

Part C – Decision Under Appeal

The decision under appeal is the Ministry of Social Development and Poverty Reduction’s (“ministry”) reconsideration decision dated October 20, 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”). At the reconsideration, the ministry found the appellant met the requirement for age, but was not satisfied that 4 other requirements were met:

- impairment likely to continue for at least 2 years;
- severe mental or physical impairment;
- significant restrictions to daily living activities (“DLA”), and
- needs help with DLA.

The ministry found 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

The ministry based the reconsideration decision on the following legislation:

Employment and Assistance for Persons with Disabilities Act - EAPWDA - section 2

Employment and Assistance for Persons with Disabilities Regulation - EAPWDR - section 2

The full text is available in the Schedule after the decision.

Part E – Summary of Facts

The evidence and documentation before the minister at the reconsideration consisted of:

1. Information from the ministry's Record of Decision indicating that the PWD application was received on July 26, 2021. On August 19, 2021, the ministry denied the application finding that the appellant met only one of the criteria for PWD designation (Age - the appellant is over 18).

On September 20, 2021, the appellant submitted a *Request for Reconsideration* ("RFR") asking for an extension of time to submit information. On October 20, 2021, the ministry completed the review of the RFR finding that the appellant met only one of the PWD criteria.

The appellant is currently receiving income assistance from the ministry.

2. The RFR signed by the appellant on September 20, 2021, "request for extension please." On October 20, 2021, the appellant contacted the ministry to advise that additional evidence would be submitted. The ministry notes that no documents were received before the legislated timelines for the reconsideration.

3. The appellant's PWD application comprised of:

- the *Applicant Information* (self-report - "SR") dated January 9, 2021,
- a *Medical Report* ("MR") dated February 8, 2021, completed by a general practitioner ("Dr. X") who has known the appellant since July 2019, and has seen her 2-10 times in the past 12 months (comment, "attends all follow up and participates voluntarily in treatment suggested"), and
- an *Assessor Report* ("AR") dated February 8, 2021, also completed by Dr. X who says they have known the appellant for approximately 18 months for health care services and have referred her to a community organization for mental health support. Dr. X indicates that an office interview with the appellant, and a review of her chart and medical records were the information sources used to complete the AR.

4. The appellant provided an unsigned letter with the PWD application ("pages 2 and 3 of 4") with the heading *Mental Health*. The letter is dated October 24, 2016.

[Panel note: The appellant explained at the hearing that the letter is from a mental health and addictions psychologist who assessed her in 2016. The appellant said she submitted the 2 pages to Dr. X].

The psychologist's letter includes the following information from the 2016 assessment:

- The appellant describes "feeling nervous." She does not currently have self-harming or suicidal thoughts.
- The appellant's sleep is fair but difficult some nights. Her appetite is currently okay but there is a history of an eating disorder that is not recently active.
- There are no symptoms suggesting mania, thought interference, or abnormal perceptions. The appellant does not have a history of substance abuse.
- The appellant has "a longstanding history of depression and anxiety." She may have encountered an eating disorder and post-traumatic stress disorder ("PTSD") related to witnessing a death in the family when she was a child.
- The appellant has accessed *Mental Health Services* in the past and has had hospital admissions for self-harm and suicidality in the context of a disrupted relationship.
- The appellant has taken medication for depression/anxiety in the past but had to stop due to side effects. She has gained some stability since her recent hospital admission and she is interested in starting medication again.
- The appellant has some positive interactions with others through her employment and is able to function in public.

- The appellant had a chaotic family life since a very young age, was abused by her parents, and removed from the home by child protection services.
- At the interview with the psychologist the appellant was somewhat withdrawn, was able to communicate in a clear and linear fashion and had adequate insight and judgment.
- The current diagnosis is major depression “recurrent”; anxiety, past eating disorder, and PTSD symptoms (Axis I). The appellant has possible borderline personality traits, primary self-harm, and “repeated suicidality” in the context of disrupted interpersonal relationships (Axis II). Current stressors include relationship difficulties and an unstable family of origin (Axis III).
- The appellant has struggled with depression and reactive moods “over the course of her life”; has been exposed to trauma and has a somewhat disrupted developmental history.
- Recommendations included trials with different medications for depression/anxiety, time-limited individual therapy, and group therapy.

5. The ministry’s PWD *Decision Summary* with attached letter dated August 19, 2021, in which the ministry found that the appellant did not meet any of the criteria for PWD designation except the age requirement.

Summary of relevant evidence from the application:

SR

The appellant reported that her mental health conditions include PTSD, depression, anxiety, and obsessive-compulsive disorder (“OCD”). The appellant described witnessing the sudden death of a family member when she was a child. The appellant experienced inadequate care, and mental and physical abuse from her parents and was placed in foster care.

Symptoms

The appellant described being underweight and having no muscle mass “due to mental health.” She has a difficult time keeping an adequate sleep schedule which makes her unreliable in maintaining employment and unable to finish a training course “due to mental health barriers.”

Functional limitations

- The appellant described having “no motivation to function” due to her mental health conditions; she will spend “days and weeks bed bound.”
- The appellant said she is known to make “rash and unsafe choices and can become reckless” with herself.

