

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 June 23, 2020, which held that the appellant did not meet 4 of the 5 statutory requirements of section 2 of the *Employment and Assistance for Persons with Disabilities Act* for designation as a person with disabilities (PWD). The ministry found that the appellant met the requirement of having reached 18 years of age. However, the ministry was not satisfied that:

- a medical or nurse practitioner has confirmed that the appellant has an impairment that is likely to continue for at least 2 years;
- 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.

Additionally, the ministry determined that it has not been demonstrated that the appellant is one of the prescribed classes of persons who may be eligible for PWD designation on alternative grounds set out in section 2.1 of the EAPWDR.

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 April 20, 2020, completed by a general practitioner (GP) who has known the appellant for 2 years and has seen the appellant 11 or more times in the past 12 months; and,
- The appellant's self-report (SR) section of the PWD application, dated April 23, 2020.

The appellant's Request for Reconsideration form, received by the ministry on June 5, 2020, to which the appellant attached:

- A June 2, 2020 letter from the appellant's hematologist (works with BC Cancer Agency).
- BC Cancer Agency information respecting the two drug treatments prescribed for the appellant.

Information and documentation provided on appeal and admissibility

The appellant's Notice of Appeal (NOA), dated July 2, 2020, in which the appellant writes that the ministry keeps responding to the GP's reporting prior to the appellant's diagnosis and chemotherapy treatment and that the appellant has been told to isolate due to Covid-19 and her immune system.

At the hearing, the appellant stated that the ministry had all the information it required to find the appellant eligible for PWD designation, emphasizing that the fact is that she has incurable cancer and cannot leave her home due to her compromised immune system and Covid-19. The appellant stated that she moved in with her mother who lives closer to the cancer clinic and that chemotherapy started on May 20, 2020. She takes medication for vomiting and diarrhea, is unable to work and needs help to pay her bills. The appellant is exhausted, frustrated and doesn't know what else to say. The appellant further explained that the GP contacted the ministry, enquiring as how to best complete the PWD application to ensure the appellant's PWD designation, and was told to write "unknown" because the treatments had not yet begun.

Additional details provided by the appellant in the NOA and at hearing, all of which directly related to the diagnosis of lymphoma, were admitted under section 22(4) of the *Employment and Assistance Act* as being information required for a full and fair disclosure of the matters related to the appeal. The panel accepted the balance of the submissions as the appellant's argument.

At the hearing, the ministry reviewed the legislative requirements for PWD designation but did not introduce new evidence.

Summary of relevant evidence

Diagnoses and Health History

The GP diagnoses Lymphoma with an onset date of March 2020.

- Chemotherapy treatment is planned after the next 1-3 weeks. Treatment plan will depend on test results - not yet known how long the chemotherapy will be required.
- Expect side effects such as fatigue, vomiting, diarrhea and more, which would prevent appellant from being able to work.
- Impact on "IADLs" and activities of daily living yet to be seen based on the severity of the side effects. May require assistance with grocery shopping and household chores.
- Type of cancer is not curable, but can be managed with treatments.

Degree and Course of Impairment

When asked to indicate "Yes" or "No" in response to "Is the impairment likely to continue for two years or more from today?" the GP circled "Yes" and wrote "unknown" with the explanation "At least 1 year."

At reconsideration, the appellant writes that continuous chemotherapy will be required to manage the cancer, that there are no guarantees how long she will live and that on a daily basis she has to deal with side effects of chemotherapy, including continually vomiting, diarrhea, pain, headaches, swelling, and difficulty sitting, walking and sleeping.

The hematologist writes that the appellant will undergo 6 months of chemotherapy immunotherapy followed by 2 years of maintenance Rituximab therapy and will be immunocompromised for the duration. In general, patients are advised to be off work for the duration of their chemotherapy immunotherapy and for 2-3 months following to recover from the side effects of treatment. Given the current pandemic, the appellant is advised to self-isolate as much as possible for the duration of the maintenance drug therapy and this may make it difficult for her to continue work. Patients on this drug maintenance therapy can also have significant fatigue which can prevent them from working for the duration of the maintenance therapy.

Information from the BC Cancer Agency respecting the chemotherapy drug "Bendamustine" identifies it as a drug used to treat some types of lymphoma. Side effects, in the order in which they may occur, include: allergic reactions, burns if leaks under the skin, pain or tenderness where the needle was placed, nausea or vomiting after treatment, skin rashes, fever and chills, and diarrhea. Rituximab is described as a monoclonal antibody – a type of protein designed to target and interfere with the growth of cancer cells. Side effects, in the order in which they may occur, include: allergic reactions (commonly occur), nausea (may sometimes occur, most people have little or no nausea),

skin rashes may sometimes occur, fever and chills may sometimes occur shortly after treatment (fever should last no longer than 24 hours), headache may occur, and tiredness and lack of energy may sometimes occur.

