

**PART C – DECISION UNDER APPEAL**

The decision under appeal is the Ministry of Social Development and Poverty Reduction (ministry) reconsideration decision dated 24 July 2019, which determined that the appellant was not eligible for Persons 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 determined that the appellant had demonstrated that she met the age and duration requirements.

The ministry determined that the Appellant had not demonstrated that she had 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 and in the opinion of a prescribed professional directly and significantly restricts the Appellant's ability to perform daily living activities either continuously or periodically for extended periods and that as a result of those restrictions the Appellant requires help to perform those activities.

**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****1. The Appellant's Application for Persons with Disabilities Designation dated January 18, 2019**  
in which the Appellant self-reported that

- she had been diagnosed with borderline personality disorder and depression
- those conditions affect her life in such a way that she can be happy and sad and mad within 20 minutes
- she feels she is a child, having freak outs and tantrums in the most unsuitable places and times over the smallest things
- she has a very hard time snapping out of a serious low which occurs at least once a month
- over the past year she can't even get out of bed or shower unless to urinate
- she goes days with very little food and will not speak to anyone
- if she has plans to go to her parents for dinner she becomes too anxious to go even though she knows it is fine
- when she is this antisocial and angry at everyone she takes it out not only on the ones closest to her but on herself
- when she is angry she is so angry she will shake and smash her head against walls, punch herself in the face, and punch walls
- she last punched the wall due to a fight with her father and she broke her hand
- she cannot snap out of such moods quickly like normal people, over a day or so and can't regulate her emotions regularly
- she overreacts to everything and every emotion
- her feelings are so powerful that she has urges to kill herself but before she attempts to do so she realizes how that would hurt her family
- she constantly feels that the world would be a better place if she was dead and everyone would be happier
- she has very little hope, no motivation, and says this is because she has been going to counselling for years and nothing is helping
- she cannot be given responsibility because she will have a mental breakdown and not do whatever she has been given to do or will simply not show up
- she feels constantly that people hate her, anywhere she goes and she cannot even get out of a car when she goes to the store on some days
- on other days she won't leave the house
- her mental state is the most embarrassing and pathetic thing and she despises herself for it.
- she has a negative outlook on everything she does and will go days without showering or weeks without cleaning to the point of mould and flies on dishes because she cannot fathom doing them and would rather be dead
- every job she has had has been compromised due to her mental health, and her becoming overwhelmed and mentally drained, and then she calls in sick and finds herself in trouble, and on some days she would get sent home because she looked like a ghost and could not properly perform her job because she is too depressed

## 2. A Medical Report (MR) from the Appellant's Family Physician, dated February 15, 2019

### Diagnoses

In the MR, the General Practitioner (GP) provides the following diagnoses, under Diagnostic Code 5.3-Mood Disorders:

- Mood Disorders (MDD/GAD) with an onset date of June 2009. The panel observes that MDD means Major Depressive Disorder and GAD means Generalized Anxiety Disorder.
- Borderline Personality Disorder with no onset date specified
- PTSD with a history of abuse, with no onset date specified. The panel observes that PTSD means Post-Traumatic Stress Disorder

### Duration

The GP indicated that the Appellant's conditions were likely to continue for 2 or more years from the date of the MR, stated that the Appellant has not been prescribed any medications or treatments that interfere with her ability to perform daily living activities, and then stated that the anticipated duration of medications and/or treatments was "*uncertain*" and that the Appellant "*will need ongoing monitoring*".

### Functional Skills

For the question enquiring about the Appellant's Functional Skills, and specifically

- how far could the Appellant walk unaided on a flat surface, the GP stated "*no limit not relevant*" and
- regarding how many stairs the Appellant can climb unaided the GP stated "*not relevant*", and
- in reply to the questions concerning the Appellant's lifting limitations and seating limitations the GP stated "*not relevant*".