Restrictions to DLA

- The appellant reported difficulty with meals (eating): she will eat “one meal a day if at all.”
- The appellant described difficulty with personal care (bathing): she does not shower more than once a week.
- The appellant said she has “extreme difficulties with personal relationships” including co-dependency. She has a family relationship with only one extended relative and has no/very limited contact with her immediate family. The appellant reported continued contact with a foster family and with her best friend from school, but contact is limited as they live in another community.
- The appellant said she has difficulty maintaining relationships and friendships because she becomes “unreliable and has difficulties taking ownership of my actions.” The appellant described “being over-dramatic when going through triggering episodes.”

Help/support

- The appellant said she has faced many misdiagnoses and “received improper mental health supports because of this.”
- The appellant described seeing a “walk in doctor” once a month for a year and trying medications, but she became “erratic, violent, and extremely unstable.”
- The appellant attributes her lack of awareness “of all triggers” to a history of misdiagnosed mental health disorders. The appellant said she does not have “proper coping tools” as a result of not receiving the proper supports.

MR*Diagnosis*

In the MR (section A), the appellant is diagnosed with depressive disorder and anxiety disorder (date of onset, “> 2 years”). Under *Health History* (section B) Dr. X said the appellant has “progressive symptoms of depression and anxiety in last 6 months impairing function in school and relationships.” Dr. X described the impairment as “moderate to severe.”

Degree and course of impairment

In section C of the MR, the doctor is asked to answer the question: *Is the impairment likely to continue for 2 years or more from today?* The form has *yes* or *no* boxes for the doctor to check as well as a space for any comments. Dr. X did not check either box but provided a comment, “unknown – course is relapsing/remitting.” In section F - *Additional comments*, Dr. X commented, “these impairments tend to fluctuate over time, but are omnipresent for her.”

Functional skills - physical impairment

In section D (1-4) Dr. X indicated the appellant can walk 4 or more blocks unaided on a flat surface, climb 5 or more steps, and has no limitations with lifting or sitting.

Functional skills - mental impairment

In section D (5-6) Dr. X indicated the appellant has no difficulties with communication. Question 6 asks whether there are *any significant deficits with cognitive and emotional function?* Dr. X checked *yes*, indicating the appellant has significant deficits with *Executive*, *Memory*, *Emotional disturbance*, and *Attention (sustained concentration)*. The doctor left *Additional Comments* (section F) blank.

Daily living activities

Dr. X indicated the following DLA are continuously restricted by the appellant's impairment:

- *Personal self-care*
- *Meal preparation*
- *Daily shopping*

The doctor marked 2 DLA as *periodically restricted*:

- *Management of finances*
- *Social functioning*

When asked to explain restrictions that are periodic, Dr. X wrote, "depends on severity of symptoms. Degree of function has varied significantly from when I met her." When asked to elaborate on the restriction to *Social functioning*, Dr. X stated, "patient reports extreme difficulties with personal relationships...co-dependent. I agree. Ongoing emotional outbursts due to living situation, very difficult for her to maintain stable relationships. No sense of security."

Dr. X indicated *no restriction* for 2 DLA listed on the form:

- *Mobility* (inside the home)
- *Mobility* (outside the home)

Dr. X indicated that restrictions to the remaining DLA are *unknown*:

- *Management of medications*
- *Basic housework*
- *Use of transportation*

Help required

Dr. X stated that the appellant would benefit from assistance with meal preparation, transportation, finances, and finding suitable employment. The appellant is taking medication that does not interfere with her ability to perform DLA. The appellant requires the medication "likely lifetime duration." Dr. X checked *no*, the appellant does not require any prostheses or aids for the impairment.

AR

Physical impairment

Dr. X indicated the appellant is independent with all physical abilities listed on the form: walking, climbing stairs, standing, lifting, and carrying/holding.

Mental impairment

Dr. X indicated the appellant has good-satisfactory communication skills (reading was not assessed).

Dr. X checked on the form that the appellant's mental impairment impacts 9 of the 14 areas of cognitive and emotional functioning listed in section B-4:

- major impact for *Emotion* and *Executive*
- moderate impact for *Attention/concentration*, *Memory*, and *Motivation*
- minimal impact for *Bodily functions*, *Impulse control*, *Insight and judgment*, and *Other neuro-psychological problems*.

Dr. X checked *No impact* for *Consciousness*, *Motor activity*, *Language*, *Psychotic symptoms*, and *Other emotional or mental problems*.

Daily living activities

Dr. X stated that the appellant's "labile/unstable mood" impacts her ability to manage DLA. The doctor said the appellant has difficulty establishing stable, secure relationships. The appellant also has difficulty with self-organization which impacts "self-care/hygiene, finances, social functioning."