Physical Impairment

In the MR, the GP indicates “unknown” respecting the appellant’s ability to walk on a flat surface, climb stairs unaided, lift, and remain seated.

In the AR, the GP indicates that walking indoors and outdoors, climbing stairs, standing, lifting, and carrying and holding require continuous assistance from another person and require the use of an assistive device. The GP explains that unknown impairments will present once the appellant starts chemotherapy and potentially radiation therapy. The GP writes that the responses provided are for the “worst case scenario.”

Information provided by the appellant in the SR includes that she:

- Has not worked for over a year.
- Has had (she indicated it was 10 to 12 per week) needles in her back to try and help with the pain.
- Has now been diagnosed with blood cancer which is not curable but is able to be managed with chemotherapy.

In her reconsideration submission, the appellant confirms the information provided in the SR, providing additional information including:

- Now having chemotherapy to try to reduce swelling in her neck, groin, breast, underarms, lungs and other areas.
- Will be on chemotherapy for a longtime and going to tests and appointments weekly so she is unable to be employed.
- Some days I can do those things and some days I need assistance.
- Have not had a full night’s sleep for over a year – a couple of hours at a time.
- Whereas unknown at the time the GP completed the PWD application, the need for chemotherapy is now known and she will have to deal with the side effects. She is “unable to cope some days.”
- Her throat is so sore she can only eat small amounts every couple hours.
- Being able to eat only very small amounts very slowly, then vomiting it up or having diarrhea always makes her extremely weak and light headed.

Mental Impairment

In the MR, the GP reports:

- No difficulties with communication.
- Unknown if there are any significant deficits with 11 listed areas of cognitive and emotional function. “Has history of severe depression which may worsen under the current circumstances.”
- Unknown if social functioning is restricted – depends on response to chemotherapy.

In the AR, the GP reports:

- “No mental impairment or brain injury. These are estimates of worst case scenario for side effects from cancer treatments based on what I know of the patient.”
- A major impact on daily functioning for emotion and motivation.
- A moderate impact on daily functioning for bodily functions and attention/concentration.
- A minimal impact on daily functioning for consciousness, impulse control, executive, memory, and motor activity.
- No impact on insight and judgement, language, psychotic symptoms, other neuropsychological problems, and other emotional or mental problems.
- All listed aspects of social functioning are managed independently - appropriate social decisions, ability to develop and maintain relationships, interact appropriately with others, ability to deal appropriately with unexpected demands, and ability to secure assistance from others. Good functioning with immediate and extended social networks. Where asked to describe support/supervision required which would help maintain the applicant in the community and to identify any safety issues, the GP did not respond.

DLA

In the MR, the GP reports:

- It is unknown if the listed activities are restricted, as the degree of restriction is unknown, depending on the appellant’s response to chemotherapy.
- Assistance needed is also unknown – may require a cleaner and assistance with grocery shopping and transportation.
- The appellant has not yet been prescribed medication and/or treatments that interfere with the ability to perform DLA, but will have chemotherapy which may impact ability to perform DLA.
- “Patient is fully functional right now. However I do expect decrease in function as she starts chemo therapy for her cancer. Unable to predict level of future function. May transiently decrease to the levels I have indicated on this form for several weeks or months but may recover to a lesser degree of impairment.”

In the AR, the GP provides a “worse (sic) case scenario estimation for [the appellant’s] response to cancer treatment. All listed physical aspects of the DLA personal care, basic housekeeping, shopping, meals and transportation are identified as requiring “continuous assistance from another person or unable.” All cognitive tasks of those DLA and all tasks for the DLA pay rent and bills and medications are managed independently.

At reconsideration the appellant reiterates that, because of the need to stay isolated due to Covid-19, she does not go out in public to shop for daily needs and relies on her family for shopping. Plus, she cannot be far from a bathroom due to the side effects of vomiting and diarrhea etc. Consistent pain from the swelling/burning of all lymph nodes in her groin, neck, throat, breast area, lungs, legs and arms makes sitting, walking, standing and laying down very uncomfortable and extremely sore. She also has very severe indigestion, blockage of food with swallowing difficulty, and dizziness.

Need for Help

The GP indicates that help is provided by family and where asked to describe the help needed with DLA writes “unknown based on current status.”

At reconsideration, the appellant reports that help is required with shopping, preparing quality meals, housework, and laundry.

