

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 17 July 2019 that denied the appellant designation as a person with disabilities (PWD). The ministry determined that the appellant did not meet all of the required criteria for PWD designation set out in section 2 of the *Employment and Assistance for Persons with Disabilities Act*. Specifically, the ministry determined that the information provided did not establish that the appellant has a severe mental or physical impairment that in the opinion of a prescribed professional

(i) directly and significantly restricts her ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and,

(ii) as a result of those restrictions, she requires help to perform those activities.

The ministry determined that the appellant satisfied the other 2 criteria: she has reached 18 years of age and her impairment in the opinion of a medical practitioner is likely to continue for at least 2 years.

The ministry also found that it has not been demonstrated that the appellant is in one of the prescribed classes of persons who may be eligible for PWD designation on the alternative grounds set out in section 2.1 of the *Employment and Assistance for Persons with Disabilities Regulation*, in particular as a person who has at any time been determined eligible by Community Living BC for community living support under the *Community Living Authority Act* to assist in caring for her.

PART D – RELEVANT LEGISLATION

Employment and Assistance for Persons with Disabilities Act (EAPWDA) – sections 2, 4, and 10.

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR) – sections 2 and 2.1, and 23.

PART E – SUMMARY OF FACTS**Background**

There is a lengthy chronology as background to this appeal:

- 17 August 2018: the ministry received the appellant's Application for PWD Designation.
- 24 October: the ministry denied her request.
- 12 December 2018: the ministry rendered a reconsideration decision denying PWD designation.
- 25 January 2019: the Employment and Assistance Appeal Tribunal (the tribunal) rescinded the ministry's reconsideration decision. While the tribunal found that the ministry reasonably determined that the information provided did not establish that the appellant met all the EAPWDA section 2(2) impairment criteria, the tribunal also found that the ministry had failed to review the appellant's eligibility for PWD designation under the prescribed class criterion.
- 22 February 2019: the appellant submitted a PWD Application for Prescribed Class, specifically regarding having received support from Community Living BC.
- 04 March 2019: the ministry denied her request, finding she did not meet the criteria under section 2.1 of the EAPWDR.
- 18 April 2019: the appellant submitted a Request for Reconsideration regarding the 04 March 2019 decision.
- 29 April 2019: the ministry rendered a reconsideration decision determining that the appellant did not meet EAPWDA section 2(2) impairment criteria or the prescribed class criteria.
- 11 July 2019: the tribunal rescinded the ministry's 29 April 2019 decision, with a panel of the tribunal finding the ministry's decision, which determined that the appellant was not in a prescribed class of persons and had not met all of the legislated criteria for PWD designation, was not a reasonable application of the legislation in the circumstances of the appellant and was not reasonably supported by the evidence. In particular, the panel of the tribunal found that the ministry had not provided any rationale for these conclusions nor had it provided any written account of its consideration and weighing of the evidence before it.
- 17 July 2019: the ministry rendered the reconsideration decision summarized in Part C above.
- 22 July 2019: the appellant submitted a Notice of Appeal regarding the 17 July 2019 reconsideration decision.

Information before the ministry for the 17 July 2019 reconsideration decision

1. The appellant's Application for PWD Designation, comprised of:
 - A Medical Report (MR) dated July 27, 2018, completed by a specialist in Neurology and Epilepsy ("the specialist") who has known the appellant since 2010, and has seen the appellant 2 -10 times in the past 12 months;
 - An Assessor Report (AR) dated August 13, 2018, completed by the appellant's general practitioner ("the GP") of more than 10 years, who has seen the appellant 2 -10 times in the past 12 months; and

- The appellant's self-report (SR), dated June 14, 2018.
2. Several medical reports, including:
 - Consult letter from the specialist to the GP, dated December 18, 2017.
 - CT angiography final report (CTA Report), dated March 22, 2018.
 - Neurology Consult Final Report, dated 06 June 2018.
 - Letter from a psychiatrist, dated 17 April 2019.
 3. The appellant's testimony on appeal respecting the 12 December 2018 reconsideration decision.
 4. The appellant's PWD Designation Application - Prescribed Class, submitted 22 February 2019 and an email from CLBC dated 25 February 2019

Notice of Appeal

The appellant's Notice of Appeal is dated 22 July 2019. Under Reasons for Appeal, the appellant writes, "Because I strongly disagree with the decision, and so do ALL my doctors."

The Hearing

The appellant did not attend the hearing. After confirming that the appellant was notified of the hearing, the hearing proceeded in accordance with section 86(b) of the Employment and Assistance Regulation.

At the hearing, the panel reviewed with the ministry representative the background to the 17 July 2019 reconsideration decision, particularly with regard to the tribunal finding the previous (29 April 2019) reconsideration decision unreasonable because the ministry had failed to provide adequate reasons for its determinations, and therefore had rescinded that decision. The panel asked the ministry representative whether, given this background, the 17 July 2019 decision was in conflict with EAPWDR section 23(3.2). The ministry representative stated that in her many years' experience she had never seen a situation where a rescinded decision was followed by another reconsideration decision. She acknowledged that another approach would have been to apply section 23(3.2) by providing disability assistance in accordance with Schedule A, and then to initiate the verification process to determine whether the appellant would continue being eligible for disability assistance.