For Part C, the doctor assessed specific DLA as follows:

The appellant is independent with all areas of 2 DLA:

- *Personal Care: Dressing, Grooming, Bathing, Toileting, Feeding self, Regulating diet, and Transfers (bed and chair)*
- *Medications: Filling/refilling prescriptions, Taking as directed, and Safe handling and storage.*

The appellant requires *periodic assistance from another person* with 2 DLA:

- *Basic housekeeping (all areas: Laundry, and Basic housekeeping), comment: “remarks that she struggles to do domestic tasks.”*
- *Shopping (2 areas: Going to and from stores and Paying for purchases).*
- The appellant is independent with the remaining areas of *Shopping: Reading prices and labels, Making appropriate choices, and Carrying purchases home.*

For the DLA requiring periodic assistance, Dr. X further commented, “needs help with organization and prioritization.”

Dr. X indicated the appellant requires *continuous assistance from another person* with 3 DLA:

- *Meals (all areas: Meal planning, Food preparation, Cooking, Safe storage of food): comment, “does remark she is impaired in these domains – assistance needed to help her plan and develop necessary skills.”*
- *Pay rent and bills (all areas: Banking, Budgeting, and Pay rent and bills)*
- *Transportation (2 areas: using public transit and using transit schedules and arranging transportation): comment, “does not feel comfortable using public transit.”*
- The appellant is independent with the remaining area of *Transportation: Getting in and out of a vehicle.*

For the DLA requiring continuous assistance, Dr. X further commented, “she struggles to keep herself organized. Mood instability affects many domains of life. Needs help to self-regulate mood and keep organized and prioritize.”

Dr. X indicated the appellant needs both periodic or continuous support with all areas of *Social Functioning*:

- *appropriate social decisions, interacts appropriately with others, able to deal appropriately with unexpected demands, and able to secure assistance from others: **periodic/support/supervision is required.***
- *able to develop and maintain relationships: **continuous support/supervision is required.***
- Dr. X commented that the appellant “struggles to maintain stable relationships, may benefit from mediation in relationships that require transfer of good or services. Needs support on an ongoing basis to manage her relationships.”
- Dr. X indicated the appellant has marginal functioning with her immediate and extended social networks.
- No safety issues were identified: comment, “patient not a threat to herself or others at this time.”

Help required

Dr. X stated that the appellant would benefit from therapy “directed at forming stable/secure relationships”; e.g., dialectical behaviour therapy (“DBT”). The appellant lives alone and has “very little support.” She is seeking counselling through the Health Authority. The appellant needs support to manage DLA through counselling, DBT, and possibly somatic/trauma-based therapy.

No assistive devices are indicated. Dr. X checked *no* the appellant does not have an assistance animal.

Additional submissions

At the request of the appellant the hearing was adjourned once from the original date in November 2021. The Tribunal granted a 30-day adjournment to give the appellant more time to obtain medical records.

Subsequent to the reconsideration decision the appellant submitted new evidence to the Tribunal requiring an admissibility determination under section 22(4) of the *Employment and Assistance Act*. The appellant provided a 9-page submission titled Appendix IV and received at the Tribunal on October 23, 2021. This submission contains the following documents:

- An email from the appellant stating that she is attaching a letter from Dr. X and a letter from the Ministry of Children and Family Development mailed from the community where the appellant used to live. The appellant said she has started the process to receive medical records from her “adult psychiatrist.”

[Panel note: A letter from a psychiatrist for adult patients was not provided to the Tribunal or the panel. However, 2 pages of a 2016 letter from a mental health and addictions psychologist was provided with the PWD application as noted on page 3 of this decision].

- A letter from Dr. X dated October 21, 2021 (2 pages)
- A letter from a child and family *psychiatrist* (“Dr. Y”) dated April 26, 2011 (1 page)
- A letter from Dr. Y dated April 26, 2010 (2 pages)
- A letter from Dr. Y dated May 6, 2009 (3 pages)

The appellant provided a second submission (6 pages) received at the Tribunal on November 24, 2021. The panel notes that this submission contains the same documents as the first submission (including the letters from Dr. X, and Dr. Y). The only difference is that the second page of Dr. X’s letter is missing from the November submission. The panel views the Appendix IV submission as the appellant’s additional documents submitted for the appeal.

The relevant evidence in the additional letters is summarized as follows:

1. Letter from Dr. X - October 21, 2021

Dr. X indicated the letter is an addition to the original medical reports (MR and AR) provided for the PWD application. In reviewing the appellant’s medical records and speaking with her personally, Dr. X sought to clarify some of the details in the application.

Diagnosis

The appellant’s “relevant diagnoses” include:

- Major depressive disorder
- Generalized anxiety disorder
- Borderline traits
- Severe iron deficiency

Dr. X. stated that these disorders have led to “ongoing, severe cognitive and emotional impairments.”

Daily living activities and functional skills

The appellant has a “severe impairment” with several DLA:

- *Taking medication as prescribed*: continuous impairment
- *Basic housework* (including laundry): intermittent impairment

The appellant noted that she has only “mild/minimal deficits in using transportation.

The appellant has “significant deficits” for several DLA:

- *Personal self-care*
- *Meal preparation*
- *Daily shopping*

Dr. X explained that these activities require “significant higher order cognitive function (decision making, impulse control and sustained focus)” along with the capacity to self-regulate emotions. Due to her mental health condition, the appellant is “severely impaired in both of these capacities, leading to impairment in the above activities of daily living.”

