

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the Ministry) Reconsideration Decision dated May 27, 2019, which found that the Appellant did not meet three of the five statutory requirements of Section 2 of the *Employment and Assistance for Persons with Disabilities Act* (EAPWDA) for designation as a person with disabilities (PWD). While the Ministry found that the Appellant met the age requirement and had an impairment which was likely to continue for at least two years, the Ministry was not satisfied that the evidence establishes 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 these restrictions, the Appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

The Ministry also found that the Appellant is not 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* (EAPWDR) and the Appellant did not appeal the decision on this basis.

PART D – RELEVANT LEGISLATION

EAPWDA, Section 2

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), Section 2

Employment and Assistance Act (EAA), Section 22(4)

Employment and Assistance Regulation (EAR), Section 86(b)

PART E – SUMMARY OF FACTS

The evidence before the Ministry at the time of the Reconsideration Decision included the PWD Application comprised of the applicant information and the first page of an undated self report (Incomplete SR), a Medical Report (MR) dated either September 5, 2018 or September 9, 2018 and completed by the Appellant's General Practitioner (GP) who has known the Appellant for twelve years and who has seen the Appellant 2 – 10 times in the past year, and an Assessor Report (AR) dated September 9, 2019, also completed by the GP.

The evidence also included:

- A Request for Reconsideration (RFR) form dated May 16, 2019 in which the section asking the Appellant to state the reason for the RFR has not been completed; and
- A Doctor's Note (Doctor's Note) dated May 11, 2019 signed by the GP stating "*The (Appellant) continues to suffer from anxiety and has trouble leaving the house*".

Diagnoses

In the MR, the GP diagnosed the Appellant with a Generalized Anxiety Disorder and Moderate Depression without a specific date of onset but stating that the Appellant has had these disorders for "*Many years*". The GP has also included the diagnostic code for "Musculoskeletal System – Other" but has not identified the specific musculoskeletal system disorder present or the date of onset.

Physical Impairment

With respect to functional skills, the GP reports in the MR that the Appellant can walk more than 4 blocks unaided on a flat surface, climb 5 or more steps unaided, has no limitations with respect to lifting, and can remain seated for 1 to 2 hours. Where asked in the MR to provide any additional information relevant to understanding the applicant's medical condition, the nature and extent of impairments and the impact on her DLA, the GP was written "*No hospitalizations*".

In the section of the AR where the assessor is asked to indicate the assistance required related to impairments that directly restrict the applicant's management of mobility and physical abilities, the GP indicates that the appellant is independent in all areas (walking indoors and outdoors, climbing stairs, standing, lifting, and carrying and holding).

In the Incomplete SR, the Appellant states that she has "*pain in (her) bones: arthritis which (she) feel(s) (leaves her) unable to do the work (she) is certified for*".

Mental Impairment

In the section of the MR where the prescribed professional is asked to indicate the severity of the medical conditions relevant to the Applicant's impairment, the GP writes "*has had problem with Generalized Anxiety Disorder and Depression for many years ... finds it stressful to interact with people especially crowds*". In the MR, the GP also indicates that the Appellant does not have any difficulties with communication but indicates that the Appellant has significant deficits with cognitive and emotional function in the areas of executive functioning, emotional disturbance and attention or sustained

concentration and hostility. No comments are provided. The GP also states that the Appellant's impairment is of an unknown duration and is partially controlled by medications.

~~In the section of the AR where the assessor is asked to identify the applicant's mental impairments that impact her ability to manage DLA, the GP has written "Difficulty in focusing, Anxiety in crowds, Anxious when (she) leaves house".~~ In the section of the AR where the assessor is asked to indicate the level of ability to communicate, the GP assesses a good ability in all areas (speaking, reading, writing and hearing). In the section of the AR where the assessor is asked to indicate to what degree the applicant's mental impairment restricts or impacts her functioning, the GP has indicated a major impact on her emotions, a moderate impact on her executive functioning, a minimal impact on consciousness, impulse control, insight and judgment, attention/concentration and motivation, and no impact in the other listed areas (bodily functions, memory, motor activity, language, psychotic symptoms, or any other neuropsychological or emotional or mental problems). No additional comments are provided.

In the SR, the Appellant states that she suffers from a chronic disability and that she is "*unable to deal with people*".

Restrictions in the Ability to Perform DLA

In the MR, the GP indicates that the Appellant has not been prescribed any medications or treatments that interfere with her ability to perform DLA.

