

**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 November 18, 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**

The ministry did not attend the hearing. After confirming delivery of the Notice of Hearing, the hearing proceeded without the ministry.

An observer from the appellant's advocate's office attended the hearing.

Information before the ministry at reconsideration

- The appellant's PWD application, comprised of:
  - A Medical Report (MR) dated June 10, 2019, completed by a general practitioner (GP) of whom the appellant has been a patient for 10 weeks and has seen the appellant 2 to 10 times;
  - An Assessor Report (AR) dated September 5, 2019, completed by a psychiatrist who has known the appellant for 2 months, seen the appellant 2 to 10 times, and used an office interview and one prior psychiatric consult to complete the AR; and
  - The self-report (SR) section of the PWD application, dated May 27, 2019.
- The appellant's Request for Reconsideration submission dated October 30, 2019.

Information provided on appeal and admissibility

- The appellant's Notice of Appeal (NOA) dated November 26, 2019, stating that the appellant disagrees with the ministry's decision and that "If they see me they will see that I am not fit." and,
- A 7-page typewritten advocate's submission dated January 13, 2019, to which the advocate attached a 3-page typewritten letter signed by the psychiatrist and the Tribunal's "Considering New Evidence" guideline were attached.

In accordance with section 22(4) of the *Employment and Assistance Act* (EAA), the panel may consider evidence that is not part of the record as the panel considers it reasonably required for a full and fair disclosure of all matters related to the decision under appeal." The appellant's NOA and advocate's submission were accepted as argument. The panel admitted the psychiatrist's letter and the appellant's oral submissions at hearing, both of which provided additional information about the appellant's mental functioning.

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

### Summary of relevant evidence

#### Diagnoses and Health History

In the MR, 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 diagnoses mood disorder – depression, onset March 2017, and reports decreased motivation, with difficulty getting out of bed, doing self-care (not showering or changing clothes regularly), cleaning the house, interacting with others (anxious in social situations), concentrating and finishing tasks, and holding down a job.

The GP comments that the appellant is being prescribed medication which may improve the appellant's condition.

#### Physical Impairment

No limitations to mobility/physical ability are reported by the appellant, the GP or the psychiatrist and no prostheses or aids are required for the appellant's impairment.

At the hearing, the advocate and the appellant confirmed that the appellant does not have a physical impairment.

#### Ability to Communicate

The GP reports that there are no cognitive, motor, sensory or other difficulties with communication.

The psychiatrist reports that reading, writing and hearing abilities are good and that speaking ability is satisfactory.

#### Mental Impairment

The GP reports:

- Significant deficits with cognitive and emotional function in 2 of 11 specified areas – emotional disturbance and motivation.

The psychiatrist reports the following impacts on daily cognitive and emotional functioning (information from the January 6, 2020 letter is italicized).

- A major impact for emotion (*2-3 days a month depression so severe that the appellant is unable to get out of bed; experiences regular anxiety attacks when leaves home*).
- A major impact for motivation (*low motivation and energy levels impact ability to maintain personal hygiene*).
- A moderate impact for bodily functions (*only gets an average of 4 hours of heavily interrupted sleep per night*), insight and judgement (*impacts judgement in social contexts*), attention/concentration (*easily distracted and often forgets*), executive, memory (*forgets to eat, drink, what day it is, and what the appellant was doing*), and motor activity (*mostly sedentary and stays home approximately 5 days per week*).

