

Part C – Decision Under Appeal

The decision under appeal is the Ministry of Social Development and Poverty Reduction (“ministry”) reconsideration decision dated April 12, 2022, in which the ministry found the appellant ineligible for designation as a person with disabilities (“PWD”) under the Employment and Assistance for Persons with Disabilities Act (“EAPWDA”). The ministry found that the appellant met the requirements for age and duration (impairment to continue at least 2 years) but was not satisfied that:

1. the appellant had a severe mental or physical impairment;
2. the appellant’s impairment significantly restricted her ability to perform daily living activities; and
3. the appellant required significant help or supervision of another person to perform daily living activities restricted by her impairment.

The ministry also found that the appellant is not in one of the prescribed classes of people 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

EAPWDA, section 2
EAPWDR, section 2

Part E – Summary of FactsEvidence before the Ministry at Reconsideration:

The appellant applied for PWD designation on November 29, 2021.

The appellant is over 18 years of age. In support of her application, she submitted a medical report and an assessor report, both completed by her family doctor and dated November 4, 2021, as well as her self-report. At the reconsideration, the appellant also provided letters from her parent and her employer.

Medical Report:

The doctor states that the appellant has been their patient for 3 years and has seen them between 2 and 10 times in the past 12 months.

The doctor lists diagnoses of fibromyalgia (onset 2017) generalized anxiety disorder (onset 2016) and post-traumatic stress disorder (onset 2015). The doctor says that “the complex PTSD impacts the patient’s functioning more severely than fibromyalgia, particularly with respect to social interactions.”

The doctor states that the appellant does not require any prostheses or aids for her impairment, and the impairment is likely to continue for 2 years or more from the date they completed the report.

Under “Functional Skills”, doctor states that the appellant:

- can walk 2 to 4 blocks unaided on a flat surface;
- can climb “5+” steps unaided, with the note “variable, range from 1-2 flights”;
- can lift 7 to 16 kg.;
- can remain seated 1 to 2 hours;
- has significant deficits with cognitive and emotional function, in particular: executive (planning, organizing, sequencing, calculations, judgement), emotional disturbance (e.g., depression, anxiety) and attention or sustained concentration.

Assessor Report:

The doctor states that the appellant lives alone. They note that her ability to communicate, her mobility and physical ability are good.

Under “Cognitive and Emotional Functioning”, the doctor indicates that the appellant’s mental impairment:

- has a major impact on emotion (e.g., excessive or inappropriate anxiety, depression, etc.);

- has a moderate impact on bodily functions (e.g., eating problems, toileting problems, poor hygiene, sleep disturbance) and attention/concentration (e.g., distractible, unable to maintain concentration, poor short-term memory);
- has a minimal impact in impulse control (e.g., inability to stop doing something or failing to resist doing something) and motivation (e.g., lack of initiative; loss of interest).

The doctor adds that the appellant has “significant sleep disruption, hypervigilance and daily anxiety, secondary to severe [generalized anxiety disorder], PTSD, and pain from her fibromyalgia. Particularly severe in crowded social situations (university, grocery stores). Does not drive.”

Under Daily Living Activities, the doctor indicates that the appellant is independent in all daily living activities except, under “Shopping – going to and from stores,” the appellant needs “periodic assistance from another person.” The doctor adds the comments that the appellant does not drive and is “easily overwhelmed in crowded situations.”

Under Daily Living Activities – Social Functioning, the doctor indicates that the appellant needs “periodic support/supervision” for making “appropriate social decisions (incl. avoiding situations dangerous to self or others, good social judgement),” “able to develop and maintain relationships,” and “able to secure assistance from others.” The doctor does not describe the degree and duration of support or supervision required.

The doctor indicates that the appellant has “good functioning” with both her immediate and extended social networks. Under Assistance Provided for Applicant, they state that family provides help for daily living activities, and the appellant uses a shower chair as a bathing aid.