In the AR, the GP states that the Appellant is independent with respect to all listed DLA in the areas of personal care, basic housekeeping, shopping (except for going to and from stores, where he has indicated that she requires continuous assistance and has written "*Difficulty in going outside*"), meals, paying rent and bills, medications (except for taking medications as directed, where he has indicated that she requires continuous assistance and has written "*problems with overuse of anxiety related meds*") and transportation (except for using public transit, using transit schedules and arranging transportation, where he has indicated that she requires continuous assistance and has written "*very anxious travelling outside the home*"). No additional comments are provided. In the section of the AR where the assessor is asked to indicate the level of support or supervision required by the applicant, the GP indicates that the Appellant is independent in the areas of interacting appropriately with others and securing assistance from others but that she needs continuous assistance from others in making appropriate social decisions (adding "*difficulty on making decisions on her own*") and in dealing appropriately with unexpected demands ("*panic attacks from time to time*"). In assessing how the Appellant's mental impairment impacts her relationship with her immediate social network (family and friends) and with her extended social networks, the GP has ticked "good functioning" and has not provided any additional comments.

The Appellant did not identify any restrictions in her ability to perform DLA in either the SR or the RFR.

Need for Help

In the MR the GP indicates that the Appellant does not require any prostheses or aids for her impairment.

In the AR, the GP has indicated that the Appellant lives with family, friends or a caregiver and that her family provides the help required with her DLA. No additional comments are provided.

The Appellant did not identify any need for help in either the SR or the RFR.

Additional Information Submitted after Reconsideration

In her Notice of Appeal (NOA) dated May 27, 2019, the Appellant states that she disagrees with the Ministry's decision, that she suffers from anxiety and panic attacks and that she also has arthritis. She also states that she has reinjured a foot that had previously been fractured.

At the hearing, the Ministry relied on its Reconsideration Decision and addressed the Panel's questions with respect to the Incomplete SR and the unsigned RFR forms. Regarding the Incomplete SR, the Ministry stated that it was likely that the final page of the form had been omitted from the appeal record in error. Regarding the unsigned RFR, the Ministry explained that the Appellant had submitted the RFR using My Self Serve, the Ministry's on line self-service facility, which would explain why the form was not signed by the Appellant, and that the Appellant must have not provided the reason for her request when she submitted the RFR, which was not strictly required.

Admissibility of Additional Information

Section 22(4) of the EAA provides that panels may admit as evidence (i.e. take into account in making its decision) the information and records that were before the Ministry when the decision being appealed was made and "*oral and written testimony in support of the information and records*" before the Ministry when the decision being appealed was made – i.e. information that substantiates or corroborates the information that was before the Ministry at reconsideration. Because a panel can accept oral and written testimony in support of the information and records before the Ministry when the decision was made, there is limited discretion for a panel to admit new evidence. Accordingly, instead of asking whether the decision under appeal was reasonable at the time it was made, panels must determine whether the decision under appeal was reasonable based on all admissible evidence, including any new evidence admitted under EAPWDA Section 22(4).

The Panel considered the written information in the NOA regarding her anxiety and panic attacks and her arthritis to be argument as these impairments had previously been disclosed in her SR or by her GP in the MR. Because the GP did not diagnose any ongoing impairment relating to a previous bone fracture, the Panel considered the information in the NOA stating that the Appellant had reinjured a foot that had previously been fractured to not be evidence in support of the information and records that were before the Ministry at reconsideration and therefore did not admit the additional information pursuant to Section 22(4)(b) of the EAA.

The Appellant did not attend the hearing. After confirming that the Appellant was notified of the hearing, the Panel proceeded with the hearing pursuant to Section 86(b) of the EAR.

PART F – REASONS FOR PANEL DECISION

The issue under appeal is whether the Ministry's Reconsideration Decision, which found that the Appellant is not eligible for 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. Was it reasonable for the Ministry to determine that the evidence does not establish that the Appellant has a severe mental or physical impairment and that her DLA are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods? Was it reasonable for the Ministry to determine that as a result of those restrictions, it could not be determined that the Appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA?

The criteria for being designated as a PWD are set out in Section 2 of the EAPWDA as follows:

Persons with disabilities

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 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).

The EAPWDR provides as follows:

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 ...

Part 1.1 — Persons with Disabilities

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).

The EAA provides as follows:

Panels of the tribunal to conduct appeals

22 (4) In a hearing referred to in subsection (3), a panel may admit as evidence only

(a) the information and records that were before the minister when the decision being appealed was made, and

(b) oral or written testimony in support of the information and records referred to in paragraph (a).

The EAR provides as follows:

Procedures

86 The practices and procedures of a panel include the following: ...

(b) the panel may hear an appeal in the absence of a party if the party was notified of the hearing ...

