Part C – Decision Under Appeal

The decision under appeal is the Ministry of Social Development and Poverty Reduction's ("ministry") reconsideration decision dated October 5, 2022, 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

The relevant legislation is included in Appendix A.

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.
- Request for Reconsideration (RFR) includes three typewritten pages the appellant submits as her reasons for requesting the reconsideration. These are summarized below:
 - The appellant asked her rheumatologist to participate in the PWD application, however they declined, indicating that the appellant does not have a disease of the autoimmune scope. The GP and the specialist have recommended different treatments and medications, which do help however she still cannot function at a normal level.
 - o The GP indicates on the PWD application the appellant is able to walk and lift small amounts, however the appellant states there are times when she is bedridden or hospitalized.
 - o The GP noted the appellant is able to sit for less than one hour at a time, however the appellant states the type of work she has requires her to sit for 12 hour shifts so she is not able to work.
 - There are a number of situations that inflame her condition, so she has learned how to manage and make the best choices, or she suffers the consequences for up to months at a time. However, with medications and knowledge from her learning she has been able to contain the flare ups to an average of five consecutive days occurring monthly, rather than for months on end.
 - During flare ups she cannot walk at any time unassisted, cannot climb stairs and cannot lift any weight at all, has aches and pains, trouble with regular bowel movements and vomiting, constant stomach and/or intestinal bloating with cramping. The symptoms range from a mildly painful day to the extreme where she must be hospitalized.
 - She receives assistance from her partner with dressing, hygiene, meal preparation and feeding, and transportation when she is not capable of doing it herself.
 - Even on her best days, it still takes two to four times as long to complete tasks compared to a capable person.
 - Every morning it takes a minimum of twenty minutes of stiffness, daily medication for pain and a soak in hot water to function at a quarter of the rate of a healthy person.
 Every evening she covers herself in hot or cold packs to reduce swelling. For these reasons her DLA have become harshly impacted and she is dependent on her partner to help.
 - Regarding her mental health, the GP writes that she suffers from anxiety, depression, insomnia, decreased concentration and motivation. She has a history of self harm and

- has been hospitalized for this twice. Her GP has recognized her mental health as disabling, however the ministry does not recognize her mental health as an impairment.
- o The GP wrote the appellant is able to maintain marginal functioning in her immediate and extended social networks. However, she avoids leaving her home as much as possible, even though her family is desperate to see her. Even if she does go to see family, she cannot stay for more than two hours and becomes fatigued and must leave. She has not worked for over a year.
- She does not even use her cellphone to communicate because she has body pains and fatigue.
- She struggles every day, cannot thrive in life and is realizing she will never be able to do the things she would like to do and will only get worse as she ages.
- She would like to assist and lighten the burden on her partner and family from their constant care and support.
- A letter from a specialist confirming the appellant's appointment of January 15, 2021.
- A medical report dated April 14, 2020, showing results of a nuclear test regarding pain in the appellant's feet, knees and hands.
- The Ministry's PWD Designation Summary dated August 3, 2022

PWD Application

The PWD application was completed by the appellant's GP on June 20, 2022. The GP indicated they had seen the appellant eleven or more times in the past twelve months. The GP completed both the AR and MR portions of the application.

Diagnosis

- Poly arthritis, fibromyalgia with no date of onset indicated.
- Anxiety and depression with no date of onset indicated.
- Irritable Bowel Syndrome with no date of onset indicated.
- Migraine with no date of onset indicated.

Physical Impairment

In the SR, the appellant reported:

- Her arthritis and other medical issues cause a constant strain on her ability to perform DLA's.
- She has inflammation in both hands and feet as well as both shoulders.
- She has regular acid reflux.
- Typing and writing is painful, as is sitting upright without proper supports.

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

- Poly arthritis and fibromyalgia cause joint pain and stiffness. Function and mobility is limited.
 Fatigue.
- Irritable bowel syndrome causes pain, gas and bloating and diarrhea.
- Migraine needs treatment with medication and a dark room.

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:

- Duration unknown.
- Numerous treatments have not improved function.
- Specialist management have not helped.

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

- Able to walk two to four blocks unaided
- Able to climb 5+ stairs unaided
- Able to lift under 5 pounds
- Able to remain seated less than one hour

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

Physical limitation due to arthritis and fibromyalgia

Mental Impairment

In the SR, the appellant reported:

- She suffers from diagnosed anxiety and depression.
- She often has fatigue and trouble sleeping from pain which leaves an emotional toll.
- Spending many hours resting instead of doing things she would like to do most, trying to accept her limitations, and an increase in dependence on others has made her mental health worse.
- She has disordered sleeping and has experienced concentration issues due to sleep deprivation and medication side effects.

