

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (ministry) reconsideration decision dated 29 April 2019, which determined that the appellant was not eligible for person with disabilities designation (PWD) because she had not met all of the legislated criteria under section 2 the *Employment and Assistance for Persons with Disabilities Act*.

The ministry first determined that the appellant did not meet the criteria for PWD designation as a member of a prescribed class of persons.

The ministry determined that the appellant had demonstrated that she has reached 18 years of age and that her impairment, in the opinion of a medical practitioner or nurse practitioner, is likely to continue for at least 2 years.

The ministry further determined that the appellant had not demonstrated that she has a severe mental or physical impairment; that her severe mental or physical impairment, in the opinion of a prescribed professional, directly and significantly restricts her ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and as a result of direct and significant restrictions, she requires help to perform those activities.

PART D – RELEVANT LEGISLATION

Employment and Assistance Act (EAA) – section 24

Employment and Assistance Regulation (EAR) – section 80

Employment and Assistance for Persons with Disabilities Act (EAPWDA) – section 2

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR) – section 2, section 2.1

PART E – SUMMARY OF FACTS

The appellant submitted an application for persons with disabilities (PWD) designation in August 2018.

The ministry determined, in a decision dated 24 October 2018, that the appellant was not eligible for PWD designation because she had not met all of the required criteria set out in the legislation.

The appellant submitted a Request for Reconsideration dated 30 November 2018.

The ministry determined, in a reconsideration decision dated 12 December 2018, that the appellant was not eligible for PWD designation because she had not met all of the required criteria set out in the legislation.

The appellant appealed the ministry's reconsideration decision to the Employment and Assistance Appeal Tribunal which, in a decision dated 25 January 2019, rescinded the reconsideration decision. The tribunal found that the ministry had failed to consider the appellant's eligibility for PWD designation as a member of a prescribed class of persons in accordance with Section 2.1 of the EAPWDR.

The appellant submitted an application, on 22 February 2019, for PWD designation as a member of a prescribed class of persons.

The ministry determined, in a decision dated 4 March 2019, that the appellant was not eligible for PWD designation as a member of a prescribed class of persons because she had not met all of the required criteria set out in the legislation, specifically Section 2.1 of the EAPWDR.

The appellant submitted a Request for Reconsideration dated 18 April 2019.

In its reconsideration decision, dated 29 April 2019, the ministry determined that the appellant was not eligible for PWD designation. This is the decision is at issue in the current appeal.

Additional information before the panel on appeal consisted of the following:

Notice of Appeal

In the Notice of Appeal dated 2 May 2019, signed by the appellant no reasons for appeal were provided.

Appeal Submissions

The appellant attended the hearing in person for approximately 30 minutes prior to declining to participate any further. With respect to the decision under appeal, the appellant expressed dissatisfaction regarding how the ministry had determined her ineligibility for PWD designation as a member of a prescribed class. The appellant stated that both of her children were recipients of Community Living BC (CLBC) benefits and that there is some mix-up between CLBC and CYSN (Children and Youth with Special Needs). The appellant argued that it is not clear how the ministry assessed whether she was a CLBC recipient. The appellant also made several arguments as to the lack of fairness in the ministry's process and again expressed her dissatisfaction with the overall system in place.

The ministry relied on the reconsideration decision.

Admissibility

The panel finds that the information provided in the appellant's Notice of Appeal and Appeal Submission do not contain any new information requiring an admissibility determination in accordance with section 22(4)(b) of the *Employment and Assistance Act*. No information was provided in the Notice of Appeal. The Appeal Submissions are comprised of argument.

Panel Note:

The panel notes that the appellant was present at the outset of the hearing but left after approximately 30 minutes,

expressing her dissatisfaction with the processes and systems in place. The panel inquired as to whether the appellant would like to take a break and then resume the hearing. This offer was declined. The panel inquired as to whether the appellant would be willing to answer questions. This request was declined. The panel inquired as to whether the appellant would be willing to remain and listen to the ministry's submissions and ask any questions that she may have. The appellant indicated that she was not willing to stay and listen to the ministry's submission. Finally, the panel asked the appellant if she would like to request an adjournment and have the hearing rescheduled on another day. The appellant stated that she was not interested in requesting an adjournment.