The substance of the ministry's determinations regarding the information provided not meeting the EAPWDA section 2 impairment criteria or the EAPWDR section 2.1 prescribed grounds criteria were not discussed.

PART F – REASONS FOR PANEL DECISION

There are three issues in this appeal.

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

Another issue is whether the ministry's reconsideration decision determining that the appellant did not meet three of the five statutory requirements of Section 2 of the EAPWDA for PWD designation is reasonably supported by the evidence or is a reasonable application of the legislation in the circumstances of the appellant. Specifically, the ministry determined that the information provided did not establish that:

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

Before addressing either of these above two issues, a third issue must be considered -- whether the ministry's reconsideration decision is in conflict with section 23(3.2) of the EAPWDR and therefore an unreasonable application of the legislation in the circumstances of the appellant.

The following section of the EAPWDA apply to this appeal:

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).

Application of Act

4 To be eligible for disability assistance or hardship assistance under this Act, a family unit must include a person with disabilities.

Information and verification

- 10 (1) For the purposes of
- (a) determining whether a person wanting to apply for disability assistance or hardship assistance is eligible to apply for it,
 - (b) determining or auditing eligibility for disability assistance, hardship assistance or a supplement,
 - (c) assessing employability and skills for the purposes of an employment plan, or
 - (d) assessing compliance with the conditions of an employment plan,

the minister may do one or more of the following:

- (e) direct a person referred to in paragraph (a), an applicant or a recipient to supply the minister with information within the time and in the manner specified by the minister;
 - (f) seek verification of any information supplied to the minister by a person referred to in paragraph (a), an applicant or a recipient;
 - (g) direct a person referred to in paragraph (a), an applicant or a recipient to supply verification of any information he or she supplied to the minister.
- (2) The minister may direct an applicant or a recipient to supply verification of information received by the minister if that information relates to the eligibility of the family unit for disability assistance, hardship assistance or a supplement.
- (4) If an applicant or a recipient fails to comply with a direction under this section, the minister may declare the family unit ineligible for disability assistance, hardship assistance or a supplement for the prescribed period.

The following sections of the EAPWDR apply to this appeal:

- 2 (1) For the purposes of the Act and this regulation, "daily living activities",
- (a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:
 - (i) prepare own meals;
 - (ii) manage personal finances;
 - (iii) shop for personal needs;
 - (iv) use public or personal transportation facilities;
 - (v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
 - (vi) move about indoors and outdoors;
 - (vii) perform personal hygiene and self care;
 - (viii) manage personal medication, and
 - (b) in relation to a person who has a severe mental impairment, includes the following activities:
 - (i) make decisions about personal activities, care or finances;
 - (ii) relate to, communicate or interact with others effectively.
- (2) For the purposes of the Act, "**prescribed professional**" means a person who is
- (a) authorized under an enactment to practise the profession of
 - (i) medical practitioner,
 - (ii) registered psychologist,
 - (iii) registered nurse or registered psychiatric nurse,
 - (iv) occupational therapist,
 - (v) physical therapist,

- (vi) social worker,
 - (vii) chiropractor, or
 - (viii) nurse practitioner, or
- (b) acting in the course of the person's employment as a school psychologist by
- (i) an authority, as that term is defined in section 1 (1) of the *Independent School Act*, or
 - (ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the *School Act*,
- if qualifications in psychology are a condition of such employment.

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) 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).

Effective date of eligibility

23 (1) Except as provided in subsections (1.1), (3.11) and (3.2), the family unit of an applicant for designation as a person with disabilities or for both that designation and disability assistance

- (a) is not eligible for disability assistance until the first day of the month after the month in which the minister designates the applicant as a person with disabilities, and
- (b) on that date, the family unit becomes eligible under section 4 and 5 of Schedule A for that portion of that month's shelter costs that remains unpaid on that date.

(1.1) The family unit of an applicant who applies for disability assistance while the applicant is 17 years of age and who the minister has determined will be designated as a person with disabilities on his or her 18th birthday

- (a) is eligible for disability assistance on that 18th birthday, and
- (b) on that date, is eligible under section 4 and 5 of Schedule A for that portion of the month's shelter costs that remains unpaid on that date.

(3.11) If the minister decides, on a request made under section 16 (1) of the Act, to designate a person as a person with disabilities, the person's family unit becomes eligible to receive disability assistance at the rate specified under Schedule A for a family unit that matches that family unit on the first day of the month after the month containing the earlier of

- (a) the date the minister makes the decision on the request made under section 16 (1) of the Act, and
- (b) the applicable of the dates referred to in section 72 of this regulation.

(3.2) If the tribunal rescinds a decision of the minister determining that a person does not qualify as a person with disabilities, the person's family unit is eligible to receive disability assistance at the rate specified under Schedule A for a family unit that matches that family unit on the first day of the month after the month containing the earlier of the dates referred to in subsection (3.11).