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 requirements of 2(2) of the EAPWDA were not met because:

- a medical or nurse practitioner has not confirmed that the appellant's impairment is likely to continue for at least two years;
- 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?

Additionally, was the ministry reasonable when determining that the appellant did not meet the alternative eligibility criteria of section 2.1 of the EAPWDR?

Panel Decision

Alternative Grounds for PWD Designation – section 2.1 of the EAPWDR

Finding that no evidence or argument has been provided to suggest or establish that the appellant falls within one of the classes of persons described in paragraphs (a) through (e) of section 2.1 of the EAPWDR, the panel concludes that the ministry reasonably determined that the appellant is not eligible for PWD designation under this section.

Eligibility for PWD Designation – section 2 of the EAPWDA

Duration of Impairment

The legislation requires that in the opinion of a medical or nurse practitioner, a severe mental or physical impairment is likely to continue for at least 2 years.

The appellant's position is that her lymphoma is not curable and will require ongoing chemotherapy treatment, therefore, the impacts are lifelong.

The ministry's position is that the GP does not confirm that the appellant's impairment is likely to continue for at least 2 years. Specifically, the GP describes the estimated duration of impairment as "At least 1 year," writes "unknown" when asked if the impairment is likely to continue for at least 2 years, and states that the appellant "may transiently decrease" in functioning for several weeks or months. The ministry also notes that the GP states that the assessments of functioning are based on a "worst case scenario estimation" for the response to cancer treatments.

Panel Analysis

While there is no dispute that the appellant's medical condition, lymphoma, is lifelong, the legislation requires a medical or nurse practitioner to confirm that resulting impairment of functioning is likely to last at least 2 years. It is important to note, that the GP does not identify impairment arising from the cancer, but directly relates any potential impairment to physical or mental functioning to the chemotherapy treatment (and possible radiation treatment, which does not appear to be taking place). In this case, the GP wrote "unknown" and circled "Yes" in response to the question "Is the impairment likely to continue for two years or more from today?" The GP also responded "At least 1 year." Elsewhere in the application, the GP writes that "functioning may decrease for several weeks or months" and that the GP is unable to predict the level of future function. Based on all of this information, it appears that the GP did not know the expected duration of impairment from the cancer treatments, which is understandable given that the treatments were unknown when the PWD application was completed.

The hematologist confirms that chemotherapy is planned for 6 months followed by 2-3 months to recover from the side-effects of that treatment. The hematologist also confirms that 2 years of a maintenance drug will follow and that this medication can cause significant fatigue which can prevent patients from working during the maintenance therapy. However, the hematologist does not address the appellant specifically or indicate that the appellant is "likely" to be impaired for two years or longer.

Based on the above, and again noting that neither the GP nor the hematologist describe any impairment resulting from the lymphoma itself, but rather from its treatment, the panel concludes that the ministry was reasonable when determining that the duration of impairment has not been confirmed by a medical or nurse practitioner as likely to continue for at least 2 years.

Severe Physical Impairment

Respecting severe physical impairment, the appellant's position is that she is unable to have a regular life due to the consistent headache, indigestion, vomiting, diarrhea, and pain from her medical condition and its treatment. The appellant questions what other information the ministry would require given the fact that she requires ongoing chemotherapy to manage the cancer, the symptoms of which are described by the appellant, her GP, the hematologist, and the BC Cancer Agency information sheets. Furthermore, she must self-isolate due to Covid-19 and must remain near a bathroom because of the chemotherapy symptoms.

Commenting that the PWD application is not intended to assess employability or vocational abilities, as noted on page 5 of the PWD application, the ministry's position is that a severe physical impairment is not established based on the information provided. Reviewing the GP's information, the ministry states that it cannot make an assessment based on an unknown level of functioning and at the time the application was completed the GP reported that the appellant was fully functional. The assessments provided are hypothetical, based on a worst case scenario, with the GP commenting that the appellant may recover to a lesser degree of impairment. The ministry concludes that the hematologist addresses the inability to work while undergoing treatment and that the appellant may experience fatigue throughout treatment, but does not address restrictions in performing DLA. The ministry acknowledges that the appellant is facing extensive treatment which may impact functioning but with no confirmed restrictions or limitations to mobility and physical abilities, the ministry cannot establish a severe physical impairment.

Panel Analysis

Unlike the duration criterion which requires the ministry to rely solely on the information from a nurse or medical practitioner, when assessing severity of an impairment the legislation provides the ministry discretion, taking into account all of the evidence including that of the appellant. While the legislation does not define "impairment", the MR and AR define "impairment" as a "loss or abnormality of psychological, anatomical or physiological structure or functioning causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration." While this is not a legislative definition, and is therefore not binding on the panel, in the panel's opinion, it reflects the legislative intent and provides an appropriate analytical framework for assessing the degree of impairment resulting from a medical condition.