For the questions inquiring into the Appellant's Daily Living Activities, and specifically asking

- if the Appellant's impairment directly restricted her ability to perform Daily Living Activities, the GP could have but did not pick any of the boxes for "Yes" or for "No" or "*Unknown*", and then, despite the instruction in the form to answer questions about whether or not the Appellant's activities were restricted only if the GP had ticked the box for "Yes", went on anyway to deal with the 10 listed Daily Living Activities, stating that the appellant's activity was not restricted in any of the first 9, specifically Personal self-care, Meal preparation, Management of medications, Daily shopping, Mobility inside the home, Mobility outside the home, Use of transportation and in dealing with the Appellant's social functioning ticked the box for "yes".
- For the DLA Basic Housework, GP initially checked "No", then crossed out her checkmark, and for Management of Finances GP did not check any box, thus expressing no opinion as to whether or not these 2 activities were restricted.
- In the space for the GP to describe the periodicity of any impairment, the GP left it blank.
- Whether or not the Appellant needed assistance in Daily Living Activities, the GP left this section blank

### Severity of mental impairment

- About the issue of whether or not the Appellant had difficulties with communication, the GP marked the box for "No"
- As to whether the Appellant had any significant deficits with cognitive and emotional function, the GP did not pick any of the boxes for "Yes" or for "No" or for "*Unknown*", and then, although instructed to answer further only if the GP had chosen "Yes" continued on and marked the boxes so as to indicate that the Appellant experienced Emotional disturbance, Motivation and Impulse control,

About the Appellant's Social Functioning being impacted, the GP picked the box for "Yes" in reply to the question "*is Activity Restricted*" and said that the Appellant's Social Functioning was impacted due to her mood being up and down and PTSD. The GP said that she struggles with social interactions and at her job as well, and went on to say that the Appellant "*is moderate to severely restricted but that can be on most days than not*", in social interactions.

For the questions dealing with additional comments, the GP stated that the Appellant moved from [REDACTED] where she had a history of emotional and physical abuse, had made two suicide attempts in high school, but also observed that the Appellant exhibited no current suicidal ideation, had in the past had a number of medications prescribed, and is now using only one drug, which is used to treat depression.

The GP stated that the Appellant does not require prostheses or aids for her impairment.

### **3. An Assessor's Report (AR) from the Appellant's Family Physician, dated February 15, 2019**

In the AR, the GP reported that the information was taken from an office interview with the Appellant and final chart information. The GP has known the Appellant for 10 months during which the GP has seen the Appellant between 2 and 10 times, and has provided counselling, group therapy, medication, and regular visits/checkups for the Appellant.

The GP said in relation to the Appellant's

- Living Environment - that the Appellant lived alone
- Mental or Physical Impairment - that the Appellant's mental or physical impairments were Borderline Personality Disorder, PTSD and Major Depressive Disorder,
- Ability to Communicate - that the Appellant was "*Good*" in all 4 listed areas
- Mobility and Physical Ability -that the Appellant was "*Independent*" in all 6 listed areas
- Cognitive and Emotional Functioning - that the Appellant's mental or physical impairments had
  - "*No impact*" in 7 of the 14 listed areas,
  - "*Minimal impact*" in 3 of the 14 listed areas,
  - "*Moderate impact*" in 2 of the 14 listed areas, and
  - "*Major impact*" in one of the 14 listed areas, and

although the form invites the Assessor were to provide details on the next page when indicating an applicant's mental impairment or brain injury and how it restricts her functioning, the GP gave no

indication of how the minimal, moderate or major impacts of the Appellant's mental impairment or brain injury affected her.

In the AR, there are 7 different areas dealing with Daily Living Activities and one section dealing with Social Functioning; in the first 7 areas, the GP indicated that

- in the 1<sup>st</sup> area, "*Personal Care*", the Appellant is "Independent" in all 8 activities,
- in the 2<sup>nd</sup> area, "*Basic Housekeeping*", the Appellant is "Independent" in both activities,
- in the 3<sup>rd</sup> area, "*Shopping*", the Appellant is "Independent" in all 5 activities,
- in the 4<sup>th</sup> area, "*Meals*", the Appellant is "Independent" in all 4 activities,
- in the 5<sup>th</sup> area, "*Pay Rent and Bills*", the Appellant is "Independent" in all activities,
- in the 6<sup>th</sup> area, "*Medications*", the Appellant is "Independent" in all 3 activities,
- in the 7<sup>th</sup> area, "*Transportation*", the Appellant was "Independent" in all 3 activities,

and in the Social Functioning area, the GP indicated that in the 5 named areas, the Appellant required Periodic Support/Supervision, and specified nothing under "*Other (specify)*". The GP commented in the area for making appropriate social decisions "*Has been doing drugs in the past. Bad company*".

