

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 April 16, 2019, which held that the appellant did not meet 3 of the 5 statutory requirements of section 2 of the *Employment and Assistance for Persons with Disabilities Act* (EAPWDA) for designation as a person with disabilities (PWD). The ministry found that the appellant met the requirements of having reached 18 years of age and having a medical practitioner confirm that the appellant's impairment is likely to continue for at least 2 years.

However, the ministry was not satisfied 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 those restrictions, in the opinion of a prescribed professional, the appellant requires an assistive device, the significant help or supervision of another person, or the services of an assistance animal to perform DLA.

The ministry also determined that the appellant is not in any of the classes of persons set out in section 2.1 of the *Employment and Assistance for Persons with Disabilities Regulation* who may be eligible for PWD designation on alternative grounds.

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 FACTSInformation before the ministry at reconsideration

- 1) The appellant's PWD application comprised of:
 - A Medical Report (MR) dated March 2019, completed by a general practitioner (GP) who first met the appellant when completing the MR;
 - An Assessor Report (AR) dated March 5, 2019, completed by a registered nurse (RN) who first met the appellant on this date and relied on an interview with the appellant to complete the AR; and,
 - The appellant's self-report (SR) section of the PWD application, dated August 19, 2018.

- 2) The appellant's Request for Reconsideration dated April 7, 2019, with the following attachments.
 - i) September 5, 2003 letter from the ministry of another province stating that the appellant has been found to be a person with a substantial disability as defined in provincial disability legislation.
 - ii) April 28, 2006 letter from the same ministry stating that following review of the information in the appellant's medical file, she has been determined to be a person with a disability as set out in the provincial legislation.
 - iii) September 19, 2003 letter from a family physician stating that the appellant is totally unable to work at any type of job from either a psychiatric or physical perspective.
 - iv) April 26, 2004 letter from the same family physician noting that the appellant has been a long-term patient who is "maintained on anti-depressants significant depression" and noting previous hospitalization for overdoses.

Information provided on appeal

The appellant's Notice of Appeal (NOA) dated April 23, 2019, which did not include new evidence.

The appellant did not attend the hearing. After confirming delivery of the Notice of Hearing to the appellant, the hearing proceeded in her absence in accordance with section 86(b) of the Employment and Assistance Regulation.

At the hearing, the ministry explained the reconsideration decision but did not provide additional evidence.

The arguments of both parties are set out in Part F of this decision.

Summary of relevant evidenceDiagnoses

In the MR, the GP reports that the appellant has severe impairment, unlikely to improve substantially, and provides the following diagnoses:

- Anxiety disorder and mood disorder
- Fibromyalgia, chronic pain
- PTSD [post-traumatic stress disorder]

- Hypothyroidism
- Osteoporosis
- COPD [chronic obstructive pulmonary disease]

Physical Impairment

The GP reports:

- Has dyspnea with exertion secondary to COPD resulting in difficulty getting around.
- Can walk 4+ blocks unaided on a flat surface (“does have dyspnea & pain”).
- Able to climb 5+ stairs unaided (“holds on to railing, needs breaks”).
- Limited to lifting under 5 lbs.
- Can remain seated for 1 to 2 hours (“secondary to pain”).
- No prostheses or aids are required.

The RN reports:

- Walking indoors and standing are managed independently. Walking outdoors takes significantly longer than typical – “can walk 1 mile then needs 1 hr. rest.”
- Climbing stairs takes significantly longer than typical.
- Lifting, and carrying and holding are managed independently – up to a maximum of 10 lbs.

In her SR and reconsideration submission, the appellant reports that she is having a hard time finding a family doctor, having recently relocated from another province where she was accepted for disability many years ago. She has osteoporosis, osteoarthritis in all of her joints, damaged lungs, and is being tested for heart problems. She is in constant pain. Stairs are difficult and she cannot walk long distances. The pain makes her weak, angry, depressed, and tired. In her reconsideration submission, the appellant adds that she has a hard time walking two blocks and must stop and rest, and that she cannot lift anything over 10 lbs. She also reports suffering from IBS [irritable bowel syndrome] and that she gets very bad migraines.

Mental Impairment

The GP reports:

- Longstanding history of depression and anxiety severely impact daily functioning.
- Very complex medical history has had a very negative impact on mood.
- No difficulties with communication.
- Significant deficits in 3 of 11 listed areas of cognitive and emotional function – emotional disturbance, motivation and attention or sustained concentration.

