

APPEAL NUMBER  
2021-00064

### **PART C – DECISION UNDER APPEAL**

The decision under appeal is the Ministry of Social Development and Poverty Reduction’s (“ministry”) reconsideration decision dated March 16, 2021, in which the ministry found the appellant was not eligible for designation as a Person with Disabilities (“PWD”) under section 2 of the Employment and Assistance for Persons with Disabilities Act (“EAPWDA”). The ministry found the appellant met the age and duration requirements but was not satisfied that:

- the appellant has a severe mental or physical impairment;
- the appellant’s impairment, in the opinion of a prescribed professional, directly and significantly restricts the ability to perform daily living activities (“DLA”) either continuously or periodically for extended periods; and
- as a result of restrictions caused by the impairment, 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 found that the appellant was not 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 (“EAPWDR”). As there was no information or argument provided for PWD designation on alternative grounds, the panel considers that matter not to be at issue in this appeal.

### **PART D – RELEVANT LEGISLATION**

Employment and Assistance for Persons with Disabilities Act section 2  
Employment and Assistance for Persons with Disabilities Regulation section 2

## **PART E – SUMMARY OF FACTS**

The evidence before the ministry at reconsideration included:

- The appellant's PWD Application comprised of the appellant's self report ("SR"), a medical report ("MR") completed by the appellant's family physician ("the GP") and an assessor report ("AR") completed by the appellant's GP. Note: an updated PWD Application, being the same PWD app originally submitted but containing additional comments in the MR and AR, was submitted with the request for reconsideration. This is the PWD application the ministry used to make their decision.
- Request for Reconsideration (RFR) submitted by the appellant on February 19, 2021 citing as the reason for requesting a reconsideration:
  - She was not able to be present with the GP when the forms were filled out by him.
  - Some information was missed and some that was filled out incorrectly.
- Ministry's PWD Designation Summary dated February 9, 2021.
- Psychiatric specialist consult letter dated January 12, 2021 with the treatment plan recommending the appellant undergo assessment with a psychologist to confirm a suspected diagnosis of ADHD.
- Rheumatology specialist consult letter dated October 29, 2020 that outlines the appellant's medical history, the diagnostic and therapeutic plans and recommendation of a referral to a chronic pain specialist to address the appellant's non-specific chronic pain.
- MHSU Initial Assessment dated February 5, 2021 that outlines the appellant's medical conditions and confirmed the appellant meets the criteria for attention deficit hyperactivity disorder (ADHD).

### **PWD Application**

#### **Diagnosis**

- Fibromyalgia with date of onset October 2020
- Anxiety disorder with date of onset 2005
- Lumbar spine disc herniation with date of onset 2006
- Depression with date of onset February 2021
- ADHD with date of onset February 2021

#### **Physical Impairment**

In the SR, the appellant reported:

- Some days she wakes up already exhausted and cannot even chew food because of the physical effort.
- Some days the migraines are so bad the stress and adrenaline hormones are overproduced which causes symptoms that mimic a heart attack.
- Slow walking is physically painful, so she has to find somewhere to sit down, stretch or lay down to relieve the pain and pressure in her back.
- She avoids shopping because she cannot stand in line ups at stores and finds it difficult to stand to cook.
- Showering is difficult so she bathes but can only do that on good days.
- She cannot climb more than ten stairs because the right joint in her back cannot physically lift her right leg.
- Cleaning the house takes multiple days because she has to lay down to finish even a small chore.

In the MR, Part B Health History, the GP wrote:

- Fibromyalgia and diffuse muscle and joint pain
- Lumbar spine disc herniation
- Chronic back pain assessed - a rheumatologist has made a referral to a pain clinic

In the MR, Part C Degree and Course of Impairment, the GP answered yes to the question "Is the impairment likely to continue for two years or more?" and commented:

- Fibromyalgia – chronic condition that has periodic flare ups – has not tolerated treatment for this and referral to pain clinic made

In the MR, Part D Functional Skills, the GP indicated:

- Able to walk less than 1 block (as indicated by appellant) unaided on a flat surface
- Able to climb 5+ stairs unaided
- Able to lift 5 to 15 pounds
- Able to sit without limitation

In the AR, Part B, the GP wrote in response to what impairments impact the appellant's ability to manage DLA:

- Chronic pain – generalized

### **Mental Impairment**

In the SR, the appellant reported:

- She feels hopeless and most days she feels depressed and mentally cannot function.

