

PART C – Decision under Appeal

The decision being appealed is the Ministry's May 15, 2012 reconsideration decision denying the Appellant Persons with Disabilities (PWD) designation. The Ministry determined that the Appellant did not meet all of the required criteria for PWD designation set out in section 2(2) of the Employment and Assistance for Persons with Disabilities Act. Specifically the Ministry determined that the Appellant does not have a severe mental or physical impairment that in the opinion of a prescribed professional

- (i) directly and significantly restricts his ability to perform daily living activities either continuously or periodically for extended periods; and,
- (ii) as a result of those restrictions he does not require help to perform those activities.

The Ministry did determine that the Appellant has reached 18 years of age and that in the opinion of a medical practitioner his impairment is likely to continue for at least 2 years.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act (EAPWDA) Section 2(2) and 2(3).

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR) Section 2.

PART E – Summary of Facts

For its reconsideration decision the Ministry had the following evidence:

1. Appellant's March 27, 2012 self-report in his PWD application.
2. Physician's Report (PR) and Assessor's Report (AR) both completed on March 27 2012 by the same physician who indicated the Appellant has been his patient since January 13, 2012 and that he had seen the Appellant between 2-10 times in the 12 months preceding the completion of the reports.
3. Appellant's request for reconsideration with a written statement from him and a physician's progress report for WorkSafe BC dated April 11, 2012 completed by a different doctor.

The Appellant described his disability in his PWD application as starting in November 2008 when he lifted a very heavy cabinet at work and heard a pop in his lower back. He wrote that he has done 22-24 weeks of occupational rehab and many physiotherapy visits (about 40-50) with minimal gains. He indicated that walking longer than 20-30 minutes completely aggravates his back and bending is at a minimum. The Appellant wrote that pain shoots to his right leg and he is unable to do physical or any work. He has been getting some severe neck pain for the past couple of months and also while in treatment. The Appellant stated that home /yard duties are hard to do. He has limits with cleaning etc. and some days getting out of bed is almost impossible. He indicated that he is always taking Advil, and other pain relief medications. He never has a day without pain and it does get rather depressing at times due to that.

The Appellant wrote that his disability affects his abilities to do activities as follows:

- Day to day keeping of house/yard clean.
- Preparing meals as standing for any length of time aggravates his back as does bending forward, walking and he needs help from his family to do any lifting.
- Shopping for groceries is hard. He needs help from family (bending down to pick up stuff etc.).
- Medications sometimes makes him drowsy; falls asleep midday quite often.
- Mood is affected, depressed, agitated due to the injury and not able to fulfill dreams and work.
- Sleep is often interrupted in the night because of pain.
- Gets some anxiety from time to time because of disability.
- Getting in and out of bathtub/shower is hard.
- Some days getting out of bed is impossible.
- Driving a vehicle for any long period of time.
- Reaching up/bending down is very limited.
- Some days, stairs are difficult to manage due to leg pain.
- Walking – back/leg pain limits this every day.

In the PR the doctor diagnosed the Appellant's condition as degenerative disc disease – lumbar spine with mechanical back pain. Regarding the severity of the impairment the doctor wrote that the Appellant has chronic pain, episodic flares make doing daily living activities, let alone work, very difficult. Flares are brought on by extended physical activity, prolonged sitting or standing, or any lifting. The doctor also wrote that given the Appellant's recurrent pain, he is having trouble finding appropriate employment and he cannot sit or stand for long. During flares, the Appellant is quite incapable of normal activities including standing to make meals, drive, walk far, etc. The doctor indicated that the Appellant takes muscle relaxants and narcotics for pain, making him sleepy. As for functional skills the doctor noted that the Appellant can walk unaided on a flat surface from 2-4

blocks, climb 2-5 steps unaided, lift 5-15 lbs. and remain seated for less than 1 hour. The doctor noted that the Appellant has a significant deficit in emotional disturbance, adding the Appellant gets downhearted regarding his disability/limitations.