Self-Report:

The appellant states:

- She has been diagnosed with fibromyalgia, chronic fatigue, anxiety, depression and PTSD;
- Chronic pain from fibromyalgia is the most debilitating of her illnesses;
- “On bad days, even just standing up or walking across the room can cause incredible amounts of pain;”
- Working even a few hours can cause extreme pain;
- Simple daily activities such as grocery shopping can exhaust her to the point where she cannot do anything else that day, or even the day after;
- She cannot write notes in class anymore because of the pain;
- Her illness is degenerative, and her condition will get worse;
- She endured significant and highly traumatic events as a child;
- Her illnesses affect her ability to work, to attend school, and to perform necessary daily activities such as showering or preparing a meal;
- Fibromyalgia also causes stomach and digestive issues;
- Her pain may fluctuate but it never goes away.

Letter from the appellant's parent, March 7, 2022:

The appellant's parent states:

- The appellant has moved back into her parent's house because her illness has become debilitating, and the parent is concerned about the appellant's ability to look after herself;
- The appellant would sometimes go a day or 2 without eating because she could not stand long enough to prepare a meal;
- If the appellant works one day, she sleeps most of the next day;
- Often the appellant cannot climb the stairs because of her pain;
- The parent makes "a number of meals a week" for the appellant and several times a month the appellant cannot keep food down;
- The appellant sometimes must cancel work shifts because of pain.

Letter from the appellant's employer, March 24, 2021 [sic]:

- The appellant has worked for the employer for 4 years, and the employer has observed her issues with pain, which have become debilitating;
- When the appellant began working with the employer, she was working 5 days a week, but now is only able to work 3 days, and not consecutively, because the appellant needs "recovery days" in between shifts;
- The appellant needs to take "micro breaks" throughout her shift;
- The employer has accommodated the appellant's disability through scheduling, but that has meant hours reduced to about half time and not scheduling shifts on consecutive days;
- The employer observes that the appellant's physical pain affects her mental health and causes her to be depressed, "at times spiralling due to being crushed by what she can no longer do."

In the Request for Reconsideration, the appellant states:

- The doctor asked her the questions in the Medical Report and told her to respond based on what her pain is like on a good day. The report does not include the information that she does not have very many good days. For example, for the question about how far she can walk, the appellant says she can walk 4 blocks on a good day. However, most days she "can barely do two without breaking down, and sometimes not even that."
- She has difficulty holding things "much of the time."
- She cannot cook because "the exertion it requires is too much."
- She can do laundry but must rest for several hours afterwards.
- On "many days" the pain makes it "difficult to work, walk or even stand."

Evidence at the Hearing:

At the hearing, the appellant stated:

- In addition to the diagnoses in the Medical Report, she has “pending diagnoses” of Attention Deficit/Hyperactivity Disorder and chronic fatigue.
- She has pain 100% of the time, to varying degrees, but the pain is always present.
- She has been unemployed for the past month due to circumstances beyond her control.
- She cannot do most jobs in her community, including retail, because she cannot stand for long periods of time, and she needs to take frequent breaks during a shift.
- She cannot live independently and had to move in with a parent because she needs help with day-to-day activities such as laundry and meals; she does not expect to live independently again.
- While the doctor told her to answer questions based on her good days, the doctor did not ask her how many good days she has; in a typical week, she might have one good day, depending on her activities.

Additional Evidence:

The ministry did not object to the additional oral evidence of the appellant at the hearing.

The panel finds the additional evidence to be admissible under section 22(4) of the Employment and Assistance Act. The evidence provides additional information about the appellant’s condition and the extent of impairment, and therefore is reasonably necessary for the full and fair disclosure of all matters relating to the decision under appeal.

Part F – Reasons for Panel Decision

The issue on appeal is whether the ministry's reconsideration decision, in which the ministry found the appellant to be ineligible for PWD designation under the EAPWDA, was reasonably supported by the evidence or was a reasonable application of the legislation in the appellant's circumstances. The ministry found that the appellant met the requirements for age and duration (impairment to continue at least 2 years) 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 her ability to perform daily living activities 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 daily living activities.