When describing how the Appellant's mental impairment impacts the Appellant's relationships with her immediate social network, the GP ticked the box for "*marginal functioning*" indicating that the Appellant has little significant participation/communication and her relationships are often minimal and fluctuating quality (but not ticking the boxes for "*good functioning*" or for "*very disturbed functioning*").

In describing how the Appellant's mental impairment impacts her extended social networks, the GP ticked similar boxes.

The panel observes that these choices by the GP as to how the Appellant functions with her immediate social network and her extended social network are at odds with how the appellant saw herself in her initial application.

The GP went on to note that the Appellant receives no assistance from other people, does not use an Assistive Device, and does not have an Assistance Animal, and gives no further information that is relevant to understanding the nature and extent of the Appellant's impairment and its effect on daily living activities.

#### **4. The Original Decision Denying the Appellant PWD Designation dated June 11, 2019**

In the original decision the adjudicator wrote that the Appellant met the age and duration requirements for designation as a Person with Disabilities, and stated that such a designation is based on whether a person has a loss or abnormality of physical or mental functioning, which causes a restriction to function independently, effectively, appropriately and for a reasonable duration.

The Adjudicator reviewed the MR and AR and determined that despite the Appellant's difficulties, that there was only one major impact indicated, and it had little effect on the Appellant's daily functioning. The adjudicator further found that the Appellant did not have a severe physical or mental impairment, and that her impairments did not directly and significantly restrict her daily living activities.

The adjudicator also determined that the Appellant does not require assistance with her daily living activities.

For these reasons the adjudicator denied the Appellant designation as a Person with Disabilities.

**5. The Request for Reconsideration dated July 13, 2019**

The Request for Reconsideration was submitted by the Appellant, but was completed by an advocate, a social worker. In that Request the advocate on behalf of Appellant put forward the following:

- although Persons with Disabilities status is not specific to employability, the Appellant's ability to secure and perform the duties of a variety of work has been compromised due to the Appellant's mental health
- although the length of time concerned with the Appellant's disability is not indicated by her physician who completed both the MR and AR, the Appellant can be impacted by long-standing and persistent symptoms of mental illness as identified by the GP for a period of days to weeks
- the advocate said examples of the Appellant's difficulties were not having attended personal or employment endeavours due to an inability to elevate her mood, or socialize appropriately and to navigate activities of daily living,
- the advocate also said that although the Appellant's symptomatic features were identified as moderate impacts that could also be described as being major impacts in areas of emotion, motivation, concentration overall mood
- the advocate also said that the impacts of her disabilities have left the Appellant isolated, withdrawn, unemployed, and unable to liase with supports for upwards of weeks at a time, and
- then said that the cycle is exacerbated with increasing negative emotions, thought content and judgement and there are impacts on the Appellant's depression, the anxiety she experiences, which are corroborated by her GP
- the advocate then went on to say that even with formal supports that the Appellant attends in order to support her mental health, the resources and learned skills are not always sustainable and therefore there are periods of unwillingness having a major impact upon Appellant in everyday life
- the advocate noted that there are discrepancies in the physician's reports and the Appellant may have been better supported in an assessment completed by her mental health professionals

**EVIDENCE AT APPEAL****Appellant's New Evidence****Psychiatrist's Letter of August 9, 2019**

The Appellant submitted a letter from a psychiatrist dated August 9, 2019 stating that the Appellant has struggled with her emotional health since the age of 14, although there are reports that she has received counselling since the age of 6. The psychiatrist has consultations dating back just under 7 years. The psychiatrist reports that there have been multiple suicide attempts throughout the Appellant's young life, that the Appellant participated in 48 weeks of intense therapy through a group program within 2 months before August 9, 2019, and that she has completed the majority of the program but continues to struggle. The psychiatrist reported that the Appellant is seen weekly by a mental health counsellor, and regularly by the psychiatrist biweekly, but that despite of the foregoing, the Appellant remains significantly symptomatic, with chronic suicidal thoughts, severely depressed mood, emotional deregulation, flashbacks and hyperreactivity to triggers. Diagnosis is complex Post Traumatic Stress Disorder as well as multiple coping challenges; the psychiatrist reports that the Appellant is currently struggling to leave her home and to interact with the community and is currently not able to participate in employment.