In the AR the doctor described the impairments that impact the Appellant's ability to manage daily living activities as chronic back pain with episodic flares, mobility issues, sometimes cannot get out of bed, secondary depression. The doctor indicated that the Appellant requires periodic assistance with all aspects of mobility and physical ability (walking indoors and outdoors, climbing stairs, standing, lifting, carrying and holding) and added "can do above but with flares – cannot!". As for cognitive and emotional function the doctor noted no impact to impulse control, insight and judgment, attention/concentration, executive, memory, motor activity, language, psychotic symptoms, other neuropsychological problems and other emotional or mental problems. He also indicated minimal impact to bodily functions and moderate impact to consciousness, emotion and motivation. The doctor added meds can make the Appellant sleepy and mood down because of his disability.

With respect to assistance required for daily living activities, the physician indicated that the Appellant is independent in all aspects of paying rent and bills, medications and social functioning. The Appellant is also independent in grooming, toileting, and feeding himself. He needs periodic assistance with dressing, bathing, regulating diet, with transfers in/out of bed and with transfers in/out of a chair. The doctor indicated that the Appellant also needs periodic assistance with all aspects of basic housekeeping, adding vacuuming always aggravates the back. For aspects of shopping the Appellant is independent with all aspects except he needs periodic assistance with going to and from stores and continuous assistance with carrying purchases home. The doctor added that the Appellant's wife has to carry heavy groceries, that the Appellant cannot lift or carry objects, that he also requires assistance with shopping and that he often cannot do housework. The doctor indicated that the Appellant needs periodic assistance with meal planning, food preparation and cooking, but he is independent with safe storage of food. As for transportation, the doctor indicated that the Appellant needs periodic assistance with getting in and out of a vehicle, and with using public transit. He is independent using transit schedules and arranging transportation. The doctor wrote that the Appellant's wife provides the needed support. For assistive devices the doctor noted that the Appellant uses a bathtub bar and a TENS unit helps to control pain. No assistance animal is used.

With his request for reconsideration dated May 14, 2012, the Appellant provided a statement of additional personal information and arguments supporting his PWD application. He wrote that since he submitted his application he has also been diagnosed with arthritis of the spine and referred to that diagnosis in the WorkSafe BC report. This affects his neck as well as loss of range of motion, pain and headaches.

The Appellant submitted that no time frames are mentioned in the disability application for the physician to refer to. The episodic nature of his disability has no time frame. The Appellant wrote that his flare ups can last upwards of 6 months in a row or more and the current episode is at 4 months in a row. He is currently in physiotherapy 4 days a week to try to get relief from pain. The Appellant referred to the PWD legislation and the PWD application, and argued that the periodic episodic nature of his disability falls within the PWD designation. He also referred to his handwritten submission in his application describing how his daily living activities are hindered by his disability. He wrote that he does require assistance in all physical aspects of daily living activities, but not

mental aspects. He noted that his physician indicated that he suffers from secondary depression because of his disability. The Appellant submitted that his physician also stated that when his disability flare ups occur he cannot perform daily living activities let alone work. The Appellant also wrote that there are days when he cannot get out of bed. He can walk for 4 blocks or climb 3-5 stairs on a good day "maybe" but definitely cannot when flared up. He again referred to his self-report in his PWD application.

The Appellant submitted that in accordance with the EAPWDA and disability definitions noted at the bottom of pages 17 and 18 of the PWD application, he does meet all physical aspects of disability. He wrote that in total he has 14 physical daily living activities requiring assistance, 13 periodic and 1 continuous, all in accordance with the EAPWDA and the PWD application definitions. The Appellant referred the Ministry to his own description in the PWD application of how his daily living activities are affected as well as his physician's observations. The Appellant also addressed the adjudicator's determination that significant help from other persons could not be determined because significant restrictions to daily living activities had not been established. The Appellant wrote that he did meet all the physical daily living restriction requirements and a total of 14 daily living activities do require significant help as required by the EAPWDA. The physician stated that he needs help, highlighting when he cannot perform daily living activities and who helps him.

At the hearing the Appellant described his physical conditions and disabilities. He also submitted arguments in support of his appeal. The arguments are set out in Part F – Reasons for the Panel's Decision. The Appellant's descriptions of his conditions and restrictions are as follows.

