

**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 3, 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 of a medical practitioner confirming 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 FACTS**Information before the ministry at reconsideration

- The appellant’s PWD application, comprised of:
  - A Medical Report (MR) dated November 16, 2018, completed by a general practitioner (GP) who saw the appellant as a new walk-in patient;
  - An Assessor Report (AR) dated November 23, 2018, completed by the same GP who had now known the appellant for 9 days and relied on the appellant’s “GP chart” and an office interview with the appellant to complete the AR; and
  - The self-report (SR) section of the PWD application, dated November 23, 2018.
- November 8, 2018 letter from a physiotherapist who had treated the appellant twice.
- Information from an orthodontist, including a November 28, 2017 letter outlining clinical findings and treatment recommendations for the appellant.
- March 13, 2018 letter from the treatment coordinator for the orthodontist.
- The appellant’s Request for Reconsideration submission dated April 2, 2018.
- A written submission from the appellant’s advocate.
- Mayo Clinic website information (1 page) respecting the causes and symptoms of fibromyalgia.

Information provided on appeal and admissibility

- Notice of Appeal (NOA) received by the Tribunal on April 28, 2019; and,
- A 1-page appeal submission from the appellant, received by the Tribunal on June 25, 2019.

By email, the ministry indicated that its appeal submission would be the reconsideration summary. The ministry did not take a position as to the admissibility of the appellant’s appeal submissions.

In accordance with section 22(4) of the *Employment and Assistance Act* (EAA), the panel may admit oral and written testimony that is in support of the information and records available at the time of reconsideration.

The panel determined that the additional evidence in the appellant’s NOA and appeal submission, with the exception of references to alcohol use and her living situation in the appeal submission, related to medical conditions either diagnosed by the GP or previously referenced by the appellant. Therefore, aside from those exceptions, the information provided by the appellant on appeal was admitted as evidence in support of the information and records available at reconsideration.

The submissions of the ministry and the appellant are set out in Part F of this decision.

### Summary of relevant evidence

#### Diagnoses and Health History

In the PWD application, where asked to specify diagnoses related to the applicant's impairment and indicate the severity of the medical conditions relevant to the impairment, the GP reports:

- Temporomandibular joint dysfunction (TMJD) – onset March 2006  
Constant severe pain, leading to fatigue and headaches, reduced motivation and low mood. Struggles to prepare meals, do housework, can spend entire day in bed. Speech impaired intermittently, slurred, and has to speak slowly causing difficulty. Avoidance of social interactions. Has seen orthodontist [the orthodontist's report is attached].
- Fibromyalgia - onset November 2015  
Easily fatigued, nauseated. Restricts physical activity. Cannot walk more than 200 metres. Awaiting internal medical specialist consultation. Appetite reduced.

#### Physical Impairment

The GP assesses the appellant's functional skills as:

- able to walk 1 to 2 blocks unaided on a flat surface; walking indoors and outdoors are done slowly, taking 2x longer than normal;
- able to climb 5+ steps unaided (slowly);
- standing is limited to a maximum of 15 minutes;
- limited to lifting 15 to 35 lbs. (further clarified as being 20 lbs., that periodic assistance is required and that the appellant's daughter carries shopping); and
- can remain seated for less than 1 hour.

The GP also reports that no prostheses or aids are required for the appellant's impairment.

The physiotherapist noted that the appellant presented with postural dysfunction, increased muscle tone was palpable in her shoulder girdles and left face/jaw and that an audible "click" was noted with opening and lateral deviation. Treatment was a trial of IMS and education regarding optimal posture.

#### Ability to Communicate

The GP reports:

- Difficulties with communication – pain and slurred speech intermittently due to TMJD;
- Reading and writing abilities are good;
- Speaking ability is poor (speech slurred at times); and
- Hearing ability is satisfactory.