**Physicians Letter of August 27, 2019**

The Appellant submitted a letter dated August 27, 2019 which advised that the Appellant is currently admitted to the psychiatric inpatient unit of the hospital in a different community from that in which the Appellant lives, and has been certified under the *Mental Health Act*. The physician did not state whether she is a General Practitioner or specialist, but advised that the Appellant has been diagnosed with bipolar disorder with mania and psychotic features, first diagnosed in 2013, and that the Appellant's illness caused her to become unwell periodically, impeding her ability to work or function in regards to her activities of daily living during those times. The physician further advised that due to the Appellant's severity of illness she will require extensive psychosocial rehabilitation and medication on discharge.

**Social Worker's Letter of August 26, 2019**

The Appellant submitted a letter from a social worker advising that the Appellant has been a client of the social worker's organization since January 2019, during which time the Appellant has attended about 25 counselling sessions and has been seen by the social worker for approximately 20 of those sessions. In this letter, the social worker indicated the Appellant's scores on a Social and Occupational Functioning Scale which indicated that the Appellant has major impairment in various areas including work, family relations and personal care. The social worker reported that the Appellant experiences frequent episodic depression, anxiety and emotional instability which has significantly impacted her functioning and that the Appellant self-reports experiencing major difficulties with motivation, impulse control insight and judgement, attention and concentration as well as executive functioning. The social worker reported that the Appellant self-reports consistently that she has difficulty keeping her home clean because of periods of extremely low energy and motivation and has reported her home is unsanitary. Dirty dishes are often piled high in the kitchen and trash is disposed of. The social worker stated that the Appellant self-reported difficulty with meal planning and healthy eating because of her depression and anxiety and that her low motivation at times keeps her from leaving the house. The social worker further repeated the Appellant's self-report of experiencing intense anxiety while in the grocery store which often prevents her from completing her shopping and leads to impulsive and unhealthy food purchases. According to the social worker, the appellant described struggles with severe emotional instability. The social worker has observed the Appellant's affect as labile, presenting with excessive emotional displays, shifting quickly between anger, frustration, sadness and cheerfulness. The social worker further reported that the Appellant self-reports that she is quickly overwhelmed by the activities of daily life and small setbacks lead to emotional immobilization easily. The social worker has observed the Appellant loses the ability to focus, to problem solve and to organize her thinking which limits her functioning significantly. The social worker says that suicide is a common theme in the Appellant's life and that she self-reports struggling almost daily with suicidal thoughts and the urge to self-harm. The Appellant's emotional instability, depression and anxiety symptoms appear to be present with or without medication. The social worker says that in his opinion the appellant is unable to search for or maintain employment at this time and he supports her seeking PWD designation.

**Panel Finding on Admissibility of New Evidence**

After hearing submissions from the Appellant's representative and the ministry, the panel finds that the 3 letters are admissible pursuant to section 22 (4) (b) *Employment and Assistance Act* because overall they are written testimony in support of the information and records that were before the Minister when the reconsideration decision was made. Specifically, they are overall in support of the psychiatric conditions reported in the MR and in the AR, which were before the ministry at reconsideration

The evidence of the Appellant's change in status from the time of reconsideration until now, specifically that she is committed under the *Mental Health Act* to a psychiatric facility, is not something that the panel may consider in determining this appeal. While the Appellant may have had a change in status, section 22 (4) of the *Employment and Assistance Act* requires the panel to consider only the information and records that were before the Minister at the time of reconsideration and oral or written testimony in

support of that information. For the same reason, the panel is unable to consider any of the information as to the status or abilities of the Appellant that have arisen since the time of reconsideration, as related by the psychiatrist in her letter of August 9, 2019, by the hospital physician in her letter dated August 27, 2019 or in the social workers letter dated August 26 to 2019. Regarding this new evidence, the 3 letters referred to in the evidence of the Appellant's mother, the panel may only take into account the status and abilities of the Appellant that were in existence and reported to have been so at the time of reconsideration.

### **Appellant's Mother's Evidence**

The Appellant's advocate called evidence from the Appellant's mother.

The Appellant's mother said that the Appellant was unable to attend the hearing as she had been hospitalized under the *Mental Health Act* 4 days ago, in the psychiatric unit of a hospital in another community, but that it was the Appellant's wish to continue with the hearing.

