

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the “ministry”) reconsideration decision dated April 24, 2019 in which the ministry found the appellant was not eligible for designation as a Person With Disabilities (“PWD”) because she did not meet all of the criteria in section 2(2) of the *Employment and Assistance for Persons with Disabilities Act* (“EAPWDA”). The ministry was satisfied that the appellant has reached 18 years of age and that her impairment will continue for at least 2 years. However, based on the information provided in the PWD Designation Application (“PWD application”) and Request for Reconsideration (“RFR”), the ministry was not satisfied that the following criteria were met:

- The appellant has a severe physical or mental impairment;
- The 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 these restrictions, she requires help to perform DLA through an assistive device, the significant help or supervision of another person, or the services of an assistance animal.

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**Evidence at Reconsideration**

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

- (1) An application for an extension of the deadline for reconsideration dated March 25, 2019.
- (2) A Request for Reconsideration with an attached letter from the appellant dated April 24, 2019 in which the appellant argues she falls into the alternative grounds for designation as PWD. Specifically, she says she is a person who is considered to be disabled under s. 42 of the *Canadian Pension Plan* ("CPP"). She says her illness is prolonged and severe; that she has been unable to work much over the last 10 years; and that her illness is of indefinite duration.
- (3) A letter from the appellant's current physician (the "current physician") dated March 20, 2019 in which the current physician wrote a letter addressed "to whom it may concern" and stated that the appellant meets the CPP definition of disabled. The current physician also states, "Her condition is chronic and is unlikely to have significant improvement in the future and due to her symptoms of severe, unrelenting fatigue she is unable to be gainfully employed."
- (4) Tax assessments for the appellant for the years 2015, 2016, and 2017.
- (5) The ministry's denial letter of February 7, 2019 along with *Persons with Disabilities Designation Denial Decision Summary*.
- (6) The PWD application, comprised of:
 - The *Applicant Information - Self Report* ("SR") signed by the appellant on May 3, 2018.
 - A *Medical Report* ("MR") completed by the appellant's former family doctor (the "physician") on July 24, 2018. The physician has known the appellant for 2.5 years and has seen her 2-10 times in the past 12 months.
 - An *Assessor Report* ("AR"), also completed by the physician on July 24, 2018.

The PWD application contained the information described below.

Diagnoses

The physician diagnosed the appellant with Chronic Fatigue Syndrome (CFS) with an onset in 2002 and Generalised Anxiety Disorder. He described her as experiencing daily fatigue symptoms and low energy, becoming extremely tired after very minimal exertion. She has suffered from CFS and anxiety for over 10 years with no signs of improvement.

In the SR, the appellant adds that there have been "no significant changes to the [CFS] since it started 16 yrs ago."

Functional Skills

In the MR, the physician reports that the appellant is able to walk unaided 2-4 blocks, climb 5+ stairs, remain seated 1-2 hours, and lift 15 to 35 pounds. In the AR, the physician notes the appellant is independent in all areas of mobility and physical ability except for needing periodic assistance carrying and holding—with the explanatory note that she “may sometimes need assistance carrying shopping due to CFS.”

The physician states the appellant experiences some cognitive based difficulties with communication, due to anxiety, and notes a significant deficit with cognitive and emotional function in the category of emotional disturbance (anxiety). In the AR, the physician states the appellant's ability to communicate in reading, writing and hearing is “good” and her speaking is “satisfactory,” noting that CFS and anxiety can affect her ability to speak. With respect to cognitive and emotional functioning, on the AR the physician notes moderate impacts in consciousness, emotion, and motivation, and no or minimal impacts in all other areas. He notes “Due to anxiety and CFS she will have problems motivating herself to perform activities of daily living.”

In the SR, the appellant describes how she is fatigued every day, but her energy levels fluctuate, with 1-2 good days per month. Most days she tires quickly and has to take breaks from or stop easy tasks (e.g., resting after showering). During very low energy phases she finds it difficult to read or process much information, sound and bright light bother her, and talking at length is tiring.