The RN reports:

- Good ability to communicate via speaking, reading, writing and hearing.
- No major impact on daily functioning for any of the 14 listed areas of cognitive and emotional functioning. A moderate impact on daily functioning for emotion. Minimal impact for bodily functions (sleep, has nightmares and awakens with panic attacks, requires medication to sleep) and memory (long-term memory). No impact is reported for the remaining areas.
- Has panic attacks during the daytime which can occur anywhere at any time, 4 days in 7.

- Depression causes appellant to avoid people and not want to do anything/not shower for 2-3 days. This occurs 2x monthly in general.
- Four areas of social functioning are managed independently – appropriate social decisions, ability to develop and maintain relationships, interact appropriately with others, ability to secure assistance from others. The fifth area – ability to deal appropriately with unexpected demands – requires periodic support/supervision (appellant reports arguing with child, in whose home she resides, when asked to do something, but follows “MD” directions). Good functioning with immediate and extended social networks.
- Living with son and his family due to financial situation. Frequent conflicts with son.

In the SR, the appellant writes that she suffers with depression and anxiety. She has anxiety attacks, sometimes when shopping, and cannot handle crowds. Due to very abusive relationships she suffers from PTSD. At one point she never left her home. She loses her appetite and gets so depressed that she won't shower for a while, won't clean and only wants to sleep. Her depression is getting bad and she needs a new counsellor, having relocated from another province.

DLA

The GP reports the following:

- The appellant has been prescribed medications that interfere with the ability to perform DLA, described as “can cause daytime drowsiness.”
- Difficulty performing ADLs [activities of daily living] as a result of low mood and severe anxiety.
- Meal preparation, management of medication, daily shopping, mobility inside and outside the home, use of transportation, and management of finances are not restricted.
- Personal self-care is restricted on a periodic basis. When mood is very low, neglects self and has difficulty bathing etc.
- Basic housework is restricted – difficulty due to pain.
- Social functioning is restricted – “when severely depressed, has difficulty with social functioning.”
- Used walker when living in other province, “still requires aid.”

The RN reports the following:

- Stage 2 osteoporosis, osteoarthritis all joints, severe IBS, fibromyalgia, depression, anxiety, COPD, and cardiac disease are the mental or physical impairments that impact the ability to manage DLA.
- All listed tasks for personal care, meals, pay rent and bills, medications, and transportation are managed independently.
- For basic housekeeping, laundry is managed independently, with basic housekeeping requiring periodic assistance from another person (“cannot wash floor or vacuum without pain.”)
- For shopping, going to and from stores, reading prices and labels, making appropriate choices, and paying for purchases are managed independently. Carrying purchases home requires periodic assistance from another person if objects over 10 lbs.
- Mobility and physical ability (relates to the DLA move about indoors and outdoors) is as described above under Physical Impairment.
- Social functioning is as described above under Mental Impairment.

Need for Help

The GP responds "No" when asked if the appellant requires any prostheses or aids for her impairment but also indicates that the appellant used a walker when residing in another province and "still requires aid."

The RN reports that assistance required for DLA is provided by family, commenting that the appellant's son drives to and from shops and appointments and carries heavy groceries. The RN indicates that no assistive devices are required and that the appellant does not have an assistance animal.

PART F – REASONS FOR PANEL DECISION**Issue on Appeal**

The issue on appeal is whether the ministry's decision to deny the appellant 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. That is, was the ministry reasonable when determining that the appellant is not a person described in section 2.1 of the EAPWDR and that the requirements of section 2(2) of the EAPWDA were not met because:

- a severe physical or mental impairment was not established;
- the appellant's DLA are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and
- as a result of those restrictions, in the opinion of a prescribed professional, the appellant does not require an assistive device, the significant help or supervision of another person, or the services of an assistance animal to perform DLA?

Relevant Legislation**EAPWDA**

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 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).

EAPWDR

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, 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.

(3) The definition of "parent" in section 1 (1) applies for the purposes of the definition of "dependent child" in section 1 (1) of the Act.

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).

Panel Decision

Eligibility under section 2.1 of the EAPWDR

In the absence of any evidence or argument respecting eligibility for PWD designation under section 2.1 of the EAPWDR, the panel finds that the ministry reasonably determined that it has not been established that the appellant falls within the prescribed classes of persons under that section. The panel's discussion below is limited to eligibility for PWD designation under section 2 of the EAPWDA and section 2 of the EAPWDR.

Eligibility under section 2 of the EAPWDA

Physical and Mental Impairment

The appellant is diagnosed by a medical practitioner, the GP, with anxiety disorder and mood disorder, fibromyalgia, chronic pain, PTSD, hypothyroidism, osteoporosis, and COPD.