The Appellant's mother said that the Appellant is not doing well and is because she has been experiencing paranoia for 6 weeks. She said that because of that the Appellant is very scared, and afraid of many things. She said that the hospitalization was a result of the Appellant going missing and the family, as well as the police, had been looking for her. The family was concerned because of the Appellant's previous suicidal thoughts and attempts. The Appellant's mother said that the police were called on the non-emergency number and went looking for the Appellant; the police found her and took her to the hospital, where her family met her. On arriving at the hospital they saw that the Appellant was very nervous, upset and her mother waited until the physician came and advised that the Appellant would be kept overnight until a psychiatrist could see her in the morning. When her mother saw her waiting at the hospital, the Appellant was just sitting and rocking in a very scared state. The Appellant later told the psychiatrist how much danger she was in, that she was very afraid and she wanted assisted suicide. The Appellant was also afraid to go to the hospital where she had previously been treated because of a bad experience there.

Her mother reported that she helps the Appellant because the appellant has a "really hard time" with cleaning, doing the dishes, doing the laundry, and otherwise coping so the Appellant's mother goes to assist her. Sometimes her mother does not go for 2 or 3 weeks, and then when she does go to the Appellant's home she sees the garbage is piled up and there is rotten food in the refrigerator, and the Appellant appears not to have showered for a considerable time. She said that while her daughter does go to the grocery store, she often goes shopping for her daughter. The Appellant's mother said that the Appellant lived in another province for about 4 years where her mother visited 3 or 4 times per year, but about 2 years ago when her mother went to visit, the Appellant had lost her job, so her mother went to that other province to bring her daughter home. When her daughter was a little bit better she finally obtained her own apartment. Her mother believes that when she was in the other province, about 3 years ago, which would be about a year before the daughter moved back to British Columbia, she suffered seriously as a result of an ongoing court case, which caused stress that her daughter was unable to deal with. Her mother also reported that her daughter, when she was employed in the other province, often spent more money than she earned, and made impulsive purchases.

On being questioned, her mother said that she sees her daughter about 3 times a week, and speaks to her every day. In explaining the comment in the MR, reported by the family physician at the Appellant cannot even get out of her bed, which happens at least once a month, her mother explained that while there is about one episode of being unable to get out of bed every month, it is not just one day, but each episode can last for 5 days or more.



Her mother explained that while the physician, in that part of the AR dealing with the Social Functioning aspects of Daily Living Activities stated that the Appellant required periodic support or supervision, but had not described the periodicity of that support or supervision, except to explain that the Appellant saw a psychiatrist every 2 weeks and a mental health counsellor every week.

The Appellant's mother explained that when the physician explained the type and duration of the program or services provided to the Appellant saying that there were "*Doctor's regular visits/checkups*" that the physician did not go to the Appellant because the physician does not make house calls and that the regular visits/checkups whereby the Appellant to the physician's office.

On questioning about the Appellant's bad experience in the first hospital where she was treated for mental health problems, the Appellant's mother explained that it was in the psychiatric ward when the Appellant was about 15 or 16 years old, and that it was traumatic enough that the Appellant was afraid to return to that same hospital.

On questioning by the ministry, whether the appellant's diagnosis was cyclic in nature, the mother said that it was, but that she feels the family physician simply doesn't know with the Appellant. When the ministry asked the Appellant's mother about financial issues, she said that she does assist her daughter with finances but gave no indication of the amount of assistance required. On questioning, the Appellant's mother clarified the medication that her daughter is now on, because it was not clear from the MR.

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

The issue in this appeal is whether the Ministry of Social Development and Poverty Reduction (ministry) reconsideration decision dated 24 July 2019, which determined that the appellant was not eligible for Persons 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*, was reasonably supported by the evidence or was a reasonable application of the legislation in the circumstances of the Appellant.

In denying the Appellant Persons with Disabilities status, the ministry determined that the information provided, while it proved that the Appellant met the age requirement and met the requirement that her impairments were likely to continue for at least 2 years, that information 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 *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:

### 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.

### 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).

### General Scheme of the Legislation

The general scheme of section 2 *EAPDWA* and section 2 *EAPDWR* is that in order to be designated as a Person With Disabilities, an applicant may qualify in 2 general ways. One way to be designated is that an applicant must satisfy the Minister that

- she has reached age 18,

- she has a severe mental or physical impairment
- her severe mental or physical impairment is likely to continue for at least 2 years
- her impairment, in the opinion of one of the members of a prescribed class of professionals, directly and significantly restricts her ability to perform Daily Living Activities continuously or periodically for extended periods, and
- as a result the applicant requires help to perform them.