Dr. X expressed the opinion that restrictions to activities “are severe and occur frequently (most days of the week) in an unpredictable manner.” Dr. X stated that the appellant will “need assistance for a continuous period of time until proven otherwise.”

Regarding severe iron deficiency, the letter indicates the appellant has a history of this condition, is taking an iron supplement, and despite showing some improvement on recent lab tests, her iron levels “are still sub-optimal.” Dr. X explained that symptoms of severe iron deficiency include “extreme fatigue, worsening anxiety, and agitation” and these symptoms “no doubt contribute to” restrictions with DLA.

The doctor stated that the appellant has been very compliant with treatments allowing her to retain her current level of function. However, the treatments require a significant amount of time, energy, and money but are necessary to prevent the worsening of the appellant’s conditions.

In addition to providing evidence Dr. X also stated argument in support of the appellant’s PWD application.

Admissibility of letter from Dr. X

The ministry did not raise any objections to the letter. The panel admits the letter as evidence under section 22(4) of the *Employment and Assistance Act* (“EAA”). The panel finds that the letter contains additional clarification and elaboration on the appellant’s mental health conditions; in particular, their impact on her ability to manage DLA.

The letter also describes an additional medical condition (severe iron deficiency) that was not before the minister at the Reconsideration, but which also has a direct impact on the appellant’s mental health. The panel finds that all the information in the letter is admissible because it is reasonably required for a full and fair disclosure of all matters related to the decision under appeal.

2. 3 letters from Dr. Y, 2009 - 2011

Dr. Y is a child and family psychiatrist who stated they originally saw the appellant 6 years earlier (2003). The May 6, 2009 letter was addressed to the appellant’s family doctor at that time (“Dr. Z”) as well as the appellant’s social worker, and therapist. The letter states that the appellant has come from a “very difficult background” and has been seeing the therapist since 2008 due to conflict with her foster family and biological parents. The appellant’s mood and ability to function deteriorated due to family strife, and despite therapy the appellant still finds her family issues “extremely difficult” to deal with.

The appellant presented with instability of mood and some suicidal ideation at times. The appellant reported that she can “perk up” when she is with friends but at home she tends to self-isolate in her room and feel quite withdrawn and uninterested in life. The appellant reported sleep difficulties as well.

The letter indicated the following diagnoses:

- Adjustment disorder with mixed disturbance of emotions and conduct (Axis I)
- Borderline personality traits (Axis II)

Dr. Y stated that the appellant's level of function is well below her potential (Axis IV) and she needs to continue with individual therapy and try a melatonin supplement for her sleep problems.

In the letter of April 26, 2010, Dr. Y. described the appellant's continuing issues with family relationships including a breakdown with her foster placement. In April 2010, the appellant was seen at the hospital emergency for an overdose of over-the-counter medications. The appellant acknowledged attention-seeking behaviour and said that she has difficulty changing her old patterns. The appellant agreed to work on reducing the level of emotional reaction rather than increase it in the face of her stressors.

The letter said the appellant is working on stabilizing her sleep patterns as she is more relaxed and has a more stable mood after a good night's sleep. The appellant is walking a lot to keep up her physical activity but has difficulty having regular meals and maintaining proper nutrition. The appellant often has "persistent suicidal ideation but with no definite plan." The appellant does not have any issues with alcohol or drugs and has stopped taking over-the-counter medications in excess of the normal dose.

The appellant continues to see her therapist and can talk to her social worker or another worker in case of any serious distress. The appellant is able to work and attend school despite some truancy.

In the letter of April 26, 2011, addressed to the appellant's family doctor (Dr. Z), Dr. Y reported that the appellant care is being supervised by another doctor and that doctor will discuss the role of Child and Youth Mental Health Services with the appellant's therapist.

Admissibility of letters from Dr. Y

The ministry did not raise any objections to the letters from Dr. Y. The panel admits the letters as evidence under section 22(4) of the EAA. Although the letters are dated some time ago (2009-2011) the panel finds that they provide background information and context to the appellant's current mental health struggles. The information is therefore reasonably required for a full and fair disclosure of all matters related to the decision under appeal.

The ministry provided argument at the hearing and did not submit new documentary evidence. The ministry attended the hearing with an observer for training purposes. The appellant had previously consented to the observer being present at the teleconference.

Oral testimony

The appellant consented to the ministry's request to present their argument first. Neither party submitted new evidence that requires an admissibility determination by the panel. The panel accepts the oral submissions of both parties as argument for the appeal. The arguments will be addressed in Part F - *Reasons*.

Part F – Reasons for Panel Decision

The issue on appeal is whether the ministry's decision that found the appellant ineligible for PWD designation because not all the criteria under section 2 of the EAPWDA were met, was reasonably supported by the evidence or was a reasonable application of the legislation in the circumstances of the appellant. Specifically, was the ministry reasonable to find that the requirements regarding the duration of the impairment, a severe mental or physical impairment, significant restrictions to DLA, and help with DLA were not established on the evidence?