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

 Anxiety and depression cause fatigue, insomnia, decreased concentration, decreased motivation.

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, insight and judgement, memory, motor activity, language, psychotic symptoms; other neuropsychological problems.
- Minimal impact: executive
- Moderate impact: emotion, attention/concentration; motivation;
- Major impact: none

In the MR, Part D, the GP indicated the following significant deficits with cognitive and emotional function: emotional disturbance; motivation; attention of sustained concentration

Restrictions in the Ability to perform DLA

In the SR, the appellant reported:

- It has become difficult or at times not possible to brush her hair, teeth, or shower.
- Holding dishes or carrying items is strenuous as she has very little grip strength.
- Cooking, personal transport or even opening prescription medication has become difficult.

In the MR, Part B, the GP answered No to the question "Has the applicant been prescribed any medications and/or treatments that interfere with the ability to perform DLA?"

In the AR, Part B, the GP noted the appellant is independent with walking indoors/outdoors, climbing stairs and standing. The GP indicated the appellant requires periodic assistance from another person with lifting and carrying/holding, writing as explanation, "joint and muscle pain".

In the AR, Part C, the GP noted the appellant:

- Is independent with: toileting; feeding self; regulating diet; transfers in and out of bed and chair; reading prices and labels; making appropriate choices; paying for purchases; safe storage of food; banking; paying rent and bills; and medications.
- Requires periodic assistance from others with: meal planning; food preparation; cooking (takes significantly longer than typical); and getting in and out of a vehicle.
- Cannot use public transportation due to joint and muscle pain.
- Is independent with: making appropriate social decisions; able to develop and maintain relationships; interacts appropriately with others; able to deal appropriately with unexpected demands and able to secure assistance from others.
- Has marginal functioning with both immediate and extended social networks.

Need for Help

In the SR, the appellant wrote she has an increased dependence on others.

In the MR, Part B, the GP answered no to the question "Does the applicant require any

prostheses or aids for his/her impairment?"

In the AR, Part C, the GP commented the appellant requires help from family and friends and does not have an Assistance Animal.

Additional Information Submitted after Reconsideration

On the Notice of Appeal form (NOA) dated October 12, 2022 the appellant wrote "I disagree with the ministry's decision based on the info that the PWD application must reflect the subjects (sic) worst, hence my application was incorrectly completed."

At the hearing, the appellant explained that when she met with her GP to complete the PWD application form they did not reflect what her worst day was like, but more an average day. They were also completing a form for her work at the same time and there may have been confusion as to what was required on the PWD form. The appellant stated that the rheumatologist did not want to include their findings on the PWD form as she has not been formally diagnosed as yet so it could not be part of this process.

When asked how often the appellant has flare-ups, she responded that one week per month she has a complete shut down and her partner must help her with all her personal care. One time it lasted for three months where she was bedridden and totally reliant on others to care for her. The appellant states with medications she has now managed to bring the flare-ups down to one week per month. On a daily basis, however, she cannot lift her arms above her shoulders so not able to brush the tangles out of her hair and she will sit in the tub and use conditioner to try to remove the tangles. The appellant explained that her partner helps her on a daily basis with cooking and cleaning because she is not able to lift the pans, and even when carrying a glass she needs help because she cannot grip and hold the glass. The appellant states she does own a vehicle, but does not drive any more.

When asked whether the appellant had discussed the PWD denial with her GP, the appellant stated yes she has seen the GP twice and she brought in the PWD application for them to read. The GP agrees that they can see why the ministry is confused as what the appellant experiences versus what was not clearly shown on the PWD form doesn't line up. The GP explained to her that the ministry is focusing on the severity of her condition and acknowledged that the forms might not have been filled out correctly.

At the hearing, the ministry relied on their decision and noted that the information provided shows the appellant has a moderate condition not a severe condition and that the physician did not echo the appellant's SR.

When asked what weight is given to the appellant's SR the ministry explained they are looking

to see whether the GP's input supports each other. The ministry appreciated the additional information the appellant provided at reconsideration and if the GP had the opportunity to refill the forms it would be different.

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.

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 suffers from anxiety and depression and her GP has confirmed this. In the appellant's SR and RFR, she shared that as her condition has worsened she is having more depressive episodes with a history of self-harm. The appellant argues that because the GP indicated on the PWD form she is able to maintain marginal functioning in social settings and did not provide additional comment, that the ministry did not give any weight to her mental health being impaired.