Having made these unsuccessful efforts to provide the appellant with an opportunity to continue to participate in the hearing, the panel then considered the procedural fairness implications for both the appellant and the ministry in either ending the hearing or proceeding with the remainder of the hearing. The panel determined that in declining to continue to attend and participate in the hearing and expressing an absence of any desire to adjourn the hearing to another date and time, the appellant had effectively waived her right to be present, ask questions and make submissions. The panel determined that it was appropriate to continue with the hearing, allowing the other party, the ministry, to make its submissions.

PART F – REASONS FOR PANEL DECISION

There are two issues in this appeal.

The first issue is whether the ministry's reconsideration decision determining that the appellant did not meet the requirements for PWD designation as a member of a prescribed class of persons in accordance with Section 2.1 of the EAPWDR is reasonably supported by the evidence or is a reasonable application of the legislation in the circumstances of the appellant.

The second issue is whether the ministry's reconsideration decision determining that the appellant did not meet three of the five statutory requirements of Section 2 of the EAPWDA for PWD designation 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:

- the appellant has a severe mental or physical impairment;
- the appellant's severe mental or physical impairment, in the opinion of a prescribed professional, directly and significantly restricts her ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and
- as a result of those restrictions, she requires significant help or supervision of another person to perform those activities.

Legislation

The following section of the EAA applies to this appeal:

- 24** (1) After holding the hearing required under section 22 (3) [*panels of the tribunal to conduct appeals*], the panel must determine whether the decision being appealed is, as applicable,
- (a) reasonably supported by the evidence, or
 - (b) a reasonable application of the applicable enactment in the circumstances of the person appealing the decision.
- (2) For a decision referred to in subsection (1), the panel must
- (a) confirm the decision if the panel finds that the decision being appealed is reasonably supported by the evidence or is a reasonable application of the applicable enactment in the circumstances of the person appealing the decision, and
 - (b) otherwise, rescind the decision, and if the decision of the tribunal cannot be implemented without a further decision as to amount, refer the further decision back to the minister.
- (3) The panel must provide written reasons for its decision under subsection (2).
- (4) Notice of the decision and reasons of the panel must be given in accordance with the regulations.
- (5) The decision of a majority of the members of a panel is the decision of the tribunal, but the decision of the chair of the panel governs in the case of a tie.
- (6) The tribunal has exclusive jurisdiction to inquire into, hear and determine all those matters and questions of fact, law and discretion arising or required to be determined in an appeal under section 19 and to make any order permitted to be made.
- (7) A decision or order of the tribunal under this Act on a matter in respect of which the tribunal has exclusive jurisdiction is final and conclusive and is not open to question or review in any court.

The following sections of the EAR applies to this appeal:

- 80** The minister must reconsider a decision referred to in section 17 (1) of the Act, and mail a written determination on the reconsideration to the person who delivered the request under section 79 (1) [*how a request to reconsider a decision is made*],
- (a) within 10 business days after receiving the request, or
 - (b) if the minister considers it necessary in the circumstances and the person consents, within 20 business days after receiving the request.

The following section of the EAPWDA applies to this appeal:

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 following section of the EAPWDR applies 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.

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).

PWD Designation

In order to qualify for PWD designation a person must have reached 18 years of age. In addition, a person must either satisfy the minister that they are in a prescribed class of persons or that they meet the criteria of EAPWDA section 2(2). Section 2(2) requires a person to establish that they have a severe mental or physical impairment that

- in the opinion of a medical practitioner or nurse practitioner is likely to continue for at least 2 years;
- in the opinion of a prescribed professional directly and significantly restricts the person's ability to perform daily living activities either continuously, or periodically for extended periods; and
- as a result of those restrictions, the person requires help to perform those activities.

The ministry has determined in the reconsideration decision at issue in this appeal that the appellant is not in a prescribed class of persons and that she does not meet all of the impairment criteria of section 2(2).

On appeal the panel must, in accordance with EAA section 24, determine whether the decision being appealed is reasonably supported by the evidence, or a reasonable application of the applicable enactment in the circumstances of the person appealing the decision.

The panel notes that section 80 of the EAR requires that the ministry provide a written determination on reconsideration, which amounts to a legislative requirement to provide written reasons. In the absence of such reasons, the panel is unable to properly exercise its function under section 24 of the EAA, which is to assess whether the ministry's conclusion is reasonably supported by the evidence or a reasonable application of the legislation in this appellant's circumstances. The panel is cognizant of the administrative law jurisprudence regarding inadequacy of written reasons where such reasons are required and takes direction from the Supreme Court of Canada (SCC), in particular, in this regard.