Impairment likely to continue for at least 2 years

Arguments

The appellant disagreed with the ministry's finding that the duration requirement was not met. In the SR, the appellant described a lengthy history of emotional trauma (since 2001) and said she needs proper mental health supports to develop coping tools into the future.

Ministry argument at the Reconsideration

The ministry's position is that a medical practitioner has not confirmed that the 2-year duration requirement was met as required by the legislation. The ministry noted that Dr. X did not check "yes" or "no" in section C-1 of the AR when asked if the impairment is likely to continue for 2 more years or more. The ministry argued that the doctor's comment for that question ("unknown - course is relapsing/remitting") did not satisfy the duration requirement.

Ministry position at the hearing

The ministry maintained that the reconsideration decision was reasonably supported by the evidence. However, based on the recent letter from Dr. X, submitted on appeal, the ministry said there is now enough evidence to confirm the impairment will continue for at least 2 more years; in particular, the doctor stated that the impairments occur frequently ("most days of the week") and unpredictably.

Legislative requirement

The legislation requires all the criteria in section 2 of the EAPWDA to be met, to be eligible for designation as a PWD. Section 2(2)(a) requires a medical practitioner or nurse practitioner to confirm that the applicant's impairment is likely to continue for at least 2 more years.

The legislation does not specify the starting point for the assessment of the 2-year period but in section C-1 of the MR, the medical practitioner is asked to indicate whether the impairment is likely to continue for 2 years or more "from today." The doctor signed the MR on February 8, 2021. The legislative test is forward-looking and in the circumstances of the appellant, the appellant's impairment should persist until February 2023 or beyond to meet the legislative requirement.

Panel's decision - duration of impairment

In section C-1 of the MR, the doctor did not check *yes* or *no* in response to the question of whether the impairment is likely to continue for 2 years or more. The doctor stated that the duration is "unknown" based on the relapsing/remitting nature of the impairment. At the reconsideration, it appears that the ministry looked only at the responses to C-1, to conclude that Dr. X had not confirmed a longer lasting impairment.

The panel finds that the ministry's reliance on a check mark or answer to a single question on the form was not reasonable. Yes, the legislation specifically states a 2-year benchmark to be met but in the panel's view, the evidence from Dr. X confirmed the duration requirement without explicitly stating "2 years" or check marking *yes* on the form.

In several comments throughout the MR and AR, the doctor implied the impairment will most definitely last for at least 2 more years as the appellant's depression and anxiety are most likely permanent. For example, in the MR, the appellant's symptoms of anxiety and depression are "progressive" and she will require medications/treatment for "likely a lifetime duration." As the appellant needs treatment for the rest of her life, it follows that the impairment will last a lifetime. In the panel's view, the legislation requires the ministry adjudicator to look at the information as a whole and make a global assessment of the evidence in the interest of fairness.

In the AR, the appellant needs support "on an ongoing basis" to manage relationships. In the 2016 letter from the psychologist, the appellant's depression and anxiety are longstanding and she has struggled with depression and reactive moods "over the course of her life." The case for an impairment that will last indefinitely is further strengthened by the recent letter from Dr. X. that describes the impairment as "ongoing" with assistance needed for a "continuous period of time." The evidence indicates that while the appellant's symptoms and ability to cope fluctuate, the impairment is "omnipresent" as stated in the MR. The record clearly shows that the appellant has a lengthy history of mood disorders that persist throughout her lifetime.

The panel finds, on a balance of probabilities and based on a global assessment of the evidence, that a medical practitioner has confirmed a longstanding impairment that will continue for at least 2 more years. The panel finds that the ministry's application of the legislation, EAPWDA section 2(2)(a), was not reasonable in the circumstances of the appellant.

Severe mental or physical impairment

Arguments

The appellant argued that she has a severe mental impairment because of her chronic mental health symptoms and longstanding difficulty with getting the right diagnosis and supports. At the hearing, the appellant said that none of the specialists she saw previously, communicated the type of anxiety and depression she has but focused only on her borderline traits and anorexia. The appellant argued that she doesn't have the proper tools to regulate her symptoms and effectively manage her emotions.

Ministry argument at the Reconsideration

The ministry argued there was insufficient evidence to establish a severe impairment of mental functioning. The ministry noted there were only 2 major impacts (for *Emotion* and *Executive*) mentioned in the AR despite significant deficits in several areas that were checked in the MR.

The ministry said that significant deficits and impacts were considered in conjunction with restrictions to DLA that require mental functions "such as decisions regarding personal activities and care." The ministry argued that the appellant manages most DLA independently and that fluctuations in the severity of the impairment over time does not establish a severe mental impairment.

Ministry position at the hearing

Regarding a physical impairment, the ministry maintained that the reconsideration decision was reasonably supported by the evidence. The ministry argued that the supplemental information from Dr. X doesn't change the decision because no physical limitations were reported despite a physical condition (severe iron deficiency) now included with the diagnosis.