Daily Living Activities

The appellant has not been prescribed any medication or treatments that interfere with DLA.

The physician reported independence in most areas of DLAs. He indicated the appellant needs periodic assistance in dressing, grooming, laundry, basic housekeeping, going to and from stores, carrying purchases home, food preparation and cooking—all due to weakness due to CFS—and using public transit—due to anxiety. In additional comments, the physician describes this assistance as “regular” in respect of shopping, laundry and housekeeping, but does not describe how often or for what duration any help is required.

With respect to the social functioning aspects of DLAs, the appellant is independent in making appropriate social decisions, but needs periodic support due to CFS and anxiety in the other listed areas. The physician does not provide a description of the degree and duration of support/supervision required. He states she has marginal functioning in her immediate and extended social networks, but that she does receive support/supervision from family and friends.

In the SR, the appellant says that because her energy levels are unreliable, planning is difficult, “it is a struggle to keep myself & my daughter fed, our home & laundry clean & maintain some social ties. I sometimes need help with grocery shopping & food preparation, which we receive from family. They also help to keep our place reasonably clean & with budgeting.” Her family also helps her with childcare when they are able.

Assistance Required

The MR states the appellant does not require any prostheses or aids for her impairment. The AR notes that help is provided by family and friends. The AR does not list any assistive devices and states that the appellant does not have an assistance animal.

Submissions and Evidence on Appeal

In her notice of appeal, the appellant raises three concerns: (1) her physician's report was not thorough enough and left out important information; (2) her condition has worsened in the year since her self-report and her physician's report were submitted; and (3) it is unclear why she does not meet the CPP definition of disabled.

The appellant provided written submissions on appeal, dated June 11, 2019. In those submissions, she argues her physician's report left out important information, and her health has declined over the past year, requiring more assistance.

In her appeal submissions, the appellant also provides the following written evidence:

- At the time of application, the appellant needed help from family and friends with DLAs, 2-3 times per week;
- Due to worsening conditions, she now needs help from family and friends 4-5 times per week for extended periods, specifically for "laundry, housekeeping and financial matters (budgeting)" and says this help "overall is continuous"; and
- Her physician incorrectly filled out the MR by failing to indicate "memory, motivation, and concentration" as "significant defects in cognitive function" (Question D6), and incorrectly filled out the AR by marking attention and memory impacts as "minimal" when they should be "moderate" impacts (Question B4).

The ministry relied on the reconsideration decision.

Panel's Ruling on New Evidence on Appeal

Under section 22(4)(b) of the *Employment and Assistance Act*, the panel may admit new evidence on appeal only if it is "in support of" the information and records that were before the ministry at the time the reconsideration decision was made. Evidence "in support" of information that was before the ministry at reconsideration means additional evidence that substantiates or corroborates the information and records that were before the ministry.

The panel admitted the appellant's new evidence concerning the help she needed from family and friends with DLAs at the time of the application, as this was evidence in support of the information and records that were before the ministry—it provides additional and supporting evidence to information in both the AR and SR that the appellant receives help from family and friends with her DLAs.

The panel did not admit the appellant's new evidence concerning worsening of her condition and that she now needs more help than she did at the time of application. There was no information or records before the ministry at reconsideration concerning a worsening of her condition and a resultant need for more assistance. The appellant's own evidence in the SR was that there have been no significant changes in her condition in 16 years. Thus, the new evidence of a worsening condition and need for more help conflicts with, and cannot be considered in support of, information and records that were before the ministry.

The panel also did not admit the appellant's evidence that the physician made errors in completing his reports. This new evidence directly contradicts the evidence from the physician that was before the ministry and thus it cannot be found to be in support of that information.