In the MR, Part B Health History, the GP wrote:

- Anxiety disorder – chronic anxiety, restless and poor concentration.
- Initially the appellant declined treatment but has agreed to try this and is hopeful this will improve.
- Depression – new diagnosis March 3, 2021 – just started treatment.
- ADHD – does not meet criteria – started treatment

In the MR, Part C Degree and Course of Impairment, the GP indicated there were no difficulties with communication and checked the following areas where deficits are evident:

- Emotional disturbance (e.g. depression, anxiety)

In the AR, Part B, the GP indicated the appellant's level of ability to communicate is "good" with speaking, reading, writing, and hearing. In response to the impacts on the appellant's daily cognitive and emotional functioning, the GP noted:

- No impact: bodily functions, consciousness, impulse control, language psychotic symptoms, or other emotional problems
- Minimal impact: insight, motor activities
- Moderate impact: executive, memory, motivation
- Major impact: emotion, attention/concentration,

### **Restrictions in the Ability to perform DLA**

In the AR, Part C, the GP noted the appellant is independent with all areas of personal care; shopping; meals; paying bills; medications; making appropriate social decisions; is able to develop and maintain relationships; interacts appropriately with others; is able to deal appropriately with unexpected demands and is able to secure assistance from others. The GP indicated the appellant has marginal functioning with regards to how the mental impairment impacts the appellant's relationship with her immediate and extended social networks.

### **Need for Help**

In the SR, the appellant wrote that she relies heavily on the father of her child to help with the child when she is having a bad day.

In the AR, Part C, the GP noted the appellant takes significantly longer than usual with doing basic housekeeping when the fibromyalgia flares up, and that the help is provided by family and friends. The GP did not indicate any need for assistive devices or an assistive animal.

### **Additional Information Submitted after Reconsideration**

On the Notice of Appeal form (NOA) dated March 22, 2021 the appellant wrote:

- There is still incorrect information.
- She cannot sit with no limitations.

- Her impairment is every day.
- She is in pain 24/7 and struggles every day with living and functioning.

The appellant gave permission for a ministry observer to listen in on the hearing.

At the hearing, the appellant stated the GP was incorrect when he noted on the PWD application that she could sit and did not need assistance with her daily living activities. The appellant argues that the application was completed over the phone, where the GP took notes and completed the form afterwards. The appellant stated she has suffered with fibromyalgia for fourteen years and has been declining in health ever since. The appellant finds it difficult to find a doctor who will take her condition seriously because she is so young and stated she has lost faith in the doctors because the medications they offer often have bad side effects. The appellant indicated she can hardly walk but was told she should try to keep active by walking, so she does walk a block, however she is in pain afterwards.

The appellant explained she measures how she is feeling each day by imagining her pain level as “spoons” and once these spoons are used up, she has to lay down. On a good day she gets her daughter off to school and does some housework but finds all her spoons used up by the end of that. The appellant explained when she is experiencing a migraine she often has to go to the hospital emergency for treatment, so on those days she asks her child’s father to take the child as she is unable to provide care. The appellant stated the migraines happen about once a month, but she experiences bad headaches approximately every week. The appellant indicated the fibromyalgia flare-ups occur every few weeks and when they happen she experiences wide-spread pain, body aches and even getting out of bed is difficult.

At the hearing, the ministry reviewed the reconsideration decision summary and explained there was just not enough information provided by the GP to determine the appellant’s medical condition caused a severe and significant physical or mental impairment as is required by legislation. The ministry argues the GP noted the appellant is independent in all areas of self care, cooking and cleaning and there was no information provided by the GP to confirm the frequency or duration of the flare-ups so the ministry could not confirm there was a severe degree of physical impairment.

The ministry argues the appellant only recently was diagnosed with depression and ADHD for which she has only recently started treatment. The GP noted the appellant is independent in making decisions regarding personal activities, care, finance and social functioning so the ministry could not confirm there was a severe degree of mental impairment.

The ministry argues they could not determine whether the appellant’s impairment significantly restricts DLA’s continuously or periodically for extended periods of time because there was no information provided by the GP to confirm the frequency of when the appellant is not able to manage DLA’s.

### **Admissibility of Additional Information**

The panel accepted the appellant’s NOA statement and oral testimony as evidence under section 22(4) of the Employment and Assistance Act, which allows for the admission of evidence reasonably required for a full and fair disclosure of all matters related to the decision under appeal.

## PART F – REASONS FOR PANEL DECISION

The issue in this appeal is whether the ministry reasonably determined that the appellant was ineligible for designation as a PWD. The ministry determined the appellant did not meet all the required criteria for PWD designation set out in the Employment and Assistance for Persons with Disabilities Act, Section 2. Specifically, the ministry determined the information provided did not establish that:

- the appellant has a severe impairment;
- the appellant's 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 these restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

(See Appendix A for Relevant Legislation)

### Analysis

#### *Severe mental or physical impairment*

To be eligible for PWD designation, the legislation requires several criteria to be met including the minister being satisfied that the applicant has a severe mental or physical impairment. The ministry found the appellant was not eligible for PWD because not all of the five criteria were met. Neither the terms “*impairment*” nor “*severe*” are defined in the EAPWDA. The Cambridge Dictionary defines “*impairment*” in the medical context to be “*a medical condition which results in restrictions to a person’s ability to function independently or effectively*” and defines “*severe*” as “*causing very great pain, difficulty, worry, damage, etc.; very serious*”. A diagnosis of a severe impairment does not in itself determine PWD eligibility.