The other way to be designated is that an applicant fit into any one of 5 categories designated in section 2.1 EAPWDR which are titled "*Alternative Grounds for Designation under Section 2 of Act*".

## **Parties' Positions at Appeal**

### **Appellant's Position**

The Appellant's advocate presented the panel with a prepared submission and called evidence from the Appellant's mother, which is summarized under Part E "Summary of Facts".

The panel will summarize the argument made by the Appellant's advocate.

The Advocate recapitulated the history of the Appellant's attempts to be designated as a Person with Disabilities, saying that she first applied on May 28, 2019 and was denied the designation on June 11, 2019. She requested a reconsideration on July 15, 2019 and on reconsideration, was again denied on July 30, 2019. The panel notes that in fact the original application was January 18, 2019, and the initial denial was June 11, 2019 as stated, that the request for reconsideration was dated July 13, 2019, not July 15, and the reconsideration decision denying the Appellant's request for reconsideration was dated July 24, 2019, not July 30, 2019.

The appellant's advocate argued that the evidence shows that the Appellant's mental health condition is severe rather than moderate, and submitted that psychiatrist's letter admitted as new evidence supported a finding that the Appellant was severely restricted in her Daily Living Activities. The advocate argued that the physician, in the MR, reported that the Appellant "*can be*" severely restricted on most days. The panel notes that the quotation is actually that the Appellant "*is moderate to severely restricted periodically in social interactions but that can be on most days than not*".

The appellant argued that the Appellant, on the mother's evidence, is severely restricted and unable to carry out the activities of daily living.

The Appellant's advocate argued that it was unfortunate that neither the original application nor the reconsideration request contained a report from a psychiatrist because the family physician did not seem to be aware of the Appellant's mental history and was overly optimistic about the effects of the Appellant's symptoms. The advocate pointed out that it was noted in the request for reconsideration the Appellant did have a mental health professional and was in fact regularly seen by a psychiatrist and mental health counsellor; both provided some of the new evidence referred to. The advocate further argued that the information in the original PWD application and the reconsideration request did not accurately reflect the appellant's situation and in light of all the supporting letters from the Appellant's mental health professionals it is clear that the appellant does in fact have a severe impairment which significantly restricts her ability to perform daily living activities and that she does require significant help from another person to perform the DLA's and that therefore the ministry's reconsideration decision was incorrect and PWD status should be granted to the Appellant.

### **Ministry Position**

The ministry relied on the reconsideration decision.

### **Panel Findings**

There are 2 ways of qualifying for designation as a Person with Disabilities.

#### **First Way of Qualifying as PWD - Section 2(2) EAPWDA**

### **Panel Findings**

#### **1<sup>ST</sup> Requirement - Age**

The legislation requires that an applicant for designation as a Person with Disabilities must be over the age of 18. At Reconsideration, there was no issue that the Appellant, now aged 23, met the age requirement. The Appellant thus met this 1<sup>st</sup> requirement.

#### **2<sup>ND</sup> Requirement - Severe Physical or Mental Impairment**

The legislation requires that for PWD designation, the minister must be “satisfied” that the person has a severe mental or physical impairment. The legislation makes it clear that the determination of severity is at the discretion of the minister, considering all the evidence, including that of the appellant. Diagnosis of a serious medical condition or the identification of mental or physical deficits does not in itself determine severity of impairment.

#### **Physical Impairment**

The panel notes that in the initial application for PWD designation, the Appellant did not claim any physical impairment; she based her claim entirely on mental impairment.

In the Reconsideration decision, the ministry did not address the issue of physical impairment, and as no claim for designation as a Person with Disabilities based on physical impairment has been made, the panel need not examine whether or not the Appellant qualifies for designation by reason of a severe physical impairment.

#### **Mental Impairment**

The ministry concluded that the requirement for the Appellant to show that she had a “severe mental impairment” had not been satisfied because the Appellant’s family physician, while indicating that the Appellant was moderately to severely depressed, did not explain further the frequency or duration of each bout of depression, and concluded that the Appellant was more often not severely depressed because of the family physician’s assessment of the Appellant’s ability to perform Daily Living Activities (DLAs).

