ability to walk after. But I experience chronic daily back pain and I can't take any pain medication because it would put my sobriety at risk.

Even if everything goes well in my life, I will always be at risk for relapsing. I know that if I start using again, I will end up homeless and probably dead. If I go out again, there's no coming back.

Having PWD support would allow me to focus on my recovery and my health. It would also allow me to gradually return to work on a part-time basis. I do want to work but I need a lot more sober time under my belt before I can do it."

Notice of Appeal

In her Notice of Appeal, dated 25 March 2019, the appellant writes:

"I am working with a new doctor to clarify that my recovery from substance use will be ongoing over the course of at least a 2 year period."

Information submitted before the hearing

Before the hearing, the appellant's advocate provided a submission dated 08 May 2019. Attached to the submission is a letter from a nurse practitioner (NP) dated 11 April 2019 and a letter from the RN who completed the AR dated 16 April 2019. The submission goes to argument on the admissibility of the letters (see Admissibility of new information below) and on their relevance respecting the PWD criterion at issue in this appeal (see Part F, Reasons for Panel Decision, below).

In his letter, the NP writes [edited for brevity]:

"...I have been a Family Nurse Practitioner for 1.5 years and have worked on over 40 PWD applications during my practice. To date, I have helped care for several vulnerable, medically complex and high risk patients who have suffered from PTSD, GAD, and MDD. As such, I am very familiar with the qualifying Criteria for this benefit

As indicated in her initial application, [the appellant] lives with a substance use disorder, generalized anxiety disorder, depression, chronic cervical spine pain, and scoliosis. [...]

I met with the appellant and spent approximately 45 minutes during this initial visit discussing her health history, impairments and restrictions extensively. I have also reviewed her application closely [...]

In regards to the duration of [the appellant's] Impairment, [she] has been addicted to substances since she was sixteen years old and has a significant history of relapse. She also has an extensive history of trauma beginning at a very early age, which involved physical, emotional and sexual abuse. These events have played a significant factor in her addictions issues, and have, in my view, left a longstanding effect upon her with respect to anxiety and depression symptoms. [The appellant] also explained that her chronic C-spine pain is linked to a MVA when she was 15 years old [...] Despite intensive treatment and rehabilitation soon after the accident, she reports persistent, intermittent pain in her L leg with associated symptoms of peripheral radiculopathy and general weakness to this day. As such, it is very likely that her mental health and physical impairments will last for two years or more.

It is my professional opinion that [the appellant] meets the criteria for this designation, and would also benefit from ongoing psychiatric interventions and/or counselling. [...]"

In her letter, the RN writes [edited for brevity]:

[...] I have been a Registered Nurse for more than 35 years. During that time, I have gravitated to evidence- based practice. In the past month I have completed [university certificate course in substance use disorders]. I also have substantial experience and have worked with numerous patients who are addicted to substances. Both my training and experience show that recovery from substance use takes significant time and that the risk of relapse is high. I would now amend my statement on her recovery. Evidence would indicate this will take longer than 3 years and she will have lifelong challenges.

[The appellant] has an extensive history of trauma and has struggled with mental health and substance use for over 30 years; These types of deep-seated mental health impairments often take years to overcome. This is due to neuropathways needing to be changed and in order to accomplish this the appellant] will require CBT which should be accessed through health care the same way speech therapy is available to stroke victims. It is my professional opinion that [the appellant's] impairment is likely to last for at least two years or more. My assessment is based on my training and experience working with patients with similar challenges as well as research I have done on this subject.

The hearing

With the consent of the ministry, a summer student with the advocacy organization of the appellant's advocate attended the hearing as an observer.

With the consent of the appellant, a trainee with the ministry attended the hearing as an observer.

At the hearing, the appellant's advocate spoke to the submission referenced above.

In answer to a question, the appellant confirmed that she had provided the NP with a copy of the reconsideration package, including the original application.

The ministry responded to the appellant's advocate's submission, both with respect to admissibility of the two letters (see below) and to the substance of these letters (see Part F, Reasons for Panel Decision, below).

Admissibility of new information

The appellant's advocate submits that the evidence contained in the letter from the NP does not introduce new information, but rather substantiates the information and records before the minister at reconsideration. The advocate argues that when asked to indicate whether the impairment is likely to last for two years or more, the GP states that she is "not sure." In the AR, the RN states that, "[The appellant] will need 24-36 months to get recovery well established." Thus the evidence from the NP corroborates the evidence concerning duration provided by the RN and clarifies the information the GP was unable to confirm. The NP specifically states, "...it is very likely that [the appellant's] mental health and physical impairments will last for two years or more."