In the appellant’s circumstance, the ministry found that she had met the age criteria and that she had a medical condition that is likely to continue for at least two years however they do not consider her impairment to be severe or that it affects her ability to manage her DLA directly and significantly. The panel agrees that the age and duration requirements of the legislation have been met and will consider the remaining requirements by reviewing each of them individually.

#### **Mental Impairment**

To assess the severity of a mental impairment, the ministry considers the extent of any impact on daily functioning as evidenced by limitations/restrictions with mental functions and emotion. The ministry does not only look at the diagnosis or a medical practitioner’s comment that the condition is “severe” but considers the bigger picture including whether there are restrictions to DLA requiring mental/social functioning and whether significant help is required to manage DLA. The panel finds that an assessment of severity based on mental and social functioning and restrictions to DLA is a reasonable interpretation of the legislation.

The appellant’s position is she becomes depressed because she is not able to keep her house as clean as she would like and when things start piling up it just makes her feel worse.

The ministry’s position is there is insufficient evidence to determine the appellant’s depression and ADHD is a severe or significant mental impairment that restricts her ability to manage her DLA.

#### Panel Decision

Section 2(2) of the legislation requires evidence of a severe impairment. The information from the appellant is that the pain she experiences often causes her anxiety and leaves her feeling she can no longer function emotionally. The GP notes the appellant experiences major impacts in the areas of emotion and concentration, as well as a moderate impact in the areas of executive thinking, memory and motivation, however, makes no comment as to the frequency and duration of this impact. The GP also notes the appellant is independent with managing finances,

taking medications and making appropriate choices. In response to the question “How does the impairment impact the appellant’s relationships with immediate and extended social networks?”, the GP indicates the appellant has some restrictions that cause a moderate impact on her cognitive and emotional functioning in the areas of sleep disturbance, anxiety, executive thinking, motivation, however, notes the appellant is independent in all areas of social functioning.

The panel finds the ministry reasonably concluded that, because the appellant reported to be independent in all activities related to making decisions regarding personal activities, care, managing finances, social functioning and no impairment in her ability to communicate was noted, they were unable to confirm the appellant’s medical conditions severely impair her cognitive, emotional, and social functioning. Accordingly, the ministry was reasonable in applying the legislation to find that a severe mental impairment under section 2(2) of the EAPWDA was not established on the evidence.

### **Physical Impairment**

To assess whether the applicant has a severe physical impairment, the ministry considers information on the degree of restrictions to physical functioning, restrictions to DLA involving movement, and whether the applicant requires significant help or any assistive devices to manage DLA. The panel finds that the assessment of severity based on daily physical functioning is a reasonable interpretation of the legislation.

The appellant’s position is that the pain she experiences due to her fibromyalgia is affecting her quality of life and sometimes weeks will go by without her being able to do the housecleaning. The appellant does not have any family or friends to help her with cleaning the house, and she relies on her child’s father to take over childcare when she is not able to.

The ministry’s position is there is insufficient evidence provided by the GP to establish that the appellant has a severe physical impairment that affects her daily living activities.

### Panel Decision

In the AR, the GP indicates the appellant takes significantly longer than typical when walking indoors and outdoors, climbing stairs, lifting, standing, carrying and doing basic housekeeping. The GP comments this occurs when the appellant is having a flare up of fibromyalgia and it takes much longer for her to carry out these DLA. The GP does not specify the how often the flare ups occur or how long they last. The appellant explained that she experiences migraines approximately once a month, which is when her child’s father must provide the childcare. The appellant experiences headaches weekly and due to the pain from fibromyalgia does not have any days that she considers to be really good. However, the GP indicates the appellant is independent in the areas of personal care, shopping, meal preparation, and using private and public transportation.

The panel acknowledges the appellant experiences pain when she has a flare up of fibromyalgia, or when a migraine is occurring, which affects her ability to do housework, however, the panel considers that housework need not necessarily be done on a daily basis. Although the appellant explained she experiences flare ups from the fibromyalgia there is no evidence as to how often this occurs, when they occur, or how long they last. The GP also confirmed the appellant does not require any prostheses or aids for her impairment. The evidence suggests the appellant is totally independent in doing all DLA, other than housekeeping, so this does not suggest a physical impairment that significantly affects her daily physical functioning, therefore, the panel finds the ministry reasonably determined the requirement for a severe physical impairment under section 2(2) of the EAPWDA was not met.