In this case, the GP completed the application prior to the appellant beginning chemotherapy treatment. At that time, the duration of the treatment and the specific course of chemotherapy were unknown. Accordingly, the GP provided an estimate, stating that "unknown impairments will present once she starts treatment for her cancer with chemotherapy and potentially radiation." Described as the worst case scenario, the GP reported the need for continuous assistance with every aspect of mobility and physical ability and with all physical aspects of DLA due to side effects from chemotherapy including nausea, diarrhea and fatigue. Although no information from the GP is provided after the chemotherapy began, the hematologist confirms that the appellant will have side effects from the chemotherapy, and

will require a 2-3 month recover period from those effect. The appellant's evidence at reconsideration and on appeal is that she experiences consistent symptoms including pain, diarrhea, vomiting, and weakness. Finding that the appellant's description of the severity of symptoms she experiences is consistent with the GP's estimate and the BC Cancer Agency information, the panel places significant weight on the evidence of the appellant. For these reasons, the panel concludes that the ministry was not reasonable to determine that a severe physical impairment of functioning is not established.

Severe Mental Impairment

The appellant does not specifically address mental impairment in her written or oral submissions.

The ministry concludes that as the GP's information is based on predictable possible "worst case scenario" impacts on mental functioning and therefore, while the appellant may have a variety of impacts on her life, a severe degree of mental impairment has not been presented.

Panel Analysis

The panel concludes that the ministry has reasonably determined that the information does not establish a severe mental impairment. In reaching this conclusion, the panel notes that the appellant did not address cognitive, emotional or social functioning and that even the worst case scenario described by the GP indicates that there are no problems with communication, that social functioning is managed independently and that all cognitive tasks of all DLA are managed independently.

Restrictions in the ability to perform DLA

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 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.

The appellant's position is that she is significantly restricted by the side effects of the chemotherapy and by the consistent pain, swelling and burning in the multiple lymph nodes where cancer is present.

The ministry's position is that it cannot assess significant restrictions, continuous or periodic for extended periods, based on the GP's assessment in the MR that the appellant "may" require assistance

with some DLA, but that restrictions are currently unknown and will depend on the appellant's response to the chemotherapy treatment. Similarly, the ministry concludes that the possible "worst case scenario estimation" of the impact on DLA from cancer treatments described by the GP in the AR does not establish that the appellant is currently significantly restricted in her DLA. The ministry also considered the oncologist's information that the appellant will be immunocompromised for the 2.5 year duration of the treatments, which may affect the ability to work and is further complicated by the advice to self-isolate as much as possible due to the Covid-19 pandemic, does not speak to the nature or frequency of any restrictions the appellant currently faces in performing DLA. Acknowledging the appellant's information provided at reconsideration, the ministry finds that the level of functioning described by the appellant must be, but has not been, confirmed by a prescribed professional.

Panel Analysis

The panel notes that DLA are defined in the legislation and while there is potentially some crossover between restrictions impacting the ability to work and those impacting the ability to perform DLA, only restrictions on the ability to perform the DLA are considered when determining PWD eligibility.

In this case, both the GP and the hematologist are prescribed professionals. Unfortunately, neither the GP nor the hematologist has assessed the appellant's ability to manage DLA while experiencing the symptoms of the chemotherapy.

While the appellant has provided some information respecting the impact of the side effects of the chemotherapy on the ability to manage DLA, the legislation requires the ministry to rely on the opinion of a prescribed professional when determining the significance of the restriction on the ability to perform DLA.

Accordingly, given that the hematologist does not assess the appellant's ability to manage DLA and as the GP's assessment is speculative, the panel concludes that the ministry was reasonable to conclude that direct and significant restrictions in the ability to manage DLA could not be established.

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." Having found that the ministry was reasonable to conclude that this precondition was not met, 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

Although the panel concluded that the ministry was unreasonable when determining that a severe physical impairment was not established, the ministry was reasonable to conclude that the remaining criteria, all of which require specific information from a prescribed professional, were not met. In reaching this conclusion, the panel acknowledges and appreciated the appellant's frustration, and notes that the appellant may wish to reapply now that her treatment is underway and a current assessment of the expected duration and degree of impacts on physical abilities and DLA could be made by the GP.

The ministry's decision is confirmed as being reasonably supported by the evidence. The appellant is not successful on appeal.

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).
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APPEAL NUMBER
2020-00175

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)

2020/07/23

PRINT NAME

Carman Thompson

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2020/07/23

PRINT NAME

Angie Blake

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2020/07/23