In the SR, the appellant reports that her TMJD is the worst it has ever been, affecting her life tremendously. She has neck and back problems, constant pain and tension in her jaw that feels like there is an elastic in her jaw, speech problems, migraines, indigestion, and is unable to eat several different foods. She clenches and grinds her teeth when sleeping which has ruined her teeth. She has low esteem as she cannot speak properly and is embarrassed. The doctor suspects that she has fibromyalgia, with blood tests having ruled out other possible conditions. She has fatigue all the time and may even have sleep apnea, though she needs a test to confirm. She also has earaches and is hard of hearing. Her whole quality of life is affected. She is on a wait list to attend a pain centre. At present, her main concern is the TMJD and she hopes to be approved for disability and have coverage for physio and the dentist.

In her reconsideration submission, the appellant also reports that every day she experiences significant arm weakness, numbing/tingling sensations in her hands, significant mobility limitations, and gets a headache, which with some frequency is a debilitating migraine. She is limited to walking one block unaided on a flat surface. Some days she does not get out of bed all day due to the pain, usually twice a week. She suspects that a motor vehicle accident may be the cause of her fibromyalgia and since the accident she has had significant hip pain that limits her mobility, in addition to the limitation of movement due to generalized pain. She deals with fatigue and exhaustion, which further limits what she can do. At about 2pm she feels nauseated and the weakness in her arms seems to be worse.

In her NOA, the appellant writes that she can barely move her arms most days or her jaw, plus her hip is bad.

In her appeal submission, the appellant writes that her conditions have become increasingly worse since she was denied disability assistance. Chronic fatigue and other symptoms of fibromyalgia are made worse by stress. The stress and depression cause her to grind her teeth and clench her jaw more at night, making her TMJD significantly worse. Her appetite has changed. Her hip hurts all the time, her jaw is sore all day, every day, and the nausea she experiences due to her pain affects and limits everything she does.

### Mental Impairment

In the MR, the GP reports:

- Significant deficits with 3 of the 11 listed areas of cognitive and emotional function – emotional disturbance, motivation, and attention or sustained concentration. “Low mood, poor concentration. Lack of motivation.”
- Social functioning is restricted but the restriction is not identified as being continuous or periodic. “Communication difficulties, avoids social interactions.”

In the AR, the GP reports:

- A major impact on daily functioning for emotion, attention/concentration and motivation. A moderate impact for bodily functions, executive, memory, and language. No impact for the remaining 7 listed aspects of cognitive and emotional functioning.
- 4 of 5 listed aspects of social functioning are managed independently – appropriate social decisions, develop and maintain relationships, interact appropriately with others, and secure assistance from others. Deal appropriately with unexpected demands requires periodic support/supervision – daughter supports emotionally.
- Marginal functioning with immediate and extended social networks.
- Self-referring to mental health.

In the SR, the appellant reports that she has depression and anxiety daily.

In her NOA, the appellant states that she is severely depressed and suicidal. In her appeal submission she writes that she feels hopeless which affects her motivation, she has increased anxiety in public and private, gets overwhelmed around people and has had suicidal thoughts (but does not want to kill herself).

### DLA

The GP reports the following:

- The appellant has been prescribed medications and/or treatments that interfere with the ability to perform DLA – “Feels widespread pain and fatigue after physiotherapy.”
- Temporomandibular joint pain and fibromyalgia are the impairments that impact the appellant’s ability to manage DLA.
- Degree of restriction with DLA is described as “Affects daily. Needs assistance with shopping. Avoids social interactions” and assistance required is described as “Daughter cooks, cleans, does dishwashing.”
- Respecting the DLA “move about indoors and outdoors” mobility inside the home is not restricted; mobility outside the home is continuously restricted. Additional details are provided under the heading Physical Impairment (above).
- Respecting the DLA “personal care,” “management of medications,” “management of finances,” and “use of transportation” there are no restrictions and all listed tasks are managed independently.
- Respecting the DLA “basic housekeeping,” both basic housekeeping and laundry are continuously restricted and require periodic assistance (daughter helps).
- Ability to perform the DLA “shopping” is continuously restricted. 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 (daughter carries groceries and bags).
- Ability to perform the DLA “meals” is continuously restricted. Meal planning, food preparation, cooking, and safe storage of food are managed independently.
- The ability to manage social functioning is as described above under the heading Mental Impairment (above).
- Low mood due to pain/fatigue. Poor concentration impacts on social interaction. Forgets appointments/other commitments.