Severity of Impairment

Neither the terms “*impairment*” nor “*severe*” are defined in the EAPWDA. The Cambridge Dictionary defines “*impairment*” in the medical context to be “*a medical condition which results in restrictions to a person’s ability to function independently or effectively*” and defines “*severe*” as “*causing very great pain, difficulty, worry, damage, etc.; very serious*”.

A diagnosis of a severe impairment does not in itself determine PWD eligibility. Section 2(2) of the EAPWDA requires that in determining whether a person may be designated as a PWD, the Ministry must be satisfied that the individual has a severe physical or mental impairment with two additional characteristics: in the opinion of a prescribed professional it must both be likely to continue for at least two years [EAPWDA 2(2)(a)], and it must significantly restrict a person’s ability to perform DLA continuously or periodically for extended periods, resulting in the need for the person to require assistance in performing those activities [EAPWDA 2(2)(b)]. Therefore, in determining PWD eligibility, after assessing the severity of an impairment the Ministry must consider how long the severe impairment is likely to last and the degree to which the ability to perform DLA is restricted and help in performing DLA is required. In making its determination the Ministry must consider all the relevant evidence, including that of the Appellant. However, the legislation is clear that the fundamental basis for the analysis is the evidence from a prescribed professional – in this case the Appellant’s GP.

The Ministry's position is that the evidence provided by the Appellant does not sufficiently describe or portray a severe physical or mental impairment. The Appellant's position is that she is unable to work due to her arthritis and and that she gets very anxious when she has to leave her home because she is unable to deal with people.

Panel Decision

The Panel has reviewed all of the evidence and notes that the GP does not explain what he means by the Appellant having "trouble" leaving the home or "difficulty" in going out alone, and provides no comments or explanations that would allow the Ministry to gauge the severity of the Appellant's impairments. In addition, the Panel notes that the Appellant has not provided any examples or explanations that would demonstrate the severity of her impairments. Therefore, the Panel finds that the Ministry reasonably determined that severe impairments of the Appellant's mental and physical functioning have not been established.

Restrictions in the Ability to Perform DLA

The Ministry's position is that, although it acknowledges that the Appellant has certain limitations as a result of her medical conditions, the information provided does not establish that an impairment significantly restricts her DLA either continuously or periodically for extended periods. The Appellant's position, as expressed by the GP in the Appellant's application for a PWD designation, is that she gets very anxious when travelling outside her home, that she has difficulty making decisions on her own, and that she cannot take medications as directed because she overuses anxiety related medications.

Panel Decision

Section 2(2)(b) of the EAPWDA requires that the Ministry be satisfied that a prescribed professional has provided an opinion that an applicant's severe impairment *directly* and *significantly* restricts his or her DLA, continuously or periodically for extended periods. In this case, the GP is the prescribed professional. DLA are defined in Section 2(1) of the EAPWDR and are also listed in the MR and, with additional details, in the AR.

The Panel has reviewed all the evidence and notes that the GP has indicated that the Appellant is largely independent in performing all but a few of her DLA, that she experiences good functioning with her immediate and extended social networks and that the GP does not describe the frequency and duration of the Appellant's difficulty in going outside her home. The Panel further notes that the Appellant has not provided any evidence of restrictions in performing her DLA. Therefore, the Panel finds that the Ministry reasonably determined that the Appellant did not have a severe impairment that directly and significantly restricts her DLA continuously or periodically for extended periods.

Help with DLA

The Ministry's position is that it cannot be determined that significant help is required because it has not been established that DLA are significantly restricted. The Appellant has not provided any evidence to indicate that she needs help with the DLA.

Panel Decision

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. That is, the establishment of direct and significant restrictions under section 2(2)(b)(i) is a precondition of meeting the need for help criterion. 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 one or more DLA.

The Panel has reviewed all the evidence and finds that the Ministry reasonably determined that the Appellant did not require help to perform any of her DLA.

Conclusion

Having reviewed and considered all of the evidence and relevant legislation, the Panel finds that the Ministry's Reconsideration Decision, which determined that the Appellant was not eligible for the PWD designation under Section 2 of the EAPWDA, was reasonably supported by the evidence and was a reasonable application of the EAPWDA in the circumstances of the Appellant, and therefore confirms the decision. The Appellant's appeal, therefore, is not successful.

APPEAL NUMBER

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

Simon Clews

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2019/06/20

PRINT NAME

Rosalie Turcotte

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

PRINT NAME

Meghan Wallace

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)