In her written submissions, the appellant argues that as a result of her medical conditions she is in constant pain and has a hard time walking two blocks, which requires her to stop and rest, and that she cannot lift anything over 10 lbs. The pain makes her weak, angry, depressed, and tired. She also suffers from PTSD and anxiety, making her

unable to handle crowds, and from depression which is getting bad.

The ministry's position is that the information provided is not evidence of a severe impairment. In reaching this conclusion, the ministry notes that while the legislation does not require an applicant to have a long-standing history with the professionals who complete the PWD application, it does require that the ministry be satisfied that a severe impairment exists. The ministry finds the PWD application to be problematic because both the GP and the RN had just met the appellant when completing the application. The ministry questions the accuracy of their assessments "given the limited understanding they would no doubt have after only one visit," noting that the RN identifies the appellant as the only source of information. On this basis, the ministry determines that it is more likely that the information in the MR and AR is a reiteration of the appellant's self-reporting to the GP and RN, rather than a direct reflection of their medical opinions. The ministry also acknowledges that the appellant had disability status in the province where she formerly resided, but notes that that province's legislation may have different requirements than BC and that the information was from 13 years ago which does not necessarily reflect the appellant's current health status.

Respecting the current information, including that of the appellant, the ministry notes that it has considered the several physical and mental diagnoses collectively but finds that, when weighing the evidence provided against the nature of the impairment and its reported functional limitations, a severe impairment is not established.

In terms of mental impairment, the ministry notes that although reporting that depression and anxiety severely impact daily functioning, the GP indicates that a large majority of DLA are unrestricted. The RN also indicates that the appellant is largely independent with DLA. The GP reports that restrictions occur when the appellant's mood is low and when severely depressed, but does not explain how often or for what duration this occurs. Additionally, the RN identifies no major impacts on daily cognitive and emotional functioning, with only one moderate impact – emotion - and that the appellant is largely independent with social functioning and has good functioning with both immediate and extended social networks.

Finding that the information in the PWD application focuses more on mental health, with only the occasional mention of pain here and there, the ministry concludes that the physical functional abilities reported by both the GP and RN are not reflective of a severe physical impairment. In particular, the ministry notes that while the GP reports that the appellant has difficulty getting around due to dyspnea secondary to COPD, the GP reports the ability to walk 4+ blocks unaided. The GP notes prior use of a walker and that the appellant still requires aid but also indicates that no assistive devices are required, making it difficult to assess the severity of the appellant's physical conditions. The RN also indicates that no assistive devices are required and that the appellant can walk 1 mile before requiring rest. With the GP reporting a lifting limit of under 5 lbs. and the RN reporting a maximum of 10 lbs., the ministry concludes that the ability to lift and carry 5-10 lbs. is a moderate rather than severe restriction, enabling the completion of most basic tasks of daily living. The ministry again notes that the appellant is identified by the GP and RN as being largely independent with DLA.

The panel notes that despite its concerns regarding the quality of the information provided by the GP and the RN, the ministry does not appear to have discounted or given the information less weight, and has largely based its conclusions on that information. At the hearing, the ministry re-iterated that there is no legislative requirement for a long-standing relationship between an applicant and a prescribed professional completing the PWD application and that the MR and AR, as completed, were considered. While the appellant's evidence must be considered when assessing severity of impairment, the legislation is clear that the fundamental basis for the analysis is the evidence from prescribed professionals, in this case, the GP and the RN. The ministry has given little weight to the information from the appellant's former province of residence, which the panel considers to be reasonable given that the information cannot be established as reflecting the appellant's current functioning and

as the requirements for disability qualification in the other province in 2003 and 2006 are unknown.

Respecting mental impairment, the GP states that anxiety and depression severely impact daily functioning, but as the ministry notes, the GP further describes the impacts as occurring “when mood is very low” and “when severely depressed” without indicating how often this occurs or for what duration. The RN describes both the frequency and the duration of depressive episodes as bi-monthly for 2-3 days. The appellant’s own information is suggestive of varying levels of depression and that her depression is getting bad, but little other detail is provided. The GP does not describe specific impacts of anxiety or PTSD, and while the RN reports that panic attacks occur 4 days a week, the RN assesses a moderate rather than major impact on daily functioning for emotion. Additionally, the RN assesses no major impact on daily functioning in any area of cognitive and emotional function, assesses good functioning with immediate and extended social networks, and identifies the need for support/supervision (periodic) in only one of five listed areas of social functioning – dealing appropriately with unexpected demands. Furthermore, both the RN and the GP assess good communication abilities and that while the appellant is periodically restricted with some DLA due to her mental health conditions, she is otherwise capable of independently managing DLA. Based on the overall level of cognitive, emotional and social functioning described in the available information, the ministry was reasonable to conclude that a severe mental impairment is not established.