Time limit for reconsidering decision

72 The minister must reconsider a decision referred to in section 16 (1) of the Act, and mail a written determination on the reconsideration to the person who delivered the request under section 71 (1) [*how a request to reconsider a decision is made*],

- (a) within 10 business days after receiving the request, or
- (b) if the minister considers it necessary in the circumstances and the person consents, within 20 business days after receiving the request.

Analysis

EAPWDR section 23(3.2) describes a condition, then unambiguously and clearly states that if that condition is met, there is a certain consequence. In this case, the condition is the tribunal having rescinded a decision of the minister that determined that the appellant does not qualify as a person with disabilities. It follows that the consequence of the rescinded decision as set out in section 23(3.2) is that the appellant's family unit is eligible to receive disability assistance at the prescribed rate beginning on the prescribed effective date.

The panel finds that, given the structure and language of section 23(3.2) and the tribunal panel's decision 11 July decision rescinding the ministry's previous 29 April 2019 reconsideration decision, the ministry failed to reasonably apply the legislation by its action in rendering its 17 July 2019 reconsideration decision instead of by providing disability assistance to the appellant as required under the legislation.

It might be argued that by applying section 23(3.2) in this case, the ministry would have been unfairly providing disability assistance to a person who had not been found eligible for such benefits, and that this situation could continue over the longer term, at significant cost to the public purse. This argument does not take into account that when the ministry denies many PWD applications, it is because the information provided is not in sufficient detail to satisfy the minister that the impairment criteria have been met. In many such cases, a subsequent fully documented application might well result in PWD designation. It is therefore essential that the reasons for the reconsideration denial be adequately explained, especially when the appellant exercises her right to provide new information at reconsideration, as happened in this case. When the reasons provided are inadequate, not only is the panel unable to assess the reasonableness of the ministry's decision, but the appellant is left wondering why her application was denied. The panel is of the view that in such circumstances, in the interests both of fairness and of respect for the legislation, it is reasonable for the ministry to take on the burden of first applying section 23(3.2), then if it deems appropriate, to take remedial action.

A comparison might also be made with other tribunal panel PWD designation rescind decisions that result in disability assistance being provided. In these appeals, the decision usually takes into account new information submitted on appeal and found to be admissible or finds that the ministry was unreasonable in how conflicting evidence was weighed at reconsideration. However, the section 23(3.2) does not differentiate between rescind decisions relying on substantive considerations and a decision like the 11 July 2019 decision based on inadequate reasons.

Section 24(1) of the *Employment and Assistance Act* (EAA) requires that a panel must determine whether the reconsideration decision is (a) reasonably supported by the evidence, or (b) a reasonable application of the applicable enactment in the circumstances of the person appealing the decision.

As the panel writes in the tribunal's 11 July 2019 decision:

The panel notes that section 80 of the EAR requires that the ministry provide a written determination on reconsideration, which amounts to a legislative requirement to provide written reasons. In the absence of such reasons, the panel is unable to properly exercise its function under section 24 of the EAA, which is to assess whether the ministry's conclusion is reasonably supported by the evidence or a reasonable application of the legislation in this appellant's circumstances.

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

In other words, it does not matter *why* a decision fails the reasonableness test (as long as the reviewing body provides its own reasons for this finding!), only that the decision was found to be unreasonable. EAPWDR section 23(3.2) does not specify that a rescind decision must be based on certain reasons and not others.

In this present appeal, the panel finds that once a reconsideration decision has been rendered, with respect to the particular application that had been reconsidered, the ministry is *functus officio* with respect to that decision. It is without jurisdiction and has no further power under the legislation to review a decision it has already reconsidered, and which has been the subject of an appeal to the tribunal.

Once a panel finds a decision unreasonable, for whatever reason, it is guided by section 22(4) of the EAA:

- (2) For a decision referred to in subsection (1), the panel **must**
 - (a) confirm the decision if the panel finds that the decision being appealed is reasonably supported by the evidence or is a reasonable application of the applicable enactment in the circumstances of the person appealing the decision, and
 - (b) **otherwise, rescind the decision**, and if the decision of the tribunal cannot be implemented without a further decision as to amount, refer the further decision back to the minister.

The panel also notes that the legislation provides a remedy for the ministry if it has doubts as to whether the person continues to be eligible for PWD benefits, including disability assistance. Such benefits can be discontinued through the information and verification provisions of section 10 of the EAPWDA and the power of the minister to rescind a PWD designation under section 2(4) of the Act. The panel notes that such an action must have an evidentiary basis and a rationale in accordance with the case law cited earlier.

Considering the above, the panel need not make a determination regarding the ministry's findings respecting the EAPWDA section 2 impairment criteria or the EAPWDR section 2.1 prescribed class criteria.

Conclusion

Based on the foregoing analysis, the panel finds that the ministry's reconsideration decision is an unreasonable application of the legislation in the circumstances of the appellant. The panel therefore rescinds the ministry's decision and refers this matter back to the ministry regarding amount of disability assistance and its effective date.

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

Richard Roberts

DATE (YEAR/MONTH/DAY)

2019 August 23

PRINT NAME

Donald McLeod

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019 August 23

PRINT NAME

Margarita Papenbrock

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019 August 23