The ministry further indicated that although the Appellant experiences significant deficits in cognitive and emotional functioning, specifically emotional disturbance, motivation and impulse control, the family physician identified only one major impact, emotion, and indicated that impulse control had only a minimal impact on the Appellant and motivation only had a moderate impact, such that the overall impact on the Appellant’s ability to perform DLAs was minimal.

The ministry noted that the family physician indicated that the Appellant can be “*moderately to severely restricted periodically*” which can be on most days. The ministry noted that the family physician reported that the Appellant is capable of DLAs, but when she is depressed she cannot even get out of her bed, and that happens at least once a month. The ministry said that it recognized the Appellant may be “severely impaired” on those days, but the Appellant is not impacted to this degree a large majority of the time.

The panel notes that it is not a legislative criterion that the Appellant be impacted to the degree of “severely impaired” a large majority of the time.

The ministry also concluded, based on the family physician’s report that although the Appellant was functioning marginally in both her immediate and extended social networks, it was not “very disrupted functioning” and that the Appellant required no support or supervision to help maintain herself in the community. The ministry concluded from the foregoing that although the Appellant’s social functioning is impacted by her mental conditions, this does not amount to an overall severe impairment.

The ministry noted that the family physician did not mention the appellant attending a mental health specialist such as a psychiatrist, but only regular physician’s visits and checkups with the family physician, a general practitioner, and that if the Appellant’s conditions were considered severe it would be expected that she would benefit from the assessment and ongoing visits from a mental health physician.

The ministry also stated that it was not satisfied that the level of impact the Appellant explains correlates with the family physician’s overall assessment, and concluded that the Appellant’s mental impairment was moderate as opposed to “severe”.

In the Reconsideration Decision the ministry noted that the family physician found that the Appellant to be independent in all DLAs with the exception of social functioning, where the physician reported the Appellant to be “*moderately to severely restricted periodically, in social interactions, but that can be on most days than not*”.

The panel notes that in the MR, the family physician indicated that the Appellant is not restricted in any way in her ability to walk unaided, climb stairs, lift things or remain seated, and stated that these abilities are not relevant. The panel notes that in response to the question asking if there were significant deficits with cognitive and emotional function, the family physician did not answer “Yes” or “No” or “Unknown” as was requested all of her in the MR form, but did he indicate there was a deficit with emotional disturbance, motivation and impulse control, which is consistent with the family physician’s diagnoses of various mood disorders, borderline personality disorder and Post Traumatic Stress Disorder.

In that same family physician’s AR, the family physician was consistent in reporting that the Appellant’s impairments were those as identified in the MR, and went on to indicate that she had no limitations in any of the physical DLAs, had only one major impact in the section inquiring into the impact on daily functioning of the Appellant’s mental disorder and two moderate impacts.

In finding that the Appellant did not qualify for designation as a Person with Disabilities, the ministry submitted that legislation requires her restrictions to be both significant and either continuous or periodic for extended periods, and as the Appellant was independent in all DLAs except social functioning, in which the Appellant was periodically restricted but not for extended periods, the Appellant’s restrictions are not “significant”.

The ministry concluded that although the Appellant had certain limitations, her impairments do not “*significantly restrict*” the appellant’s DLAs either continuously or periodically for extended periods.

The panel finds that the ministry’s determination that the assessments provided do not establish that a severe impairment significantly restricts the appellant’s ability to perform DLA continuously or periodically for extended periods was reasonable.

The panel notes that the legislation specifies that direct and significant restrictions to DLA must be in the opinion of a prescribed professional. The panel notes that the family physician indicates that the Appellant is periodically restricted in her social functioning and says that it “can be” on most days, and that she cannot get out of bed at least once per month.

The panel finds that the lack of explanation as to the actual periodicity of the Appellant’s restrictions beyond the foregoing is insufficient detail to establish whether the frequency of restriction meets the threshold set out in the legislation of “periodically for extended periods”.

The panel notes that in her initial application, the appellant said that some days she would get sent home from work and she could not properly perform her job. The panel also notes that the psychiatrist in her letter of August 9, 2019 said the Appellant is not currently able to participate in employment, as did the physician in the hospital in her letter of August 27, 2019. The social worker concluded in his letter of August 26, 2019 that the Appellant is unable to search for or maintain employment. He concluded by saying “... *and I support her in seeking a PWD designation*”. The panel notes that employability or vocational ability is not a criterion for PWD designation nor is it a DLA set out in the regulation.