Full text of the legislation is provided in the Schedule after these reasons.

Appellant's Position:

The appellant maintained that the ministry has failed to consider her evidence about the extent of her disability and its effect on her day-to-day activities. She says that the medical report does not show her level of impairment accurately, because the doctor only reported information about her functioning on a good day. The medical report does not show the overall level of impairment on most days, because the doctor asked her to answer questions based on her best level of functioning. She only has about one day a week when she can function as the doctor describes in the medical report.

The appellant emphasizes that she is virtually unable to work or attend school because of her disabilities. She points out the contradiction in the reconsideration decision, which states that she lives independently, when her evidence and that of her parent is that she does not and cannot live independently, because she needs help from her parent with her daily living activities. She points out that her condition is degenerative, and she will only get worse and need more assistance in the future. She says she cannot over-emphasize how much her medical conditions affect everything she does from day to day, where every effort is exhausting.

Ministry Position:

The ministry maintains that, while the appellant may have a serious medical condition, the medical report does not establish a severe mental or physical impairment. The ministry also maintains that the assessor report does not show that the appellant's ability to perform daily living activities is directly or significantly restricted, or that the appellant requires help to perform those activities.

The ministry acknowledges that the appellant may have described a more severe impairment, and greater restrictions on daily living activities, than is shown in the medical or assessor reports. However, under the EAPWDA, the ministry must rely on the opinion of a prescribed professional

as defined in EAPWDR section 2. In this case, the ministry says that the medical report and the assessor report do not show the restrictions or degree of impairment that the appellant describes.

(The ministry notes that the reconsideration decision states that the appellant can lift 5-15 pounds, where the doctor says the appellant can lift 15-35 pounds. The ministry accepts the doctor's evidence and says the statement in the reconsideration decision is an error.)

Panel Decision:

To find a person eligible for PWD designation under the EAPWDA, the ministry must be satisfied of all the requirements in section 2. In this case, the ministry was not satisfied:

1. that the appellant had a severe mental or physical impairment,
2. that, in the opinion of a prescribed professional, the impairment directly and significantly restricted the appellant's ability to perform daily living activities and
3. as a result of those restrictions, the appellant requires help to perform those activities.

Severe mental or physical impairment:

In the medical report, the doctor provides the diagnoses of the appellant's medical condition as fibromyalgia, generalized anxiety disorder and PTSD. (Neither the ministry nor the panel can consider additional "pending diagnoses" that are not included in a medical report.) In the medical report, the doctor says that "the complex PTSD impacts patient's functioning more severely than fibromyalgia." The doctor identifies "significant deficits with cognitive and emotional functioning" in the areas of executive function, emotional disturbance, and attention or sustained concentration.

In the assessor report, the doctor describes "significant sleep disruption, hypervigilance and daily anxiety, secondary to severe [generalized anxiety disorder], PTSD, and pain from her fibromyalgia. Particularly severe in crowded social situations (university, grocery stores)."

The appellant describes constant pain of varying intensity that affects every aspect of her life, though she disagrees with the doctor about which condition affects her functioning more. She has stated that she had to reduce her work schedule by half and take frequent unscheduled 'micro-breaks' during a shift because of her medical conditions, and her ability to attend school is limited.

The ministry was not satisfied that the appellant has a severe mental or physical impairment, based on the impact of the appellant's serious medical conditions on her daily living activities as described by the doctor. The ministry relies on the information in the reports that the appellant is independent in almost all daily living activities, and that the doctor reports minimal or no impact on most areas of daily cognitive and emotional functioning.

The panel is divided on the question of whether the appellant has met the criterion of having a severe mental or physical impairment. However, as will be explained below, the panel is agreed about the other 2 criteria, and about the outcome of the appeal.

- *Majority Panel re severe mental or physical impairment:*

The majority panel finds that the diagnoses of severe generalized anxiety disorder, PTSD and fibromyalgia, with the “significant deficits with cognitive and emotional functioning” identified in the medical report and the symptoms of “significant sleep disruption, hypervigilance and daily anxiety” and “pain from her fibromyalgia” set out in the assessor report, represent severe mental and physical impairments for the appellant. The appellant’s evidence provides further information about the limiting effect of those symptoms in her daily life, where “every effort is exhausting.”