He stated that he has been diagnosed with spinal arthritis as indicated in the WorkSafe BC report and that is also one of the conditions listed in the PWD application form. He also said that according to his doctor, 14 daily living activities, all physical, are restricted. Thirteen are periodically restricted and one continuously. The Appellant said that he goes to physiotherapy for pain relief. The physiotherapist told him his L-4/5 disc range of motion is depleted and sooner or later he will end up with a locked back. The Appellant reviewed the information his doctor provided in the PR and in the AR and he agreed with the doctor's assessment that any increased physical activity increases his pain and immobility. Also when his condition flares up the Appellant said he is unable to walk, sit, get of bed, etc. as the physician noted. He specifically referred to the doctor's statements that "with flare up the patient is quite incapacitated" and that he will be plagued with this condition indefinitely.

The Appellant explained the episodic nature of his disability. He said the current episode has lasted for about 6 months. In the past his flare ups have lasted between 4-6 months. One time when he had a painting job, the Appellant said he threw his back out and the flare up lasted for 6-7 months. Even walking around a store "does it" and "he's done". With his episodic flare ups he is unable do to daily living activities of a physical nature. He said that he cannot prepare meals, he cannot get of bed without his wife's help, he cannot sleep, he cannot shop, and he cannot stand for more than 10 minutes and so on. He also said during flare ups he experiences these restrictions 24/7.

The Appellant submitted that the Ministry did not consider the episodic nature of his flare ups and that his flare ups last for extended periods as required by the PWD legislation. He said the significant flare up episodes have been occurring since 2008. The Appellant also said that that there is no day without pain for him and no day without a limited range of motion. Sometimes his flare ups are so bad

that he cannot walk. He also said he has difficulties with getting in and out of a car because of his back.

The Appellant's wife said that she cannot work because she has to stay home to help her husband. She's noticed that he is not getting better. She said that she helps him roll out of bed, often helps him with dressing and getting out of chairs, makes sure he eats and generally does most of the physical tasks for him. She described herself as "his muscle."

The Panel finds that the oral testimony of the Appellant and his wife at the hearing relate to information about the Appellant's impairments which was before the Ministry and therefore admits the testimony as being in support of the evidence that the Ministry had when it made its reconsideration decision pursuant to section 22(4) of the Employment and Assistance Act.

At the hearing the Ministry indicated that it made its reconsideration decision based on the information it had at the time and it reaffirmed that decision.

PART F – Reasons for Panel Decision

The issue in this appeal is whether the Ministry reasonably determined that the Appellant is ineligible for PWD designation because he did not meet all the requirements in section 2(2) of the EAPWDA and specifically that: he does not have a severe mental or physical impairment that 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, that in the opinion of a prescribed professional, as a result of the restrictions, he does not require significant help to perform those activities.

The following sections of the EAPWDA apply to this appeal:

- 2(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 has a severe mental or physical impairment that
- (a) in the opinion of a medical 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.

The following sections of the EAPWDR apply to this appeal:

- 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.

The Panel will consider each party's position regarding the reasonableness of the Ministry's decision under the applicable PWD criteria at issue in this appeal.

Severe Impairment

The Ministry was not satisfied that the information provided established a severe impairment. In its reconsideration decision the Ministry wrote that it reviewed the information in the PWD application and in the request for reconsideration. The Ministry referred to the doctor's description of the Appellant's medical condition as degenerative disc disease – lumbar spine with mechanical back pain and that the Appellant's history of episodic flares make doing daily living activities and work very difficult. The Ministry noted how flares are brought on and it wrote that with the flares the Appellant is "quite incapable of normal activities including standing to make meals, driving, walking far, etc". The Ministry also reviewed the doctor's assessment of the Appellant's physical functioning and that periodic help is noted with the explanation that the Appellant can do these but with flares cannot and that a bathtub bar is used when bathing. Based on this assessment the Ministry determined that the Appellant's functional limitations are consistent with a moderate degree of impairment and that there are remedial measures in place including pain medication and a recommendation for regular core strengthening exercises. The Ministry wrote that it was not satisfied that the information provided is evidence of a severe physical impairment that significantly restricts the Appellant's ability to perform daily living activities either continuously or episodically for extended periods.