The advocate also notes that the NP's new evidence also substantiates information contained in the SR concerning her history of relapses. The NP corroborates this information in his letter stating, "In regards to the duration of [the appellant's] impairment, [she] has been addicted to substances since she was sixteen years old and has a significant history of relapse. She also has an extensive history of trauma beginning at a very early age, which involved physical, emotional, and sexual abuse. These events have played a significant factor in her addictions issues, and have, in my view, left a long-standing effect upon her with respect to anxiety and depression symptoms."

In addition, the advocate notes that in the MR the GP states that "[the appellant] has not disclosed to me that she has addiction problems." The appellant submits that she had not discussed her mental health or substance use challenges with the GP prior to October 2018 and that the GP had limited knowledge of the history of these impairments. Furthermore, in the MR, where the medical practitioner or nurse practitioner completing the form is asked to indicate the frequency of contact they have had with the applicant, the GP did not indicate how many times she had seen the appellant in the past 12 months. The appellant submits that she had only seen the GP twice in the three years preceding her PWD application.

On this basis, the advocate submits that the evidence of the NP is in support of information already before the Minister, and that it is admissible under section 22(4) of the *Employment and Assistance Act*.

The ministry representative stated that, given the arguments advanced by the appellant's advocate, the ministry did not object to the admissibility of the two letters.

The panel finds that the two letters attached to the advocate's submission are in support of the

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information before the ministry at reconsideration. As argued by the advocate, these letters, and in particular that from the NP, tend to corroborate the assessment by the RN in the AR that the appellant's "condition is severe & prolonged. She will need 24 to 36 months to get recovery well established." The panel therefore admits these letters as evidence in accordance with section 22(4) of the *Employment and 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 one of 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.

Specifically, the ministry determined that the information provided did not establish that her impairment in the opinion of a medical practitioner or nurse practitioner is likely to continue for at least 2 years.

The ministry determined that the appellant satisfied the other criteria set out in the legislation: she has reached 18 years of age and she has a severe 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 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

The position of the appellant, as explained in her advocate's submission, is that in the original application, the GP was unable to confirm the duration of the appellant's impairment due to limited knowledge of her mental health impairments. The appellant submits that the evidence provided by the NP clarifies the uncertainty in the application regarding duration of her impairment – i.e. that her impairment is likely to continue for at least 2 years. On consideration of all the admissible evidence, the appellant thus submits that the reconsideration decision is neither reasonably supported by the evidence, nor is it a reasonable application of section 2 of the EAPWDA. For these reasons, the appellant respectfully requests that the panel rescind the minister's decision to

deny her the PWD designation.

In the reconsideration decision, the ministry noted that the GP in the MR does not indicate that the appellant's impairment is likely to continue for two years or more, with the GP writing: "Not sure." The ministry held that the indication of uncertainty regarding the expected duration of her impairment does not establish the likelihood that her impairment will continue for two years or more. The ministry also noted that the GP does not speak to the expected duration of the appellant's impairment through the remainder of the PWD application.

The ministry acknowledged that in the AR, under Additional Comments, the RN's statement: "Her condition is severe & prolonged. She will need 24-36 months to get recovery well established." However the ministry noted that the AR was completed by a registered nurse, with the latter not being the equivalent of a nurse practitioner. As the ministry had noted, it must be established, in the opinion specifically of a medical practitioner or a nurse practitioner, that the impairment is likely to continue for at least 2 years.

At the hearing, the ministry representative stated that though he had no objection to its admissibility, the NP's letter would be subject to the ministry verifying that the person who wrote the letter is a nurse practitioner registered with the British Columbia College of Nursing Professionals. Subject to such verification, the ministry representative stated that, given the opinion provided by the NP, if this information had been available to the ministry at reconsideration, the reconsideration decision would likely have been different.

Panel finding

The panel has admitted as evidence the letter from the NP in which he describes the appellant's impairment and its history. From this letter, it is clear that the impairment described by the NP is the same severe impairment that the ministry found had been established based on the assessments provided by the GP and RN, in conjunction with the SR, and in consideration of the combined impacts of the appellant's medical conditions on both physical and mental functioning. In providing his opinion on the duration of impairment, the NP states, "it is very likely that her mental health and physical impairments will last for two years or more." While the ministry did not have the benefit of this opinion at reconsideration, given this opinion is from a nurse practitioner and clearly states that the appellant's impairment will likely continue for at least 2 years, as required in the legislation, the panel finds that the ministry determination that this criterion had not been met was not reasonably supported by the admissible evidence.

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 reasonably supported by the admissible evidence. The panel therefore rescinds the ministry's decision. The appellant is thus successful on appeal.

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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 May 14

PRINT NAME

Kent Ashby

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019 May 14

PRINT NAME

Jane Nielsen

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019 May 14