The majority panel notes that the term “severe mental or physical impairment” is not defined in the legislation, and that “the Tribunal should interpret the EAPDA with a benevolent purpose in mind” (*Hudson v. British Columbia (Employment and Assistance Appeal Tribunal)*, 2009 BCSC 1461). While education and employment are not among the daily living activities that the ministry considers when assessing an applicant’s restrictions in daily living activities, the panel may consider the appellant’s ability to participate in those activities, when deciding whether the ministry was reasonable in determining if there was a severe mental or physical impairment.

The majority panel finds that in light of the evidence in the medical and assessor reports, and the additional evidence of the appellant, summarized above, the ministry was not reasonable in its determination that the appellant does not have a severe mental and physical impairment. The ministry appears to have limited the determination of a severe impairment to the ability to perform the specific daily living activities set out in the EAPWDR, and to have required impairment of a majority of the aspects of cognitive and emotional functioning listed on the assessor report. The majority panel finds that the ministry failed to give sufficient weight to the doctor’s opinion that the psychiatric conditions are severe, the sleep disruption, hypervigilance and daily anxiety are due to both fibromyalgia and the psychiatric conditions, and the deficits in cognitive and emotional functioning are significant. Taken together with the appellant’s evidence of the effect of the pain from fibromyalgia on her daily life, the majority panel finds that the ministry’s decision that the appellant does not have a severe mental and physical impairment was not reasonably supported by the evidence and was not a reasonable application of the legislation in the appellant’s circumstances.

However, a severe mental or physical impairment is only one of the criteria in the EAPWDA. A serious medical condition can represent a severe impairment, without directly and significantly restricting the person’s ability to perform the daily living activities specified in the EAPWDR, or without the person needing help to perform those activities.

- *Dissent re severe mental or physical impairment:*

The dissenting panel member finds that the ministry was reasonable in determining that the appellant has not met the criterion of having a severe mental or physical impairment. In particular, the ministry was reasonable by concluding that the appellant’s evidence of impairment is not supported by the doctor’s opinion. Further, the ability to work or attend school is not included in the criteria set out in the EAPWDR, and the doctor states that the appellant is independent in almost all activities of daily living.

Ability to perform daily living activities:

EAPWDR section 2 lists the activities that the ministry can consider in determining if a severe mental or physical impairment directly and significantly restricts a person's ability to perform daily living activities. Education and employment are not included in the list of daily living activities. The question is whether the appellant's ability to perform the specified activities of daily living is directly and significantly restricted by a severe mental or physical impairment.

In the doctor's opinion, the appellant can perform the physical activities of daily living listed on the assessor report, except for needing periodic assistance getting to and from the store. The doctor states that the appellant has good functioning in her immediate and extended social networks. She needs periodic support in some aspects of social functioning – making appropriate social decisions, developing and maintaining relationships and dealing appropriately with unexpected demands. There is no information provided about the nature or extent of the support the appellant might need in these areas.

In the medical report the doctor states that the "complex PTSD" impacts the appellant's functioning more severely than the fibromyalgia. The appellant disagrees with this assessment and says the pain of fibromyalgia is more significant, affecting every aspect of her life. However, whether due to the psychiatric conditions or the physical condition, the level of restriction in daily living activities that the doctor reports is less than the restrictions that the appellant describes for herself.

In the section of the assessor report where the doctor is asked to identify the degree to which a mental impairment impacts cognitive and emotional functioning, they identify a "major impact" on emotion - comment indicates hypervigilance and daily anxiety. There is "moderate impact" on bodily function – comment indicates significant sleep disruption. There is "moderate impact" on attention and concentration. There is minimal impact on impulse control and motivation. Symptoms are "secondary to severe [generalized anxiety disorder], PTSD, and pain from fibromyalgia." However, the assessor report does not explain how those symptoms affect the appellant's ability to perform daily living activities.

