

**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 July 17, 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) and an Assessor Report (AR) both dated May 10, 2019, completed by a general practitioner (GP) who has treated the appellant for 6 years, has seen the appellant 11 or more times in the past 12 months and relied on the appellant, family members, file/chart information and consultant letters to complete the application; and
  - The self-report (SR) section of the PWD application, dated May 19, 2019.
- The appellant's Request for Reconsideration submission dated July 3, 2019.

Documents provided on appeal and admissibility

- The appellant's Notice of Appeal (NOA) dated July 24, 2019, which did not include additional evidence; and,
- An August 22, 2019 email from the ministry in which it indicated that its appeal submission would be the reconsideration summary.

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. As no additional evidence was provided on appeal, a determination as to admissibility was not required.

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

Summary of relevant evidenceDiagnoses 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:

- Diffuse Soft Tissue Pain
- Increased Sensitivity of Sensory Nerves
- Dysphoria

The appellant has chronic muscle pain and stiffness, fatigue and weakness. Symptoms have been of enough severity to have to leave her retail job. She requires constant support and help from family to complete daily domestic tasks and chores.

### Physical Impairment

The GP assesses the appellant's functional skills and mobility/physical ability as:

- able to walk 2 to 4 blocks unaided on a flat surface; needs to stop and rest after 2-4 blocks; Walking indoors and outdoors are managed independently;
- able to climb 5+ steps unaided; approximately 2x as long as others her age;
- standing is managed independently;
- limited to lifting 5 to 15 lbs.; periodic assistance is required for lifting, carrying and holding; and
- can remain seated for 1 to 2 hours.

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

In her SR, the appellant describes being awakened by pain in the morning. Pain medication only helps for a little bit. She had hoped to get better, but feels worse. It is hard to stand or walk for too long. The pain doesn't let her do too much. She is unable to walk to the park anymore, only walking in and around the house. Living with the pain is really hard and she doesn't know what to do.

In her reconsideration submission, the appellant describes beginning her day with dizziness, and that it takes time to get up and move. All of her joints hurt. Getting up to go to the washroom, brush her teeth, and make something to eat so that she can take her medication is hard because she is in so much pain. She is dizzy when walking and it is really dangerous for her to go outside by herself. Her medication is not helping too much and she doesn't know what is wrong with her.

In her NOA, the appellant questions how she is going to work given that it is hard for her to do things in her house.

### Ability to Communicate

The GP reports:

- No difficulties with communication.
- Speaking, reading, writing and hearing abilities are good.

### Mental Impairment

The GP reports:

- Significant deficits with cognitive and emotional function in 2 of 11 specified areas – emotional disturbance and attention or sustained concentration.
- A moderate impact on daily functioning for emotion and motivation. A minimal impact for attention/concentration and motor activity. No impact on daily functioning for the remaining 10 listed aspects of cognitive and emotional functioning. No major impacts are reported.
- 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 continuous support/supervision – Husband and family provide constant support.

- Marginal functioning with extended social networks.
- Good functioning with immediate social network.
- “No identifiable safety issues.”

In the SR, the appellant reports that her depression is getting worse and she doesn't want to do anything. The appellant does not address her depression in her reconsideration submission.

### 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.”
- Diffuse soft tissue pain, increased sensitivity of sensory nerves and dysphoria are the impairments that impact the appellant's ability to manage DLA.
- Respecting the DLA “move about indoors and outdoors” walking indoors and outdoors are managed independently. Additional details are provided under the heading Physical Impairment (above).
- All listed tasks for the DLA “personal care,” “management of medications” and “management of finances” are managed independently with no noted restrictions.
- Respecting the DLA “basic housekeeping,” both basic housekeeping and laundry require continuous assistance from another person. “Due to pain + weakness, other family members do these chores.”
- Respecting the DLA “shopping,” going to and from stores requires periodic assistance from another person and carrying purchases home requires continuous assistance from another person (“Unable to lift/carry groceries”). Reading prices and labels, making appropriate choices and paying for purchases are managed independently.
- Respecting the DLA “meals,” continuous assistance from another person is required for food preparation, cooking, and safe storage of food. Meal planning is managed independently.
- Respecting the DLA “transportation,” getting in and out of a vehicle and using transit schedules/arranging transportation are managed independently. Using public transit requires periodic assistance from another person. “Husband provides assistance.”
- Gets assistance from family members with physical tasks, including meals, on a constant daily basis.
- The ability to manage social functioning is as described above under the heading Mental Impairment (above).

In her SR, the appellant reports that she can't take a shower without her husband's help. It is hard for her to cook; her husband has to help with cooking and other things. Everything she does is with pain in all her body. Going shopping is painful and takes too long to do because her family does not have a car and must walk, having to rest every 20 to 30 minutes. She uses recyclable dishes because it is too hard to clean dishes after eating.

### Need for Help

The GP reports that help required for DLA is provided by family.

**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**

The appellant's position is that as a result of pain throughout her body she is unable to do much, must rely on her husband to help at home and is not able to work.