### **Direct and Significant Restrictions in the ability to perform DLA**

Subsection 2(2)(b)(i) of the EAPWDA requires the ministry to be satisfied that, in the opinion of a prescribed professional, a severe impairment directly and significantly restricts a person’s ability to perform DLA either continuously, or periodically for extended periods. This means that restrictions to DLA must be confirmed by the appellant’s doctor or one of the practitioners named in the legislation such as a psychologist or occupational therapist.

The term “directly” means that the severe impairment must cause or result in restrictions to activities. The direct restriction must also be significant. This means that being unable to do DLA without a lot of help or support will have a large impact on the person’s life.

Finally, there is a time or duration factor: the restriction may be either continuous or periodic under the legislation. Continuous means that the activity must generally be restricted all the time. The ministry views a periodic

restriction as significant when it occurs frequently or for longer periods of time; for example, the activity is restricted most days of the week, or for the whole day on the days that the person cannot do the activity without help or support.

The panel views the ministry's interpretation of the legislation as reasonable. Accordingly, where the evidence indicates that a restriction arises periodically as with the appellant's fibromyalgia and chronic pain, it is appropriate for the ministry to require information on the duration and frequency of the restriction as well as details about the help or support that is needed. With that information, the ministry can assess whether the legislative requirement is met.

DLA are defined in section 2(1) of the EAPWDR and are also listed in the MR, with additional details in the AR. Therefore, the doctor or other practitioner completing these forms has the opportunity to indicate which, if any, DLA are significantly restricted by the applicant's impairments either continuously or periodically for extended periods and to provide additional details.

The appellant's position in regards to how her impairment affects her daily living is that there are some days she finds it difficult to get out of bed and on good days she does her housework but suffers for it at the end of the day. The appellant's child is cared for by the child's father when the appellant is experiencing a bad migraine which is approximately once a month.

The ministry's position is they are not satisfied that the appellant has a severe impairment that, in the opinion of a prescribed professional, directly and significantly restricts the appellant's ability to perform the daily living activities set out in the legislation.

#### Panel Decision

The GP indicated the appellant's family and friends assist her, however the appellant states she does not have anyone that helps her. The appellant did not indicate she required ongoing and frequent assistance in managing DLA's, only that housework does not get done as often as she would like. The panel considers the appellant being able to manage all DLA except housework is not indicative that the impairment significantly restricts her. The panel notes the GP has indicated the appellant is independent in all areas of managing DLA, except housework when having a flare up, but did not confirm the frequency or duration of the flare ups. The evidence suggests the appellant does not experience the flare ups continuously, but they happen periodically, however the panel could not determine whether they last for an extended period because no indication was made as to how long they last. The panel finds the ministry was reasonable to determine the appellant's impairment does not directly and significantly restrict her ability to perform DLA either continuously, or periodically for extended periods as required under subsection 2(2)(b)(i) of the EAPWDA.

#### **Help with DLA**

##### Panel Decision

Section 2(2)(b)(ii) of the EAPWDA requires that, as a result of being directly and significantly restricted in the ability to perform DLA either continuously or periodically for extended periods, a person must also require help to perform those activities. That is, the establishment of direct and significant restrictions under section 2(2)(b)(i) is a precondition of meeting the need for help criterion. 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 a DLA.

As the panel found that the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established, the panel also finds that the ministry reasonably concluded that it cannot be determined that the appellant requires help to perform DLA 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.

**APPENDIX A**  
**RELEVANT LEGISLATION**

**EAPWDA**

**Persons with disabilities**

**2** (1) In this section:

"assistive device" means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform;

"daily living activity" has the prescribed meaning;

"prescribed professional" has the prescribed meaning.

(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person is in a prescribed class of persons or that the person has a severe mental or physical impairment that

(a) in the opinion of a medical practitioner or nurse practitioner is likely to continue for at least 2 years, and

(b) in the opinion of a prescribed professional

(i) directly and significantly restricts the person's ability to perform daily living activities either

(A) continuously, or

(B) periodically for extended periods, and

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

(3) For the purposes of subsection (2),

(a) a person who has a severe mental impairment includes a person with a mental disorder, and

(b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires

(i) an assistive device,

(ii) the significant help or supervision of another person, or

(iii) the services of an assistance animal.

**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.

### **Part 1.1 — Persons with Disabilities**

#### **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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**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

Janet Ward

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2021 April 14

PRINT NAME

Rick Bizarro

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2021 April 14

PRINT NAME

Linda Smerychynski

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2021 April 14