- A minimal impact on daily functioning for consciousness (*as a result of poor sleep, often feels foggy and overly fatigued*), impulse control and language (*when anxious a voice tremor causes stuttering*).
- No impact on daily functioning for psychotic symptoms, other neuropsychological problems and other emotional or mental problems.
- All 5 listed aspects of social functioning require periodic support/supervision – appropriate social decisions, develop and maintain relationships, interact appropriately with others, deal appropriately with unexpected demands, and secure assistance from others requires. *Ability to make appropriate social decisions is limited by intense social anxiety. Panics when faced with unexpected demands and is unable to ask others for help.*
- Marginal functioning with immediate and extended social networks, with the psychiatrist commenting that there is no immediate or extended social network. *Very disrupted social functioning in immediate and extended social networks. Avoids interacting with people most of the time due to anxiety.*
- No response is provided where asked to describe the support/supervision required or if there are any safety issues.
- *Mental health impairments are severe in nature, restricted to home most days due to the intensity of symptoms.*

In the SR, the appellant describes having lost two jobs in the last 18 months due to severe depression and anxiety.

In the reconsideration submission, the appellant describes impacts on the ability to work, perform self-care and housework, and the need for assistance. At the hearing, the appellant stated that appointments with the GP were usually 5-10 minutes long and that the appellant continues to see the psychiatrist every month for ½ to 1 hour at a time. The appellant stated that the psychiatrist has increased the number and dosage of medications since the PWD application was completed. The appellant explained that a wheeled cart is used for grocery shopping so that the appellant can shop without having to take the bus.

### DLA

The GP reports:

- The appellant has not been prescribed medications and/or treatments that interfere with the ability to perform DLA.
- Respecting the DLA “move about indoors and outdoors” walking indoors and outdoors are managed independently.
- Personal self-care and basic housework are periodically restricted – “Mood related and motivation related self-care and housework.”
- Social functioning is periodically restricted – “Mood and anxiety impairs decision-making and interaction with others.”
- When asked to provide additional comments regarding the degree of restriction, the GP responds “These are mostly self-reported, and seem of moderate restriction.”
- When asked to describe what assistance is needed with DLA, the GP responds “I don’t think, given the periodic nature of the restrictions that assistance is needed.”
- All remaining DLA are not restricted – meal preparation, management of medications, daily shopping, use of transportation, and management of finances.

The psychiatrist provides the following information (information from the January 6, 2020 letter is italicized).

- Major depressive disorder, dysthymia and social anxiety are the impairments that impact the appellant's ability to manage DLA.
- Respecting the DLA "personal care" dressing, grooming, bathing, toileting, and transfers off/on chair and in/out of bed are managed independently. Feeding self and regulating diet require periodic assistance from another person and take significantly longer than typical. *Only has motivation to bathe approximately once every 2 weeks, requires reminders and prompting to eat, limited to eating simple pre-prepared food due to lack of motivation, takes 20-25 minutes to gather motivation to get out of bed.*
- Respecting the DLA "basic housekeeping," both basic housekeeping and laundry are managed independently, taking significantly longer than typical. *Lacks motivation to do laundry more than once a month and then is unable to complete the task due to fatigue, unable to maintain basic sanitary standards of housekeeping.*
- Respecting the DLA "shopping," going to and from stores, reading prices and labels, making appropriate choices, paying for purchases, and carrying purchases are managed independently, with going to and from stores taking significantly longer than typical. *Only able to go shopping once per month due to anxiety, uses a wheeled cart to carry purchases.*
- Respecting the DLA "meals," meal planning, food preparation, cooking, and safe storage of food are all managed independently, with all but safe storage of food taking significantly longer than typical.
- The listed tasks for the DLA "management of medications", "management of finances" and "transportation" are managed independently with no noted restrictions.
- 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*.

#### Need for Help

The GP indicates "I don't think, given the periodic nature of the restrictions that assistance is needed."

In the AR, the psychiatrist indicates that help required for DLA is provided by Health Authority professionals. In the subsequent letter, the psychiatrist reports that the appellant requires continuous assistance with dressing, grooming, bathing, feeding, regulating diet, laundry, housekeeping, shopping, preparing meals, paying rent and bills on time and filling prescriptions. The appellant also requires periodic assistance on average 30% of the time with transportation.

**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*

Noting that the appellant's position is that there is no physical impairment and the lack of evidence respecting physical functional limitations, the ministry was reasonable in determining that the information does not establish a severe physical impairment.

