

Part C – Decision Under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Poverty Reduction (“ministry”) dated January 3, 2023 , in which the ministry denied the appellant 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 (over 18) and duration (impairment to continue for 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

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

Part E – Summary of Facts

The hearing took place by videoconference. The appellant attended with an advocate and her spouse as a support person.

Evidence Before the Ministry at Reconsideration:

The appellant applied for PWD designation on October 26, 2022. She is over 18 years of age. In support of her application, she submitted a medical report completed by a specialist in nephrology, an assessor report completed by a social worker, and her self-report.

The appellant provided an additional handwritten submission in the Request for Reconsideration.

Medical Report:

The specialist states that the appellant has been their patient for “2+ months” and has seen them eleven or more times.

Diagnoses:

The appellant is diagnosed with severe end stage renal disease secondary to membranous nephropathy (onset 2009) and severe anxiety (onset unknown).

Health History:

The specialist states that the appellant requires dialysis four to five times a week to sustain her life. The condition and the treatment cause fatigue, pain, nausea and restless legs. Pain and fatigue fluctuate. The appellant’s condition will not improve without a kidney transplant, and until then, she will need dialysis treatment. It is unknown if the appellant will be a candidate for a transplant, and she is not on the transplant list yet.

The appellant developed severe anxiety because of the kidney disease. Anxiety impairs her ability to communicate and participate in stressful situations.

Functional Skills:

The specialist says that the appellant can walk unaided 4+ blocks, climb 5+ steps unaided, lift 7 to 16 kilograms and remain seated 2 to 3 hours. Although the specialist checks “no” in answer to the question about whether the appellant has difficulties with communication, they also identify anxiety as a cause of difficulty with communication. The specialist does not answer the question of whether the appellant has significant deficits with cognitive and emotional functioning but identifies a deficit in emotional disturbance, circling the word “anxiety.”

Daily Living Activities:

The specialist indicates that the impairment directly restricts the appellant’s ability to perform daily living activities. They indicate restrictions in meal preparation, basic housework, daily shopping, mobility inside and outside the house, and social functioning. However, they do not indicate if the restriction is either continuous or periodic. For social functioning, they provide the further explanation that, due to severe anxiety, the appellant can have difficulty expressing herself to others, and note that the appellant’s spouse helps to share her perspective. For other daily living activities, they state that the appellant’s family helps in the affected areas when the appellant is in pain or too fatigued or weak.

Additional Comments:

The specialist adds that the appellant also has symptoms of poor appetite, insomnia, pain, low energy, and shortness of breath due to kidney failure.

Assessor Report:

The social worker states they have been providing ongoing social work support for the appellant for two months and have seen the appellant eleven or more times.

They identify the appellant’s impairments as end-stage renal disease and anxiety. They note that, although the appellant has good ability to communicate, she also has anxiety and “depends on rapport and approach.” They indicate that the appellant is independent in all aspects of mobility and physical ability, but note that the appellant fatigues and can become weak when walking or climbing stairs.

Regarding cognitive and emotional functioning, they note moderate impact in the areas of emotion, impulse control, insight and judgement. They indicate minimal impact on bodily functions, consciousness and attention/concentration. Under “Comments” they note “has severe anxiety.”

Daily Living Activities

The social worker indicates that the appellant needs periodic assistance from another person for laundry and basic housekeeping, going to and from stores, food preparation and cooking. They do not provide any explanation or description of the type or amount of assistance required. They indicate that the appellant is independent in all other aspects of daily living activities listed in the assessor report, including all aspects of social functioning. They indicate that the appellant receives help for daily living activities from family and health authority professionals. They also state that the appellant routinely uses hemodialysis supplies to help compensate for their impairment.

Additional Comments:

The social worker states that the appellant's ability to do daily living activities fluctuates, stating that fatigue, pain, and anxiety "can become severe where she needs more help from family, other times she can do more."

Appellant's Self-report:

The appellant states that she has stage 5 kidney failure and is on dialysis four times a week, which leaves her very weak. She says she has restless legs that cause her a lot of pain, and she has "great difficulty getting up and sitting down." She says her "walking is not the greatest" but she does not use an assistive device. She also has severe anxiety but does not take medication for that condition because of anxiety around taking medication.

Request for Reconsideration:

In her Request for Reconsideration, the appellant adds that, without help, she can walk one block, with a lot of pain. She says she needs help to walk two blocks or more, has difficulty getting up from a chair without help, and has pain and difficulty dressing herself. She says she must rely on her spouse to her with "pretty much everything."