In her reconsideration submission, the appellant reports that some days she cannot lift her arms, which affects everything she does in the kitchen. She experiences significant limitations with her arms over half the time, requiring assistance from her daughter. She has numbing/tingling sensation in her hands daily which is particularly concerning when trying to chop vegetables or something of that nature: she must stop and try to get the blood circulating so her hands can function again. Due to widespread pain and fatigue, many DLA take twice as long as typical, with cleaning the house or anything involving the use of her arms, such as brushing or washing hair, taking twice as long because her arms won’t cooperate. She experiences this every day. She relies on her daughter to cook, clean, take out the garbage, carry laundry baskets, and shop (carries purchases and pushes the cart) because of the pain and exhaustion associated with her fibromyalgia and TMJD.

APPEAL NUMBER

**Need for Help**

The GP describes help provided by other people as "Daughter."

**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 was not in the prescribed class of persons described in section 2.1 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 Impairment**

At reconsideration, the appellant's advocate argued that the ministry's original reasons for denial interpreted the appellant's application, particularly respecting the ability to walk and lift, in a manner unfavourable to its success, including ignoring the GP's comment that walking is limited to 200 metres, not just that it takes two times longer. The appellant argues that she is severely impaired by the daily pain, chronic fatigue and reduced mobility caused by her medical conditions and that her conditions have become increasingly worse.

The ministry's position is that a diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment, rather, "impairment" is a medical condition that results in restrictions to a person's ability to function independently or effectively. The ministry reviewed the information provided by the GP, the appellant, orthodontist, and physiotherapist, also noting the advocate's submission and concluded that the information in the PWD application demonstrates limitations to physical functioning that speak to a moderate rather than severe physical impairment.

**Panel Analysis**

The legislation, section 2 of the EAPWDA, requires that the minister "is satisfied" that a person has a severe physical or mental impairment which gives the ministry discretion when making the determination.

The panel finds that the GP's assessment of the appellant's physical functional skills was reasonably viewed by the ministry as establishing a moderate degree of impairment: walking takes twice as long as normal and is limited to 1 to 2 blocks, consistently described by the GP as 200 metres, and no assistive devices are required; although taking 2x longer than typical, the appellant can climb 5+ steps unaided; and, the appellant is able to lift 20 lbs. The appellant is reported as being able to sit for less than 1 hour but it is unclear how much less, the GP does not explain how this limitation relates to the diagnoses of TMDJ or fibromyalgia, and the appellant's own information does not identify limitations with remaining seated. Both the appellant and the GP identify physical difficulties with communication, with the GP describing the frequency of these difficulties as "intermittent" and "at times," which is not reflective of severe impairment. The GP and the appellant note hearing loss but the appellant's ability to hear remains "satisfactory." The appellant describes being bedridden two days a week but that degree of impairment is not confirmed by the GP who notes that the appellant can spend an entire day in bed but, as noted above, assesses the appellant as independently managing almost all activities. The appellant also reports that her condition has worsened since the PWD application was completed but more recent medical information was not provided.

Based on the above analysis, the panel concludes that the ministry was reasonable in determining that the information does not establish a severe physical impairment.

**Mental Impairment**

The appellant's position as expressed in her SR is that on a daily basis she experiences depression and anxiety. On appeal, the appellant argues that she is severely depressed and has suicidal thoughts.

The ministry's position is that the information from the GP respecting cognitive and emotional functioning, communication and social functioning demonstrates that the appellant experiences low mood, lack of motivation and poor concentration but does not establish a severe mental impairment.

*Panel Analysis*

The appellant is not diagnosed with a mental impairment or brain injury. While the GP assesses major impacts on daily cognitive and emotional functioning in three areas (emotion –low mood, motivation, and attention/concentration), aside from getting support from her daughter to deal with unexpected demands, the GP does not describe resulting impacts on the ability to manage cognitive or decision-making tasks. Social functioning is described as marginal rather than good, but aside from the need for periodic support with unexpected demands the appellant independently manages social functioning. Impacts on social functioning related to the physical symptoms of TMJD are also noted and the appellant's hearing is satisfactory rather than good, but these conditions do not relate to mental impairment. While the GP notes that the appellant has self-referred to mental health, the GP makes no further comment, and the appellant repeatedly describes TMJD and its physical implications as being her main issue.