*Mental Impairment*

As stated by the advocate, the appellant's position is that the initial application combined with the additional information provided in the psychiatrist's letter establishes a severe mental health impairment. The additional information in the letter should be given greater weight than the PWD application because the psychiatrist is a specialist in the field of mental health who now has, as stated in the letter, "a more thorough understanding of the severity of [the appellant's] impairments and the impact they have on [the appellant's] daily living activities."

The ministry's position is that the information available at reconsideration, including the lack of description respecting the need for periodic support with social functioning, does not establish a severe mental impairment. The ministry also notes that for the purposes of determining PWD eligibility, employability or ability to work is not taken into consideration.

*Panel Analysis*

The appellant is diagnosed by the GP with mood disorder – depression and the psychiatrist confirms major depressive disorder and anxiety. The panel accepts the advocate's argument that greater weight should be placed on the most recent information from the psychiatrist over the PWD application given the specialized and ongoing nature of treatment provided by the psychiatrist. While the panel is not persuaded by the advocate's characterization of the new information as confirming major impacts on daily functioning in almost all aspects of cognitive and emotional functioning listed in the AR, the panel finds that there is sufficient information to establish a severe impairment of mental functioning. The new description of the impacts on motivation due to depression and the ability to interact with others due to anxiety and depression, together with a significant number of moderately impacted areas (many of which were previously assessed in the AR) reflect a severe impairment of mental functioning. In particular, the psychiatrist reports a significant level of neglect of personal and home care due to lack of motivation, very limited interaction with others for socializing and performing routine errands (restricted to home most days, high levels of anxiety in public), and moderate impacts on areas including executive function, attention/concentration, insight and judgement, and memory. Based on all of the admissible evidence, the panel concludes that the ministry's decision that a severe mental impairment was not established was not reasonable.

*Restrictions in the ability to perform DLA*

The appellant's position is that the new information from the psychiatrist establishes significant restrictions in the ability to perform DLA.

The ministry notes that it relies on the daily living assessments provided by prescribed professionals, in this case the GP and the psychiatrist, concluding that the assessments are indicative of a moderate level of restriction.

#### *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 additional information provided by the psychiatrist respecting the ability to perform DLA differs greatly from the information provided in the PWD Application by the GP and the psychiatrist. For the reasons previously stated, the panel is placing greater weight on the more recent information from the psychiatrist. The panel considers the limitations described in the ability to manage personal care and basic housekeeping due to lack of motivation due to depression demonstrate a level of ongoing neglect reflecting a continuous significant restriction. Similarly, the panel concludes that the limitations on the appellant's ability to leave home and interact with others result in continuous significant restrictions in the ability to manage shopping (once a month) and social functioning.

Therefore, based on all of the admissible information, the panel concludes that the ministry's determination that significant restrictions in the ability to perform DLA either continuously or periodically for extended periods were not established was not reasonable.

#### *Help to perform DLA*

The appellant's position is that the additional information from the psychiatrist establishes the need for help with DLA. The ministry's position is that as significant restrictions with DLA, either continuous or periodic for extended periods, have not been established, it cannot be determined that significant help is required from other persons.

#### *Panel Analysis*

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” which the panel concluded was met. Again giving greater weight to the additional information from the psychiatrist, who reports the need for continuous assistance with tasks including most aspects of personal care, all basic housekeeping, and shopping, the panel finds that the ministry unreasonably concluded that it cannot be determined that the appellant requires help to perform DLA as a result of direct and significant restrictions.

Conclusion

The panel concludes that based on all admissible evidence, the ministry’s reconsideration decision that the appellant was not eligible for PWD designation, was not reasonably supported by the evidence, and therefore rescinds the decision. The appellant is 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)

2020/01/16

PRINT NAME

Kent Ashby

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2020/01/16

PRINT NAME

Joseph Rodgers

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2020/01/16