After making that determination the Ministry then referred to the Appellant's self-report in the request for reconsideration and the additional doctor's report from WorkSafe BC. The Ministry determined there was no new information related to severity or restrictions provided by a prescribed professional. It wrote that all of the newly presented information had been considered with the information in the original application. The Ministry concluded that it did not demonstrate that the Appellant has either a severe impairment or is significantly restriction in his ability to perform daily living activities continuously or periodically for extended periods.

The Appellant's position is that the Ministry failed to consider his self-reports in his original PWD application and in his request for reconsideration. He submitted that the Ministry did not consider all of the activities he listed as being limited by his disability, the severe pain he experiences and how his flare up episodes can last up to 6 months. He argued that the Ministry also completely disregarded the doctor's narrative statements in the PR and the AR. The Appellant pointed out all of the specific comments written by the doctor. For example the Appellant noted that the doctor wrote that he cannot sit or stand for long, that he often cannot do housework and that with flare ups he is quite incapable of normal activities including standing, walking far, etc. The Appellant also referred to the doctor's description of his chronic back pain with episodic flares causing mobility issues, and that sometimes he cannot get out bed. In the AR the doctor also noted that the Appellant requires periodic assistance with all aspects of mobility and physical ability and that with flares cannot do these. The Appellant argued the Ministry did not consider all of the doctor's statements plus his own 2 separate descriptions of how his episodic flare ups of up to 6 months severely impair his physical abilities. The Appellant further argued that the Ministry also did not consider that 14 physical aspects of daily living activities reported by the doctor as requiring periodic or continuous assistance.

The Appellant submitted that there is no definition of "severe" or "severity of impairment" in the PWD legislation or in the PWD application. He argued that if a medical practitioner confirms that he meets the 2 year impairment requirement then that should also satisfy the requirement for "severe impairment" because that part of the Act should be read together. The Appellant also argued that the legislation and application form provide no definition of time frames for episodic impairments or for

“extended periods”. There is no guidance for a doctor filling out the PWD forms except a footnote which the Appellant argues only refers to “episodic nature of the impairment”. Therefore, the Appellant argued that the Ministry must consider all of the information, including his two self-reports plus the doctor’s reports which demonstrate that he does meet the requirements for a severe physical impairment. His physical restrictions during his months’ long flare ups are episodic in nature and the doctor confirmed that when he experiences the flare ups he is severely restricted in his physical daily living activities. In addition he experiences ongoing pain and restrictions with day to day activities such as housekeeping, shopping, standing, walking and getting in and out of a tub/shower.

The Panel notes that although the Ministry states in its reconsideration decision that it reviewed the information in the PWD application and in the request for reconsideration, it did not refer to any of the Appellant’s descriptions of his ongoing physical limitations, of the episodic nature and months-long extent of his flare ups or of the extent to which his daily living activities are restricted. For example, in the PWD application the Appellant described how he never has a day without pain, how walking longer than 20-30 minutes completely aggravates his back and bending is at a minimum. He also listed several activities negatively affected by his disability. For example in the PWD application he stated that his disability affects his ability with day to day keeping of house/yard clean, preparing meals because standing aggravates his back, needing help to do any lifting, very limited reaching up/bending and with walking –back/leg pains every day.

The Appellant also described the episodic nature of his disability in his request for reconsideration, including that the episodes last from 4-6 months. The Appellant wrote that when his condition flares up he is unable to walk, sit, get out of bed etc. The Panel notes that these descriptions are consistent with the information from the doctor. The Ministry did note that the doctor described the Appellant as quite incapable of normal activities and also as unable to do mobility/physical activities with flare ups, but it did not address the information provided by the Appellant about the length of time those flares ups last or of the Appellant’s ongoing impairments. Therefore, based on all of the evidence the Panel finds that it was not reasonable for the Ministry to determine that the Appellant does not have a severe physical impairment.

In terms of a mental impairment the Ministry noted that the doctor indicated one deficit to cognitive and emotional functioning. He also noted moderate impacts to consciousness (effects of meds), emotion, and motivation, minimal impact on bodily functions and no impact to 10 of 14 other aspects of cognitive and emotional functioning. The Ministry also found there was no diagnosis of a severe mental disorder. The Ministry considered the mental health impacts on daily functioning to be in the minimal/moderate range and related to the effects of the Appellant’s medication and situational reaction. Therefore the Ministry was not satisfied that the information provided was evidence of a severe mental impairment.