The ministry acknowledges the appellant's own description of limitations to physical functioning but argues that it is difficult to establish a severe physical impairment or significant restrictions to DLA in consideration of the GP's assessment of physical functioning. Noting that employability or ability to work is not taken into consideration when determining eligibility for PWD designation, the ministry concludes that although constant help is reported to be required with domestic tasks, the ability to walk 2 to 4 blocks and climb 2 to 5 steps unaided, lift 5 to 15 lbs., and remain seated for 1 to 2 hours is not indicative of a severe impairment of physical functioning. The ministry does not consider taking twice as long climbing stairs to be indicative of severe impairment and notes that the GP does not describe the frequency or duration of the periodic assistance with climbing stairs, lifting and carrying/holding. The ministry concludes that, while the information establishes that the appellant experiences impacts to physical functioning due to her medical conditions, the physical functional abilities assessed by the GP reflects a level of independence that does not establish a severe impairment of physical functioning.

**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 not establishing a severe degree of impairment. Relying on multiple sources of information, including a 6-year history of treating the appellant, the GP reports that the appellant independently manages walking indoors and outdoors, climbing stairs, lifting, and carrying within limits that are reasonably considered as not reflecting severe impairment; specifically, the ability to walk 2 to 4 blocks unaided, which is consistent with the appellant's self-reported difficulties with standing or walking too long and the need for rest after walking 20-30 minutes, and the ability to climb 2 to 5 steps unaided and lift 5 to 15 lbs. While periodic assistance is required for climbing stairs and lifting/carrying/holding, in the absence of any further explanation, the panel finds that such assistance would likely be required when the aforementioned limits of independence with these activities are exceeded. Both the GP and the appellant indicate that the appellant is not able to work due to the pain caused by her medical conditions, but as the ministry notes PWD designation eligibility is based on the ability to manage normal routine daily physical functioning, not the ability to work.

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 is that her depression is getting worse and she doesn't want to do anything.

The ministry's position is that the information from the GP does not establish a severe impairment of mental functioning because a major impact on daily functioning is not reported for any area of cognitive and emotional functioning, there are no difficulties with communication and four of five listed areas of social functioning are managed independently.

### *Panel Analysis*

The appellant is diagnosed with dysphoria and a moderate impact on daily cognitive and emotional functioning is reported in the areas of emotion and motivation. However, as the ministry notes, a major impact on daily functioning is not assessed in any of the 14 listed areas and no impact is reported for most areas. No difficulties with communication are identified by the appellant or the GP and, with the exception of dealing with unexpected demands, social functioning is managed independently. Based on this information, and noting that the appellant's own information primarily addresses impacts relating to her physical impairment, 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 as a result of pain, she relies on her husband to manage cooking and other activities.

The ministry notes that it relies on the daily living assessments provided by prescribed professionals, in this case the GP. The ministry acknowledges the GP's indication that continuous assistance is required with a number of DLA related to physical activity including laundry, housekeeping, carrying purchases, and cooking but concludes that this level of restriction is difficult to establish in consideration of the GP's assessment of the appellant's physical functioning for walking, lifting and standing which suggest a level of independence with DLA related to physical activity. The ministry also notes that the GP indicates that the appellant is independent with four of five listed areas of social functioning. Based on the GP's assessments and the appellant's self-reports, the ministry concludes that there is not enough evidence to confirm that the appellant has a severe impairment that 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, 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, the GP is the only prescribed professional providing information respecting the appellant's ability to perform the prescribed DLA. As the ministry notes, the GP reports the need for continuous assistance with all listed physical tasks for the DLA basic housekeeping and meals, as well as with one task of the DLA shopping. The appellant confirms the need for assistance with meals and "other things," adding that she cannot even take a shower without her husband's help. However, as the ministry notes, the GP also assesses the ability to walk indoors with no noted limitation (in both the MR and AR), walk outdoors independently for distances of 2 to 4 blocks, and lift weights somewhere between 5 to 15 pounds – functional abilities which were reasonably viewed by the ministry as suggesting a level of independence with DLA related to physical activities. Additionally, it is unclear why the appellant would require continuous assistance with these activities but be assessed by the GP as being completely independent when managing all physical activities associated with personal care including, dressing, bathing and transferring in and out of bed and on and off of chairs. Given the level of independent physical functioning assessed by the GP in the MR and AR, it was reasonable for the ministry to conclude that it was not satisfied that the prescribed professional's information established that the appellant's physical impairment significantly restricts her ability to perform DLA. Finally, the GP's assessments do not identify significant restrictions in the ability to manage the two DLA specific to mental impairment – make decisions about personal activities, care or finances and relate to, communicate or interact with others effectively – all but one of the listed decision-making tasks are managed independently, there are no communication difficulties and, except for requiring support to deal with unexpected demands, social functioning is managed independently.

For the above reasons, 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)

2019/09/11

PRINT NAME

Marcus Hadley

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/09/12

PRINT NAME

Diane O'Connor

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/09/11