Additional Evidence:

For the appeal, the appellant provided a letter from the advocate to the specialist, dated November 17, 2022, on which the specialist wrote answers to questions presented by the advocate (reply dated November 23, 2022). The specialist indicated agreement with the following statements presented by the advocate, and provided additional comments:

- The appellant is only able to walk up to a block at a time before she has to stop and take a break, commenting that the appellant has marked shortness of breath and weakness secondary to renal failure.
- The appellant is unable to climb any stairs without the use of handrails or support of another person, commenting that, as a result of renal failure, the appellant has gait unsteadiness and lower extremity weakness.
- The appellant is able to lift under 5 pounds, commenting that the appellant has muscle weakness due to renal failure.
- The appellant can only sit for up to one hour before suffering pain in restless legs, commenting that the appellant has marked restless legs that are unresponsive to medication.
- The appellant can only stand for ten to fifteen minutes, commenting again that, due to renal failure, the appellant has weakness and fatigue.
- Impaired cognitive and emotional functioning have a major impact on the appellant's daily functioning due to severe anxiety.
- The appellant needs continuous assistance or is unable to do the following daily living activities due to her health conditions/diagnosis:
 - Transfers in and out of bed: needs assistance daily
 - Transfers on and off a chair: needs assistance to get up from a chair
 - Laundry
 - Basic housekeeping: husband does all laundry and housekeeping, appellant can only do dishes for a short time, leaning on the counter
 - Going to and from stores: needs someone with her at all times due to physical limitations and anxiety
 - Carrying purchases home: can carry no more than 5 pounds
 - Meal planning
 - Food preparation and cooking: husband does these tasks due to appellant's physical limitations and fatigue levels, she is unable to carry pots and pans
 - Getting in and out of a vehicle: needs assistance getting out of a vehicle due to physical limitations
 - Dealing appropriately with unexpected demands: appellant has anxiety when met with unexpected demands.

Written Submission:

The advocate provided a written submission dated January 19, 2023, which the panel accepts as argument. The advocate adds that the appellant is not on the kidney transplant list in British Columbia yet, for various reasons, and "most likely will not be for some time." The appellant expects that, once she is on the list, she will still have to wait a long time for a transplant.

Oral Evidence at the Hearing:

The advocate explained that the ministry did not receive the additional letter from the specialist in time for the reconsideration because of an error at the hospital. She also explained that the assessor report contains many errors because the social worker was completing an assessor report for the first time and did not ask the appellant any questions when she filled it out.

Admissibility of Additional Evidence:

The ministry did not object to the additional written and oral evidence. The additional letter from the specialist provides further evidence about the appellant's medical condition, its impact on her ability to perform daily living activities, and the assistance she needs as a result. The panel finds the additional evidence is reasonably necessary for the full and fair disclosure of all matters relating to the decision under appeal, and therefore finds it to be admissible under section 22(4) of the Employment and Assistance Act.

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 (over 18) and duration (impairment to continue at least two years) but was not satisfied that:

- the appellant has a severe mental or physical disability;
- the appellant's impairment, in the opinion of a prescribed professional, directly and significantly restricts his 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.

Appellant's Position:

The appellant maintains that, with the additional evidence from the specialist, she satisfies all the criteria for PWD designation.

Ministry Position:

At reconsideration, the ministry was not satisfied that the appellant had a severe mental or physical impairment, or that her ability to perform daily living activities was directly and significantly restricted. As it had not been established that daily living activities were significantly restricted, the ministry asserted that it could not be determined that significant help was required from other persons or a restricted device.

However, on reviewing the additional letter from the specialist, the ministry agrees that the appellant meets the legislated criteria for PWD designation. They advise that:

- the deficits identified by the specialist show that the appellant has severe mental and physical impairments
- the restrictions on daily living activities in the areas of housekeeping, going to and from stores, carrying food, cooking and dealing with unexpected demands amount to a significant restriction on daily living activities
- the assessor report and the specialist's letter confirm that the appellant needs significant help from other people to perform daily living activities.

Panel Decision:

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

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

In considering the evidence, the panel accepts the advocate's explanation of the discrepancies between the assessor report and the evidence of the specialist in the additional letter. The panel places little weight on the sections of the assessor report that describe the appellant's level of function and ability to perform daily living activities, which the social worker prepared without input from the appellant.

Severe Mental or Physical Impairment

In the additional letter, the specialist identifies symptoms secondary to renal failure, that affect the appellant's physical function. They state that the appellant has marked shortness of breath, lower extremity and general muscle weakness, gait unsteadiness, fatigue, and restless legs. As a result, they confirm that the appellant can only walk one block at a time, can not climb stairs without the use of a handrail or the help of another person, can lift less than five pounds and can sit for only one hour. They also confirm that the appellant has marked, severe anxiety as a result of the diagnosis of renal failure. They state that anxiety has a major impact on emotion, consciousness, memory, motor activity and language.

The panel finds that the additional evidence from the specialist establishes that the appellant has severe mental and physical impairments due to severe anxiety and renal failure.