The panel concludes that the ministry’s determination that the evidence is insufficient to show that the appellant’s overall ability to perform her DLA is significantly restricted either continuously or periodically for extended periods is reasonable.

### **3<sup>RD</sup> Requirement – Duration - The Impairment is Likely to Continue for At Least 2 Years**

The legislation requires that minister assess the anticipated duration of an individual’s impairment in consideration of the opinion of a medical practitioner or nurse practitioner, who must confirm that the impairment is likely to continue for at least 2 years.

At Reconsideration, there was no issue that the Appellant’s suffers from one or more impairments that are likely to continue for 2 years or more. The Appellant thus met this 3<sup>RD</sup> requirement

### **4<sup>TH</sup> Requirement - An Applicant Requires Assistance Performing DLAs**

The 4<sup>th</sup> requirement is that as a result of restrictions on DLAs, an applicant requires help in performing, that help may be provided by an assistive device, significant help or supervision of another person or the services of an assistance animal.

In the AR, the family physician reported that the Appellant had no assistance provided by other people, did not use an assistive device and did not have an Assistance Animal.

The family physician explains in the AR that the appellant required periodic support or supervision in the Social Functioning DLA, but did not explain the nature of the support required or its periodicity. Further, in the AR the physician stated that the Appellant received no assistance from other people, did not require the use of an assistive device, and did not have assistance provided by an assistance animal.

The ministry did not directly address the issue of whether or not the Appellant required assistance performing DLA’s, but in the opinion of the panel it was not necessary to do so because the family physician left that part of the AR inquiring as to what type and amount of assistance was required blank in one place, stated “none” in relation to DLAs concerned with social functioning, and stated there was no assistance in the section provided for the family physician to explain what assistance was provided.

The panel does not find that surprising as in all areas of the physical DLAs the Appellant was rated as “Independent”, and while the family physician indicated that periodic support or supervision was required, he wrote “*none*” to the question of what support or supervision was required.

As noted in the summary of evidence, the panel cannot consider the Appellant's change in mental health status between the time of reconsideration and the appeal.

Thus, the Appellant's ability or inability to perform a DLAs between the time of reconsideration and the time of appeal are not something that the panel may take cognizance of.

The panel finds that the Appellant has not satisfied this 4<sup>th</sup> requirement, that of requiring assistance to perform DLAs.

### **Second Way of Qualifying as PWD - Section 2.1 EAPWDR**

As well as qualifying for designation as PWD by meeting the requirements of section 2 (2) EAPWDA, an applicant may qualify for that designation under section 2.1 *EAPWDR* entitled "*Alternative Grounds for Designation under Section 2 of Act*". In order to qualify, a person must be one of 5 different classifications of individuals; those are:

- someone enrolled in Plan P (Palliative Care) under the Drug Plans Regulation
- someone who has at any time been determined as eligible for payments made through the Ministry of Children and Family Development's At Home Program
- a person who at any time has been determined by Community Living British Columbia to be eligible to receive community living support under the *Community Living Authority Act*
- 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
- a person considered a disabled under section 42(2) of the *Canada Pension Plan (Canada)*

There was no application by the Appellant alleging that she qualified under any of the 5 foregoing categories. In the Reconsideration decision the ministry stated that it was not demonstrated that the Appellant was qualified under one of the 5 prescribed classes of section 2.1 *EAPWDR*.

The panel finds that the decision of the ministry that the Appellant did not qualify under any of the classes of persons set out in section 2.1 *EAPWDR* was reasonably supported by the evidence and was a reasonable application of the *EAPWDA* and *EAPWDR* in the circumstances of the Appellant

### **Conclusion**

The panel finds that the ministry's reconsideration decision, determining that the appellant had not met all of the legislated criteria for PWD designation, and did not qualify for that designation under one of the alternative grounds was a reasonable application of the legislation in the circumstances of the appellant and was reasonably supported by the evidence. The panel confirms the ministry's reconsideration decision.

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

Donald (Dan) McLeod

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2019/AUGUST/28

PRINT NAME

Inge Morrissey

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/AUGUST/28

PRINT NAME

Carman Thompson

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/AUGUST/28