Respecting physical impairment, the GP, RN and appellant all identify some limitations to functioning due to dyspnea (secondary to COPD) and pain. For example, the GP reports that while the appellant is able to walk unaided for 4+ blocks she has dyspnea and pain and the RN reports that the appellant takes significantly longer walking outdoors but is able to walk 1 mile before requiring rest for an hour. The appellant reports being more limited, describing that walking 2 blocks is difficult and that she must rest afterward. No limitations on the ability to walk or mobilize within the home are reported. The GP and the RN indicate that stairs are managed independently, with the GP identifying the need to use the rails, which the panel notes do not fall within the legislative definition of assistive device, and the RN indicating that stairs take significantly longer. Information regarding the need for an assistive device is not entirely clear, with both the GP and the RN indicating that assistive devices are not required but with the GP also stating that the appellant previously used a walker and still requires aid. The GP does not explain further and the appellant does not mention the need for assistive devices. The appellant’s ability to lift is also limited, but the degree of that limitation is not entirely clear, though both the appellant and the RN report the ability to lift up to a maximum of 10 lbs. The only information respecting the appellant’s ability to remain seated is from the GP who reports that the appellant cannot remain seated for more than 1 to 2 hours due to pain.

While there is some variability and uncertainty in the description of the limitations to the appellant’s physical functioning, it is clear that both the GP and RN report that the appellant remains able to independently manage most DLA. Respecting aspects of DLA for which physical limitations are reported, the appellant is reported by the GP and RN as remaining capable of walking a reasonable distance, and of managing housekeeping and carrying purchases home with only periodic assistance. Based on the assessments of physical functional skills/abilities and the assessment of the ability to perform DLA, the ministry was reasonable in concluding that a severe physical impairment is not established.

Restrictions in the ability to perform DLA

The appellant’s written submissions address difficulties with walking outdoors, climbing stairs and being limited to lifting up to 10 lbs. as a result of her physical medical conditions. The appellant also reports that anxiety impacts her ability to be in crowds, including when shopping, and that depression impacts her appetite, personal care and

housekeeping.

The ministry notes that a severe impairment has not been established and that the legislation requires that restrictions with DLA be both significant and either continuous or periodic for extended periods. The ministry finds that the GP and RN indicate that the appellant is independent in a large majority of DLA and that no continuous restrictions are identified, which does not suggest overall significant restrictions. The ministry acknowledges that there are certain limitations as a result of medical conditions, but concludes that the information provided does not establish that an impairment significantly restricts DLA continuously or periodically for extended periods.

Section 2(2)(b)(i) of the EAPWDA requires that the minister be satisfied that in the opinion of a prescribed professional, a severe mental or physical impairment directly and significantly restricts the appellant's 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. The term "directly" means that there must be a causal link between the severe impairment and the restriction. The direct restriction must also be significant.

DLA are defined in section 2(1) of the EAPWDR and are listed in both the MR and the AR sections of the PWD application with the opportunity for the prescribed professional to check marked boxes and provide additional narrative. DLA, as defined in the legislation, do not include the ability to work.

In this case, both the GP and the RN are prescribed professionals. As the ministry notes, neither the GP nor the RN identifies any continuous restrictions in the ability to perform DLA and both report that the majority of DLA are managed independently. On the evidence available, the periodic restrictions with basic housekeeping, personal care and shopping (carrying over 10 lbs.), and social functioning cannot be established as meeting the requirement of being for extended periods. Both the GP and the RN identify restrictions in the ability to walk outdoors, which relates to the DLA move about outdoors and indoors, as the appellant takes significantly longer and experiences pain and dyspnea, but given the reported ability to walk 4+ blocks or up to 1 mile, a significant restriction is not established. Based on the information from the GP and the RN, the ministry is reasonable in concluding that the evidence does not establish that in the opinion of a prescribed professional the appellant's impairment *significantly* restricts the ability to perform DLA either *continuously or periodically for extended periods*.

Help to perform DLA

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 DLA.

The establishment of direct and significant restrictions with DLA is a precondition of the need for help criterion. As the panel found that the ministry reasonably determined 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, which determined that the appellant was not eligible for PWD designation, was reasonably supported by the evidence, and therefore confirms the decision. The appellant is not 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

Jane Nielsen

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2019/05/16

PRINT NAME

Margarita Papenbrock

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/05/16

PRINT NAME

Wesley Nelson

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/05/16