Restrictions to Daily Living Activities

Under section 2(2)(b)(i) of the EAPWDR, if the ministry is satisfied that a person has a severe mental or physical impairment, the ministry must also be satisfied that, in the opinion of a prescribed professional, the appellant's ability to perform daily living activities is directly and significantly restricted by the severe impairment, either continuously or

periodically for extended periods. Not all daily living activities must be directly and significantly restricted. However, in *Hudson v. British Columbia (Employment and Assistance Appeal Tribunal)*, 2009 BCSC 1461, the court stated that “there must be evidence from a prescribed professional indicating a direct and significant restriction on at least two daily living activities.”

Under section 2(1)(b) of the EAPWDR, for a person who has a severe physical or mental impairment, “daily living activities” means:

- prepare own meals;
- manage personal finances;
- shop for personal needs;
- use public or personal transportation facilities;
- perform housework to maintain the person’s place of residence in acceptable sanitary conditions;
- move about indoors and outdoors;
- perform personal hygiene and self-care;
- manage personal medication.

For a person with a severe mental impairment, the definition of “daily living activities” includes:

- make decisions about personal activities, care or finances; and
- relate to, communicate or interact with others effectively.

The categories of daily living activities in the ministry forms do not match exactly the categories in the legislation. However, based on the additional letter, the panel finds that the specialist has confirmed continuous, significant restrictions in the following daily living activities, as a result of the severe mental and physical impairments described above:

- prepare own meals: appellant is unable to prepare meals
- shop for personal needs: the appellant needs to have someone with her always when shopping
- perform housework to maintain the person’s place of residence in acceptable sanitary condition: appellant is unable to do laundry or basic housekeeping
- move about indoors and outdoors: appellant needs assistance to get in and out of bed, get out of a chair, get in and out of a vehicle, and climb stairs; she is only able to walk one block
- relate to, communicate or interact with others effectively: due to anxiety, appellant cannot deal appropriately with unexpected demands.

Therefore, the panel finds that the ministry's determination that there was not enough evidence to confirm that the appellant's ability to perform daily living activities either continuously or periodically for extended periods is not reasonably supported by the evidence.

Help with Daily Living Activities

Under section 2(2) of the EAPWDA, confirmation of direct and significant restrictions to daily living activities is a precondition for the determination that, because of those restrictions, the person requires help to perform those activities. In its reconsideration decision, the ministry stated that, as it had not been established that the appellant's daily living activities were significantly restricted, it could not be determined that the appellant needed help to perform daily living activities.

The panel has found that the appellant's daily living activities are significantly restricted by severe mental and physical impairments, and therefore goes on to consider whether, in the opinion of a prescribed professional, the appellant requires help to perform those activities as a result.

Under section 2(3) of the EAPWDA, a person requires help to perform a daily living activity if they need an assistive device or significant help from another person to perform it. At the hearing, the ministry confirmed that, based on the additional evidence from the specialist, it is satisfied that the appellant needs significant help from others to perform daily living activities. The specialist has confirmed that the appellant's spouse prepares all meals, does all the housekeeping, and assists her with mobility inside and outside the home every day. They also confirm that the appellant needs someone with her whenever she shops. Therefore, the panel finds that the appellant requires the significant help of another person to perform the restricted daily living activities.

Conclusion:

The panel finds that, considering the additional evidence, the ministry's determination that the appellant did not meet the criteria for eligibility for PWD designation is not reasonably supported by the evidence. The appellant is successful in the appeal.

Schedule – Relevant Legislation
Employment and Assistance for Persons with Disabilities Act

Persons with disabilities

s. 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

s.2 (1) For the purposes of the Act and this regulation, "daily living activities",

(a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:

(i) prepare own meals;

(ii) manage personal finances;

(iii) shop for personal needs;

(iv) use public or personal transportation facilities;

(v) perform housework to maintain the person's place of residence in acceptable sanitary condition;

(vi) move about indoors and outdoors;

(vii) perform personal hygiene and self care;

(viii) manage personal medication, and

(b) in relation to a person who has a severe mental impairment, includes the following activities:

(i) make decisions about personal activities, care or finances;

(ii) relate to, communicate or interact with others effectively.

(2) For the purposes of the Act, "prescribed professional" means a person who is

(a) authorized under an enactment to practise the profession of

(i) medical practitioner,

ii) registered psychologist,

(iii) registered nurse or registered psychiatric nurse,

(iv) occupational therapist,

(v) physical therapist,

(vi) social worker,

(vii) chiropractor, or

(viii) nurse practitioner, or

(b) acting in the course of the person's employment as a school psychologist by

(i) an authority, as that term is defined in section 1 (1) of the *Independent School Act*, or

(ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the *School Act*,

if qualifications in psychology are a condition of such employment.

(3) The definition of "parent" in section 1 (1) applies for the purposes of the definition of "dependent child" in section 1 (1) of the Act.

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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
Susan Ferguson

Signature of Chair

Date (Year/Month/Day)
2023/01/30

Print Name
Anil Aggarwal

Signature of Member

Date (Year/Month/Day)
2023/01/30

Print Name
Bill Haire

Signature of Member

Date (Year/Month/Day)
2023/01/29