The Panel's Findings of Facts

The Panel finds as fact that:

- the appellant suffers from CFS and anxiety;
- her condition is long-term, indefinite in duration, and shows no signs of improvement;
- she experiences daily symptoms of fatigue and periods of low energy;
- she faces few restrictions in mobility or physical functioning, but is limited by fatigue;
- both anxiety and CFS can affect the appellant's ability to speak, though her written communication and hearing is generally good;
- in times of low energy, she finds it difficult to read or process information;
- she experiences moderate impacts in consciousness, emotion, and motivation, which make it difficult for the appellant to motivate herself to do DLAs;
- the appellant is independent in most of the non-social DLAs, but requires periodic assistance 2-3 times per week with shopping, laundry, housekeeping, and food preparation (the duration of this assistance is unknown);
- the appellant needs periodic assistance with, or needs to rest after, dressing and grooming (the duration and frequency of any assistance is unknown); and
- the appellant is independent in making appropriate social decisions but needs some periodic support/supervision in developing and maintaining relationships, interacting appropriately with others, dealing appropriately with unexpected demands and securing assistance from others (the frequency and duration of this support/supervision is unknown).

PART F – REASONS FOR PANEL DECISION

The issue on appeal is whether the ministry's reconsideration decision of April 24, 2019 in which the ministry found the appellant was not eligible for designation as a PWD because she did not meet all of the criteria in section 2(2) of the EAPWDA was reasonably supported by the evidence or was a reasonable application of the legislation in the circumstances of the appellant. The ministry was satisfied that the appellant had reached 18 years of age and that her impairment would continue for at least 2 years. However, based on the information provided in the PWD application and Request for Reconsideration, the ministry was not satisfied that, the appellant had a severe physical or mental impairment; in the opinion of a prescribed professional, the appellant's impairment directly and significantly restricts her ability to perform DLA either continuously or periodically for extended periods; and as a result of these restrictions she requires help to perform DLA through an assistive device, the significant help or supervision of another person, or the services of an assistance animal.

The eligibility criteria for PWD designation are set out in section 2(2) of the EAPWDA as follows:

2(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.

The "daily living activities" referred to in EAPWDA section 2(2)(b)(i) are defined in section 2 of the EAPWDR:

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;

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.

Section 2.1 of the EAPWDR also sets out alternative grounds for PWD designation as follows:

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).

Analysis

Alternative Grounds for PWD Designation

In both her Notice of Appeal and in her submission at reconsideration, the appellant argued she met the definition of "disabled" under the CPP and therefore should be prescribed as a PWD on alternative grounds. The Reconsideration Decision notes the appellant is not one of the prescribed classes of persons in section 2.1 of the EAPWDR, but does not explain why.

Section 42(2)(a) of the CPP provides that "a person shall be considered disabled only if he is determined in prescribed manner to have a severe and prolonged mental or physical disability" (emphasis added). That "prescribed manner" is found in section 68 of the *Canadian Pension Plan Regulations* (C.R.C. c.385), under which the federal minister responsible makes a determination of "disability" based on a process that involves an application and subsequent evaluation of that application. A person only meets the definition of disabled under the CPP if they are determined to be disabled through that application and approval process set out in section 68 of the CPP Regulation. Here, while the appellant's current doctor opines in her letter of March 20, 2019 that the appellant meets the definition of disabled in the CPP, there is no evidence that the appellant has made the required application and that the federal minister has made a determination that she is disabled under the CPP. Accordingly, the ministry reasonably determined there were no alternative grounds for PWD designation.

Severe Impairment

The appellant disputes the finding of no severe impairment, arguing her physician omitted evidence and that her condition has worsened.

The ministry's position as set out in the Reconsideration Decision is that, while the appellant does experience limitations to her physical functioning as a result of her CFS, the physician's evidence

supports finding a moderate rather than a severe level of impairment. With respect to mental functioning, the ministry found insufficient evidence to support a finding of severe mental impairment.