However, based on the recent letter from Dr. X, submitted on appeal, the ministry said there is enough evidence to confirm a severe mental impairment. The ministry said the letter from Dr. X is compelling because it provides more detail about the appellant's difficulties with self-regulation and indicates that iron deficiency also worsens the appellant's anxiety and limits her ability to function due to "extreme fatigue."

Legislative requirement

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. "Severe" is not defined in the legislation but in the ministry's view, the diagnosis of a serious medical condition does not in itself establish a severe impairment of mental functioning. To assess the severity of an impairment, the ministry considers the extent of any impact on daily functioning as shown by limitations/restrictions with physical abilities, and mental functions and emotion.

The ministry explained that a medical practitioner's comment that the condition is "severe" is not enough to establish a severe impairment. The ministry said it considers the impact on functional skills and abilities in conjunction with the medical assessments of DLA. The panel finds that an assessment of severity based on physical, cognitive, and social functioning and restrictions to "mental DLA" is a reasonable interpretation of the legislation.

Panel's decision - severe mental or physical impairment

The panel finds it was not reasonable for the ministry to conclude that a severe mental impairment was not established on the evidence at reconsideration. The panel takes a cumulative view of the evidence and notes that the information for the PWD application (SR, MR, AR, and psychologist's letter) confirm the appellant's longstanding struggle with mental health and childhood trauma and their impact on her ability to function despite some periods of greater stability. In the SR, the appellant reported "extreme difficulty providing adequate care and emotional support" to herself.

The ministry focused on the number of checkmarks for significant/major impacts to cognitive and emotional function between the MR and AR, but the panel finds that there was enough evidence in the reports (read together) to establish that the appellant's impairment greatly impacts her ability to function. Major impacts were reported in the AR (for *Emotion* and *Executive*), with moderate impacts for *Attention/ concentration*, and *Memory*. In the MR, Dr. X indicated significant deficits for all 4 of these functions. While the severity of symptoms fluctuates over time, the impairments are "omnipresent" and Dr. X confirmed a "moderate to severe impairment" that requires life long treatment.

The ministry also said the impairment was not severe because the functional impacts and deficits did not impact DLA such as personal care and activities that require decision-making ("mental DLA"). However, there was consistent information between the MR and AR indicating significant restrictions with meal preparation and managing finances, both of which require decision-making and other executive functions. Furthermore, Dr. X provided more detail in the narrative than in the check marks for DLA and in the panel's view, the comments carry more weight in establishing the severity of the mental impairment than the check marks in boxes on the form.

The letter from the psychologist adds PTSD, borderline personality traits, eating disorder, and "repeated suicidality" to the appellant's history of mental health struggles which manifest in longstanding difficulties with emotional regulation and social functioning despite some periods of greater stability. The panel finds that it was not reasonable for the ministry to focus on check marks when a broader view of the evidence is necessary to understand the appellant's impairment.

The submissions on appeal further strengthen the evidence for mental impairment. The letters from Dr. Y described the appellant's longstanding difficulties with relationships and emotional function including suicidal ideation. Dr. Y indicated the appellant has required mental health services since 2003. The evidence in the letters indicated the appellant required a lot of support from mental health professionals (to the point seeing several at the same time) during the periods when her symptoms and conditions were not as challenging for her.

The letter from Dr. X detailed the appellant's deficits with "higher order cognitive function" and sustained difficulty with emotional regulation which restricts her ability to manage mental DLA. Based on all the evidence, the panel finds it was not reasonable to conclude there was insufficient evidence to establish a severe mental impairment under section 2(2) of the EAPWDA.

Regarding a severe physical impairment, the panel finds that the reconsideration decision was reasonably supported by the evidence. The appellant, and her doctor and psychologist presented a mental impairment; i.e., mental health conditions, especially depression and anxiety. The diagnosis of a physical impairment (severe iron deficiency) was not included in the original application and medical reports, but the main impact of that condition is a worsening of mental health symptoms such as anxiety and agitation.

In the SR, the appellant attributed her difficulties with eating and sleep to her mental health conditions. In the MR and AR, the appellant is independent with all physical functions including mobility (walking, climbing stairs), lifting/carting, and standing/sitting. The panel finds the ministry was reasonable to conclude that a severe physical impairment was not established under section 2(2) of the EAPWDA. However, the appellant meets the legislative requirement because of her mental impairment.

Restrictions to DLA

Arguments

The appellant disagreed with the ministry's finding that her DLA were not significantly restricted by her mental health conditions. In the SR, the appellant argued that she is "emotionally erratic and unstable" and has "extreme difficulties with personal relationships." The appellant described being "bed bound" due to depression, eating only one meal a day, and showering just once a week.

Ministry argument at the Reconsideration

The ministry's position was that of insufficient evidence from the prescribed professional (Dr. X) to establish that the appellant's impairments directly and significantly restrict the appellant's DLA. The ministry acknowledged that several restrictions were reported but argued that "discrepancies in your reported functioning" between the MR and AR made it difficult to determine if the restriction was significant. The ministry said that the appellant's ability to perform activities such as personal care, shopping, and managing finances "is unclear." The ministry also argued that "it is not clear how your restrictions are directly related to your impairments."