The ministry's position is that although the appellant has shared she struggles with mental function and social functioning more than was reported, the GP reported the mental impairment has a moderate impact on her daily functioning in the areas of emotional disturbance, motivation and attention/concentration. The ministry notes the GP indicated there were no major deficits with cognitive or emotional functioning and that the appellant is independent with no help required in things like paying bills, managing medications or with social functioning. For these reasons the ministry considers the impairment to be mild/moderate and not severe.

Panel Decision

Section 2(2) of the legislation requires evidence of a severe impairment. The information from the appellant is that as her physical condition is worsening, she is finding it harder to maintain good mental health and is suffering from depression. The panel notes the GP indicates the appellant experiences a moderate impact with the areas of attention, motivation and attention/concentration, however, finds insufficient evidence to confirm the frequency and duration of how this impacts her daily living. The GP wrote a diagnosis of anxiety and depression and indicated the appellant has significant deficits with cognitive and emotional function in the areas of emotional disturbance, motivation and attention or sustained concentration. However, the GP did not provide any further details and noted the appellant can independently manage her banking, budgeting, pay bills, and take medications and that she is independent in all areas of social functioning. The appellant did not dispute this.

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 because her physical condition has continued to worsen she requires help with some areas of personal care on a daily basis, and that she requires more intensive care for at least one week out of every month, where she is unable to do any personal or home care.

The ministry's position is there was a discrepancy between what the appellant reports as her restrictions with DLA and what the GP reports, therefore, they did not have sufficient evidence to establish that the appellant has a severe physical impairment that affects her daily living activities.

Panel Decision

The appellant wrote a detailed description in the RFR as to how her physical condition affects her on a daily and monthly basis, and she also reiterated these statements at the hearing. The ministry argues because the GP did not indicate the frequency of how often she required assistance with DLA, that there was insufficient evidence to make a severe impairment determination. However, the panel finds the GP does confirm the appellant suffers from several medical conditions: poly arthritis; fibromyalgia; IBS; and migraines, and because of these conditions the appellant experiences great pain and requires periodic assistance from another person and that it takes her significantly longer than typical in the areas of dressing, grooming, bathing. The GP notes the appellant continuously requires assistance with carrying purchases home.

The panel finds the additional clarification provided by the appellant with regards to her limitations in managing her DLA's was supported by the GP because the GP confirmed these same areas were the areas the appellant required assistance in. The panel finds the evidence does suggest the appellant has a severe physical impairment that significantly affects her daily physical functioning. Therefore, the panel finds the ministry was not reasonable to determine 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 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.

Panel Decision

The legislation requires that the appellant's physical impairment must directly affect her daily living activities and be confirmed by a medical practitioner. DLA's are listed in the legislation as:

- (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

In the AR, DLA's are listed as major categories with minor subheadings:

Personal Care (dressing, grooming, bathing, etc); Basic Housekeeping (laundry, etc); Shopping; Meals; Pay Rent and Bills; Medications; and Transportation

The appellant has described how she is restricted in her DLA because of her impairment: she is not able to lift her arm above her head so that she is not able to wash or brush her hair; she is unable to cook because she has no strength in her hands and cannot lift or hold heavy kitchen items; if she carries a glass her partner has to be on hand to watch it doesn't slip and fall; she is not able to drive her vehicle and relies on others to go with her shopping because she cannot lift or carry groceries. The panel finds the appellant's inability to do these DLA's does significantly restrict her on a daily basis and when she is bed-ridden for one week of every month, requiring even more assistance with DLA's, she is also restricted for an extended period of time. In the AR, the GP has confirmed her medical condition directly and significantly affects her ability to perform DLA's, both continuously and periodically in these areas: personal care (dressing, grooming, bathing); basic housekeeping, meal preparation, shopping and transportation (going to and from stores). The panel finds although the GP does not provide the specific details as noted in the appellant's testimony, that the GP does support the appellant's position by indicating in the AR the appellant has these direct and significant restrictions. The panel finds because the appellant requires assistance in five areas, out of the eight DLA's outlined in the legislation, that they are significant and are a direct result of the severe impairment.

Therefore, the panel finds the ministry was not reasonable to determine the appellant's impairment does not directly and significantly restrict her ability to perform DLA either continuous, or periodically for extended periods as required under subsection 2(2)(b)(i) of the EAPWDA.

Help with DLA

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.

Panel Decision

The appellant suffers from a medical condition that requires her to receive help on a daily basis with some of her personal care and for a week straight each month when her condition is such that she requires even more in-depth care by her partner. The GP confirmed the appellant requires frequent and periodic help from friends and family.

The panel finds the ministry was not reasonable when it 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 not reasonably supported by the evidence, and therefore rescinds the decision. The appellant is 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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