Panel's Decision:

The legislation provides that the minister has the discretion to make a PWD designation if satisfied that the person has a severe impairment, taking into account all of the evidence including that of the appellant. However, the legislation is also clear that the fundamental basis for the PWD analysis is the evidence from a prescribed professional about the nature of the impairment and its impact on daily functioning. Here, the PWD application shows that the appellant is capable of walking 2-4 blocks, climbing 5+ stairs, lifting 15-35 pounds, and sitting for 1-2 hours. Further, as discussed below, the AR shows the appellant to be independent in all areas of physical ability and mobility with the exception of needing periodic assistance for "carrying shopping due to CFS." While the appellant does face daily limitations on her activities due to fatigue, and needs to rest after some activities, the evidence shows no "severe" physical impairment. On review of the evidence provided, the panel finds the ministry's decision that the appellant did not have a severe physical impairment to be reasonably supported by the evidence.

Similarly, there is no evidence of a severe mental impairment. The medical evidence shows moderate impacts in consciousness, emotion, and motivation, and a minimal degree of impact on language ability (comprehension and speech). While the appellant needs some assistance in social functioning due to anxiety and CFS, there is insufficient evidence about the problems she faces and the degree and duration of support/supervision she requires on which to base a finding of *severe* mental impairment. Accordingly, the panel finds the ministry's decision that the appellant did not have a severe mental impairment to be reasonably supported by the evidence.

Impairment's Effect on DLAs

The appellant submits that her physician left out information, and that her condition has worsened and she needs more assistance with DLAs.

The ministry submits that the assessments provided by the physician are indicative of a moderate level of restriction to DLAs and does not establish that DLAs are restricted continuously or periodically for extended periods.

Panel's Decision:

The legislative requirement respecting DLAs is set out in section 2(2)(b) of the EAPWDA. The minister must be satisfied that, as a result of a severe physical or mental impairment a person is, in the opinion of a prescribed professional, directly and significantly restricted in the 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. DLAs are defined in section 2(1) of the EAPWDR and are listed in the PWD application with the opportunity for the prescribed professionals to check marked boxes and provide written comments.

As noted above, the AR and SR, together with the new evidence admitted on appeal, show that the appellant is independent in most of the non-social DLAs, but requires periodic assistance 2-3 times per week with shopping, laundry, housekeeping, and food preparation (the duration of this assistance is unknown); the appellant needs periodic assistance with (or needs to rest after) dressing and grooming (the duration and frequency of any assistance is unknown); and the appellant needs periodic support/supervision in developing and maintaining relationships, interacting appropriately with others, dealing appropriately with unexpected demands and securing assistance from others (the frequency and

duration of this support/supervision is unknown). There is no admissible evidence, and no evidence from a medical professional to show that her ability to perform DLAs has worsened over the past year.

Without information about the duration of periodic help for shopping/laundry/housekeeping/cooking, or frequency and duration of periodic help for dressing/grooming and social support/supervision, it is difficult to assess whether DLAs are "directly and *significantly*" restricted. Here, the periodic assistance from family for 2-3 times per week (with an unknown duration), indicates some degree of restriction, but does not demonstrate *significant* restriction, especially when the AR indicates the appellant is independent in most areas of DLAs. Based on all the information that was before the panel, the panel finds that the information does not establish that the appellant's impairment directly and significantly restricts her DLA continuously or periodically for extended periods as required by section 2(2)(b)(i) of the EAPWDA.

Need for Assistance

The appellant submits that her condition has worsened, and she needs more assistance.

The ministry states that as it has not been established that DLAs are significantly restricted, it cannot be determined that significant help is required.

Panel's 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. 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 a DLA.

The establishment of direct and significant restrictions with DLA is a precondition of the need for help criterion because the need for help must be as a result of those restrictions. As the panel found 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 that determined the appellant is not eligible for PWD designation under section 2 of the EAPWDA was reasonably supported by the evidence. The panel confirms the decision pursuant to section 24 of the EAA and the appellant is not successful in her 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

Kathy Grant

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2019/07/11

PRINT NAME

Susan Mackey

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/07/14

PRINT NAME

Stephanie Korour

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/07/13