In addition, the ministry argued there was not enough information for restrictions with transportation and basic housework because restrictions to these activities were reported to be unknown. Regarding the *Social functioning* DLA, the ministry argued that the comments from Dr. X endorsing "extreme difficulties with relationships" and co-dependency did not support the check marks in the AR which indicated the appellant maintains marginal functioning with her social networks and required only periodic support with most areas of *Social Functioning*.

Ministry position at the hearing

The ministry maintained that the reconsideration decision was reasonably supported by the evidence because of discrepancies in reported functioning between the MR and AR. However, based on the recent letter from Dr. X, submitted on appeal, the ministry conceded that the facts establish significant restrictions with personal care, meals, shopping, and activities that require emotional regulation and decision-making. The ministry said that the supplemental information confirms that DLA are restricted continuously ("most days of the week"). The ministry said that the reconsideration decision was reasonable based on the evidence the ministry had at the time, but if the supplementary information had been received with the original submissions, the PWD application would have been approved.

Legislative requirement

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 not being able 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 or requires periodic support as was indicated in the MR and AR for several DLA, 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. **It is important to note that under the legislation, the inability to work or manage job or training duties, is not considered a DLA. Also, the ministry cannot consider financial need in determining PWD eligibility.**

Regarding how many DLA need to be impacted for the legislative requirements to be met, the BC Supreme Court decision *Hudson v. Employment and Assistance Appeal Tribunal* [2009 BCSC 1461] stated that there must be evidence from a prescribed professional indicating a direct and significant restriction on at least two DLA. Not all DLA need to be affected by the severe impairment.

Panel’s decision - restrictions to DLA

The panel has considered the evidence from Dr. X in the MR and AR and finds that the reconsideration decision was not reasonably supported by the evidence. The panel acknowledges that there are discrepancies in the check marks between the MR and AR for the following DLA:

- *Personal care*: continuously restricted (MR) vs. independent with all areas (AR)
- *Basic housekeeping*: unknown (MR) vs. needs periodic assistance with all areas (AR)
- *Shopping*: continuously restricted (MR) vs. needs periodic assistance with 2 areas, and independent with 3 areas (AR)
- *Pay rent and bills/manage finances*: periodically restricted (MR) vs. needs continuous assistance with all areas (AR)
- *Medications*: unknown (MR) vs. independent with all areas (AR)
- *Transportation*: unknown (MR) vs. independent with 1 area and needs continuous assistance with 2 areas (AR)

However, Dr. X explained in the narrative (MR) that the appellant has a variable degree of function depending on the severity of her symptoms and she would benefit from assistance with transportation and managing finances and personal care due her anxiety and difficulties with self-organization and prioritization that stem from her unstable mood. The comments indicated that restrictions to *Transportation* were not “unknown”, and the appellant was not independent with *Personal care*. In the SR, the appellant added details about only showering once a week due to a lack of motivation and self-regulation that stems from her mental impairment.

Given Dr. X's narrative comments, the panel gives more weight to the information in the MR for *Personal Care* (continuously restricted) and more weight to the information in the AR for *Pay rent and bills* and *Transportation* (needs continuous assistance). In the context of the appellant's longstanding struggles with depression, anxiety, and childhood trauma, it is not surprising that the appellant needs continuous emotional support from her doctor/mental health professionals to manage DLA.

The ministry found that the variation in the appellant's symptoms did not confirm significant restrictions to DLA; however, Dr. X stated that symptoms have "varied significantly" over a short period of time (the appellant has been seeing Dr. X for a year and a half) despite the appellant complying with treatment. The doctor's comments suggest that the appellant needs continuous support to stabilize her mood disorders and manage her DLA consistently.

For 1 other DLA, *Meals*, the checkmarks were consistent between the MR and AR (continuously restricted, and needs continuous assistance), providing further evidence for continuous restrictions to DLA. In the SR, the appellant detailed her issues with eating ("a meal a day if at all") and the psychologist provided information about an eating disorder (2016 letter) that was related to the appellant's traumatic childhood.

The check marks in the MR and AR indicated a periodic restriction with the *Social Functioning* DLA (needs periodic support with most areas, but continuous support with *develop and maintain relationships*). However, the panel gives more weight to Dr. X's narrative comments which indicated a significant degree of restriction in relationships. Despite check marking *periodic support/supervision*, the doctor stated that the appellant "needs support on an ongoing basis to manage her relationships." In the MR, Dr. X wrote, "I agree," endorsing the appellant's report of "extreme difficulties with personal relationships...codependent."

As the ministry noted at the hearing, the additional information from Dr. X (October 21, 2021 letter) unequivocally establishes significant restrictions to DLA that are also continuous. The letter indicated that while *Transportation* is now minimally impacted by the appellant's impairment, the appellant has "significant deficits" with *Personal Care*, *Meals*, and *Shopping* and requires continuous support with these activities due to her struggles with cognitive functions, emotional self-regulation, and increased anxiety that stem from her mental health conditions and iron deficiency. While the appellant's symptoms fluctuate, the doctor explained that the symptoms "occur frequently (most days of the week) in an unpredictable manner."