Based on the available information, again noting that a mental health condition is not diagnosed by a medical practitioner, the panel concludes that the ministry was reasonable in determining that a severe mental impairment is not established.

*Restrictions in the ability to perform DLA*

The appellant's position is that she is significantly restricted in her ability to perform DLA because many DLA take her twice as long to complete as they would a typical person and she relies on the help of her daughter to cook, clean, take out the garbage, carry laundry baskets, and shop due to the pain and exhaustion caused by fibromyalgia and TMJD.

Reviewing the DLA assessments in the MR and AR, and the appellant's description of her ability to manage DLA in her reconsideration submission, the ministry acknowledges that certain limitations resulting from pain and fatigue result in the need for periodic assistance with laundry, basic housekeeping and carrying purchases home, but that in the absence of a description of the frequency and duration of these periods it can't be determined if they represent a significant restriction to the appellant's overall level of functioning. For example, a restriction that only arises once a month is less likely to be significant than one which occurs several times a week. The ministry notes the appellant's own statements that she usually cannot get out of bed twice a week but finds that the information has not been confirmed by a medical practitioner or prescribed professional. The ministry concludes that the information is indicative of a moderate level of restriction and that there is not enough evidence to confirm that the appellant's impairment significantly restricts her ability to perform DLA continuously or periodically for extended periods.

*Panel Analysis*

Section 2(2)(b)(i) of the EAPWDA requires that the minister be satisfied that, in the opinion of a prescribed professional [emphasis added], 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.

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, does not include the ability to work. While there is likely some crossover between restrictions impacting the ability to work and those impacting the ability to perform DLA, the demands of employment are routinely more demanding in terms of frequency and duration than managing DLA, and more importantly, only restrictions on the ability to perform the DLA set out in the legislation are considered under section 2(b)(i) of the EAPWDA.

In this case, both the GP and the physiotherapist are prescribed professionals but only the GP has provided information respecting the appellant's ability to perform the prescribed DLA. In the MR, the GP states that the appellant struggles to prepare meals and do housework, indicating that the appellant is continuously restricted in her ability to perform those DLA and with daily shopping and mobility outside the home. In the AR, when asked to indicate the assistance required related to impairments restricting the ability to manage DLA, the GP indicates that the appellant independently moves about indoors and outdoors, with walking and climbing stairs taking twice as long as typical, and that the appellant independently manages almost all listed tasks of all other DLA without the need for any assistance and without taking significantly longer. The exceptions are both tasks of basic housekeeping, carrying purchases home (shopping DLA), and one aspect of social functioning (deal appropriately with unexpected demands) which all require periodic assistance provided by the appellant's daughter. In view of the information respecting the degree of independence with which the appellant manages most DLA, the ministry is reasonable to conclude that the continuous restrictions identified in the MR are not established as being significant. Additionally, the ministry has reasonably concluded that information respecting the need for periodic assistance with the DLA basic housekeeping and the two other DLA is insufficient to establish that the restriction in the ability to perform these tasks is for extended periods.

Noting again that the legislation requires that the ministry is satisfied that an applicant's DLA are directly and significantly restricted "in the opinion of a prescribed professional," based on the GP's assessment of the appellant's ability to perform DLA, the panel concludes that the ministry's determination that there is not enough evidence to 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 was reasonable.

#### 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 daily living "activities" is a precondition of requiring "help to perform those activities." In this case, the panel found the ministry was reasonable in concluding that direct and significant restrictions with DLA were not established. Accordingly, the panel also finds that the ministry reasonably concluded that it cannot be determined that the appellant requires help to perform "those activities" as a result of direct and significant restrictions with daily living "activities" 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)

2019/07/23

PRINT NAME

Chris McEwan

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/07/23

PRINT NAME

Trevor Morley

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/07/23