In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, the Supreme Court stated that the quality of reasons was not a question of procedural fairness but rather had to be considered through the lens of the reasonableness analysis. At para. 14 of this decision the SCC goes on to say "the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes" and, referring to its own 2008 decision in *Dunsmuir*, further clarified the task of reviewing bodies in directing them to look at "the qualities that make a decision reasonable, referring to both the process of articulating the reasons and outcomes". The SCC adds to this jurisprudence in *Canada (Attorney General) v. Igloo Vikski Inc.*, 2016 SCC 38, in which it states "[w]hile the adequacy of a tribunal's reasons is not on its own a discrete basis for judicial review, the reasons should 'adequately explain the bases of [the] decision'" (para. 18).

Prescribed Class

In the reconsideration decision dated 29 April 2019, the ministry indicates that the appellant is not in a prescribed class of persons. The panel finds that the ministry has provided no reasons for this conclusion, makes no reference to any evidence it may have considered, and has not set out any analysis in its reconsideration decision. The panel

notes that the documentary evidence available on appeal appears to reflect some investigation by the ministry as to whether the appellant has received support from CLBC; however, the panel is not empowered to do its own assessment of this evidence to weigh the ministry's conclusion against. Instead, the task of the panel is to determine whether the ministry's assessment of the evidence was reasonable. In this instance, the dearth of reasons provided by the ministry leads the panel to conclude that the ministry's determination that the appellant is not in a prescribed class of persons as set out in is not a reasonable application of the legislation or reasonably supported by the evidence.

Section 2(2) impairment criteria

The first requirement set out in section 2(2) of the EAPWDA at issue in this appeal is that a person must satisfy the minister that they have severe mental or physical impairment. The ministry concluded in the reconsideration decision that the appellant had not met this criterion. With respect to physical impairment, the ministry reproduced some of the information in the appellant's PWD application, observed that the information provided by the appellant in her Self Report had not been confirmed by a medical practitioner and stated, "The ministry determines that the assessments provided by your medical practitioner do not establish that you have a severe physical impairment." With respect to mental impairment, the ministry reproduced some of the information in the appellant's PWD application and Request for Reconsideration and stated, "The ministry determines that there is not enough information provided in Dr. [omitted]'s assessments, the letter from Dr. [omitted] and your Self-Report to establish a severe mental impairment."

The panel finds that the ministry has not provided any rationale for these conclusions nor has it provided any written account of its consideration and weighing of the evidence before it. The ministry's approach to simply listing some of the evidence and providing a conclusion does not adequately explain the bases of the ministry's decision. In reaching this conclusion, the panel also notes that the ministry has made reference to some (but not all) of the evidence before it, including several other medical documents. In addition to this, the panel notes that the ministry has incorrectly indicated that the same doctor completed the Medical Report and Assessor Report. The panel concludes that the ministry's determination that the appellant has not established a severe mental or physical impairment is not a reasonable application of the legislation or reasonably supported by the evidence.

The next requirements set out in section 2(2) of the EAPWDA are that the person's severe impairment must, in the opinion of a prescribed professional, directly and significantly restrict the person's ability to perform daily living activities either continuously, or periodically for extended periods; and as a result of those restrictions, the person requires help to perform those activities. The legislation is written in manner that first requires the establishment of a severe impairment, and then direct and significant restrictions to daily living activities because of that severe impairment and finally a requirement for help because of those direct and significant restrictions. Each of these criteria is contingent on the one that comes before it in the legislation. In other words, each legislated requirement can only be met if the preceding requirement has also been met.

In light of this conjunctive, internally dependent test set out in the legislation, the panel finds that the ministry's failure to adequately explain the bases of its decision on the first of three criteria renders the ministry's determination on the second and third criteria unreasonable as well. The ministry's unreasonable conclusion with respect to severity of the appellant's mental or physical impairment leads the panel to conclude that the ministry's determinations with respect to direct and significant restrictions to daily living activities and help required with daily living activities are neither a reasonable application of the legislation or reasonably supported by the evidence.

Conclusion

The panel finds that the ministry's reconsideration decision, determining that the appellant was not in a prescribed class of persons and had not met all of the legislated criteria for PWD designation, was not a reasonable application of the legislation in the circumstances of the appellant and was not reasonably supported by the evidence. The panel rescinds the ministry's reconsideration decision. The appellant is successful on appeal.

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

Jennifer Smith

DATE (YEAR/MONTH/DAY)

2019/06/21

PRINT NAME

Carl Gorham

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/06/21

PRINT NAME

Richard Roberts

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/06/21