The panel finds that the information in the MR and AR, with additional details from the appellant (SR) and Dr. X shows that DLA are directly impacted by the appellant's mental impairment and are significantly restricted *continuously*. The evidence in its totality indicates continuous restrictions for *Personal Care*, *Shopping*, *Meals*, *Pay rent and bills*, and *Social Functioning*. The panel therefore finds that the reconsideration decision is unreasonable because the requirement for restrictions to DLA under subsection 2(2)(b)(i) of the EAPWDA has been established on the evidence.

Help with daily living activities

Arguments

The appellant disagreed with the ministry's finding that she does not require help with DLA. The appellant emphasized at the hearing that she has spent most of her life trying to get "proper support" from doctors and mental health professionals and have them understand her diagnoses and help her develop tools to regulate her emotional symptoms and reactions to stressors.

The appellant believes that PWD designation will allow her to explore supports for her mental health conditions and traumatizing experiences and enter the healing process knowing that she will have a security net. The appellant intends to continue taking her medication but would also like to explore other avenues for treatment. The appellant said that Dr. X has taken the time to read and look into what she has been through and where she is at. Dr. X agrees to support the appellant so long as she makes her best attempt to take care of her physical and mental health.

Ministry argument at the Reconsideration

The ministry acknowledged that the appellant receives assistance from Health Authority professionals and could benefit from counselling and DBT or trauma-based therapy. However, the ministry took the position that it cannot be determined that significant help was required as it had not been established that DLA were significantly restricted.

Ministry position at the hearing

The ministry maintained that the reconsideration decision was reasonably supported by the evidence the ministry had at the time. However, based on the recent letter from Dr. X, submitted on appeal, the ministry said there is now enough evidence to confirm that the appellant needs significant help and support in the form of DBT and trauma-based therapy.

Legislative requirement

Subsection 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 to perform DLA.

The panel discussed whether the legislation requires help from another person to be in a physical sense (e.g., assisting with meal preparation or shopping). The panel concluded that support through counselling and therapy, as prescribed by Dr. X. and other healthcare professionals, can help the appellant perform DLA by stabilizing her mood and fostering coping skills, appropriate reactions, and new behaviours. The ministry did not disagree with that interpretation of the legislation as they acknowledged that the appellant could benefit from counselling and therapy to manage her DLA.

Panel's decision - help with daily living activities

In the AR, Dr. X stated that while the appellant receives help from Health Authority professionals, she has "very little support" and requires counselling, DBT, and somatic/trauma-based therapy, especially to help her develop and maintain stable and secure relationships. For specific daily tasks such as housework, shopping, preparing meals and managing finances, the doctor said the appellant needs help with "organization and prioritization" as her "mood instability affects many domains."

In the letter for the appeal, Dr. X reiterated the need for assistance with DLA "for a continuous period of time" due to the appellant's frequent and unpredictable symptoms that impact emotional self-regulation. The doctor wrote that the appellant must be able to access treatment "in order to prevent a worsening of her condition." If the appellant is denied treatments and ongoing support, the cost to the ministry through increased medical costs and potential hospitalizations would far outweigh any PWD assistance. Dr. X argued that "ongoing support for [the appellant] is not only the most reasonable action, but the most compassionate one as well."

Under the legislation, confirmation of direct and significant restrictions to DLA is a precondition for needing help to perform DLA. The panel found that the ministry's determination that significant restrictions to DLA were not established by the information provided was unreasonable. On review of the evidence from the doctor, including the supplementary information on appeal, the panel finds the ministry's conclusion, that the criteria for help under subsection 2(2)(b)(ii) of the EAPWDA were not met, was not a reasonable application of the legislation.

Conclusion

The panel has considered the information in its entirety and finds that the ministry's reconsideration decision was not reasonably supported by the evidence and was not a reasonable application of the legislation in the circumstances of the appellant. The information before the minister at the reconsideration and the supplementary information on appeal, establishes that all the requirements for PWD designation have been met.

The EAPWDA states that 5 criteria need to met including a severe impairment that will last for at least 2 more years and that significantly restricts DLA to the point that the person requires significant help or support from another person to perform DLA. The evidence indicates the appellant has met all 5 criteria under section 2 of the EAPWDA. The panel rescinds the ministry's decision and refers the decision back to the minister for determination on amount of disability assistance. The appellant is successful with her appeal.

Schedule – 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 is in a prescribed class of persons or that the person has a severe mental or physical impairment that

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

(b) in the opinion of a prescribed professional

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

(A) continuously, or

(B) periodically for extended periods, and

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

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

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

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

(i) an assistive device,

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

(iii) the services of an assistance animal.

(4) The minister may rescind a designation under subsection (2).

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,

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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)

Section 24(2)(a) or Section 24(2)(b)

Part H – Signatures

Print Name

Margaret Koren

Signature of Chair

Date (Year/Month/Day)

2021/12/09

Print Name

Angie Blake

Signature of Member

Date (Year/Month/Day)

2021/12/09

Print Name

Wesley Nelson

Signature of Member

Date (Year/Month/Day)

2021/12/09