The doctor indicates in one section of the assessor report that the appellant uses a shower chair, but elsewhere states that the appellant is independent in bathing and does not use an assistive device, which would indicate no restriction. With respect to shopping, the only restriction the doctor indicates is a need for periodic assistance going to and from the store.

The panel accepts the appellant's evidence that the doctor asked her to answer the questions based on her experience on a good day. It is unfortunate that the doctor framed the interview, and completed the reports, on that basis. To make an informed decision based on the legislated criteria, the ministry, and the panel, need a complete picture of the appellant's condition, restrictions on activities of daily living, and the nature and extent of any help she needs. While her functioning on good days is relevant, they also need to know how often she has 'good days' and how she functions the rest of the time.

While the appellant has described the restrictions in her abilities, the ministry is required to base its decision on the opinion of a "prescribed professional" (in this case, a medical practitioner). If

those opinions do not show a direct and significant restriction of the ability to perform at least 2 daily living activities listed in the EAPWDR, the legislated criteria have not been met. Neither the ministry nor the panel can find that someone meets the criteria for PWD designation, without the necessary opinions from the prescribed professional in support.

The panel finds that the ministry reasonably determined that the opinions in the medical report and the assessor report do not show a direct and significant restriction on the appellant's ability to perform at least 2 daily living activities, either continuously or periodically for extended periods.

Help to perform daily living activities:

The doctor assesses the appellant as "independent" in all daily living activities except going to and from stores when shopping, and some aspects of social functioning. The doctor says the appellant does not drive and is "easily overwhelmed in crowded situations" but does not explain how that relates to her ability to shop for her personal needs, or what type of assistance she needs.

As previously noted, under "Assistance provided through the use of Assistive Devices" the doctor lists "bathing aids - shower chair." At the same time, under "daily living activities – personal care" the doctor says that the appellant is independent in bathing and has not marked the box that indicates that she uses an assistive device. The doctor has not explained why the appellant might need to use a shower chair. Similarly, while the doctor says that the appellant needs periodic help going to and from the store, the doctor also says the appellant is independent in using transit and arranging transportation.

The doctor also appears to contradict the appellant's evidence in some respects. For example, the appellant says she needs help preparing meals and doing laundry, while the doctor says she is independent in all aspects of meal preparation and basic housekeeping, including laundry.

In the section of the assessor report that covers Social Functioning, the doctor says the appellant needs "periodic support/supervision" for making appropriate social decisions, developing, and maintaining relationships and dealing appropriately with unexpected demands. The doctor indicates that "help required for daily living activities is provided by family," but again, the doctor does not indicate the degree and duration of support or supervision required.

The panel finds that the doctor has not indicated that the appellant needs an assistive device or the significant help or supervision of another person, in order to carry out a daily living activity. Therefore, the ministry's determination that this requirement was not met, was reasonably supported by the evidence.

Conclusion:

The panel confirms the ministry's reconsideration decision that found the appellant ineligible for PWD designation.

While the majority panel finds that the ministry was not reasonable in finding that the appellant does not have a severe mental and physical impairment, the panel as a whole finds that the

ministry was reasonable in finding that the appellant did not meet the remaining criteria. The panel finds that the ministry was reasonable in determining that the appellant did not meet the requirements that, in the opinion of a prescribed professional, the impairment directly and significantly restricts daily living activities and that, as a result, the appellant requires an assistive device, the significant help or support from another person, or an assistive animal.

The appellant is not successful in the appeal.

Schedule – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act

Persons with disabilities

Section 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).

Employment and Assistance for Persons with Disabilities Regulation

Definitions for Act

Section 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 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
Susan Ferguson

Signature of Chair

Date (Year/Month/Day)
2022/06/11

Print Name
Daniel Chow

Signature of Member

Date (Year/Month/Day)
2022/06/11

Print Name
Julie Iuvancigh

Signature of Member

Date (Year/Month/Day)
2022/06/11