The Appellant acknowledged that he had no difficulty with any of the mental aspects of daily living activities. His depression and other emotional impacts he attributed to his reaction to his physical disability. Therefore based on all of the evidence the Panel finds that the Ministry reasonably determined that the Appellant does not have a severe mental impairment.

Restrictions to Daily Living Activities

In its reconsideration decision the Ministry reviewed the doctor’s report that the Appellant needs

periodic assistance with some aspects of personal care, basic housekeeping, shopping, meals and transportation. The Ministry also referred to the doctor's note that the Appellant cannot lift and carry objects far, requires assistance with shopping, often cannot do housework and is independently able to perform social functioning. The Ministry noted that the doctor referred to the Appellant's episodic nature of back pain; however, it found that there was no information about the frequency or duration of the episodes to allow the Ministry to determine the significance of the times of "extreme dysfunction". Therefore the Ministry concluded that because the majority of daily living activities require periodic help which it determined was undefined, the information from the Appellant's prescribed professional does not establish that the Appellant's impairment significantly restricts daily living activities either continuously or periodically for extended periods of time.

The Appellant argued that the Ministry did not consider all of the evidence from the doctor regarding his ability to manage daily living activities. The Appellant pointed to all of the doctor's written comments in the PR and in the AR and he argued that all of those should confirm that his daily living activities are significantly and directly restricted. For example, he referred to the doctor's notes that he is "plagued indefinitely", that he "cannot do" activities with flare ups, that his is "quite incapacitated" with flare ups and that 14 physical daily living activities require periodic or continuous assistance. The Appellant also referred to the list of daily living activities in section 2(1) of the EAPWDR. He argued that according to his doctor's reports he is directly and significantly restricted in preparing meals, shopping for personal needs, using transportation facilities, performing housework, and moving about indoors and outdoors during his flare ups. The Appellant also argued that there is nothing in the PWD legislation stating that all of the listed daily living activities have to be restricted, and he is significantly restricted in 5 out of the 8 listed activities.

The Appellant further submitted that the Ministry has not defined any time frames or definitions for this PWD requirement. He pointed to the footnote in the AR which he argued only refers to the episodic nature of an impairment for periodic assistance, but that note provides no guidance to doctors regarding time frames. The Appellant submitted that both he and his doctor have described his flare ups as episodic, which is the term used in the AR footnote. He has described his flare ups as lasting for months. The Appellant's position is that the doctor confirmed that 5 out of 8 daily living activities are directly and significantly restricted by the episodic nature of his back pain contrary to the Ministry's finding.

Section 2(2)(b) of the EAPWDA requires the opinion of a prescribed professional to satisfy the requirements in section 2(2)(b)(i) and (ii). In this case the doctor who completed the PR and the AR is the prescribed professional. The Panel notes that although the Ministry considered the doctor's report about the restrictions to the Appellant's daily living activities, it did not consider all of the additional information from the doctor, including that flares are brought on by physical activity, prolonged sitting or standing or any lifting, that the Appellant cannot sit or stand for long, and that episodic flares make doing daily living activities very difficult. The Ministry also did not refer to the doctor's notes that the Appellant will likely be plagued by this indefinitely, that he requires continuous assistance with carrying, or that during flare ups the Appellant is incapable of any aspect of moving indoors or outdoors. The Ministry also did not consider the Appellant's information that his flare up episodes last for about 6 months. Therefore the Panel finds that based on the evidence it was not reasonable for the Ministry to determine that the information provided did not establish the frequency or duration of the episodic flare ups and further that it was not reasonable for the Ministry to

determine that the Appellant's impairment does not directly and significantly restrict daily living activities either continuously or periodically for extended periods.

Help Performing Daily Living Activities

The Ministry decided that because it determined that the Appellant's daily living activities are not significantly restricted by a severe impairment it could not determine that significant help is required from other persons. It did note that a bathtub bar is used, as well as a TENS unit to control pain, but the Ministry wrote that no assistive devices are required to ambulate.

The Appellant pointed out that the doctor wrote that the Appellant's wife provides support for him. In addition the doctor indicated that for 14 of the physical daily living activities listed in the AR he needs periodic or continuous assistance. The doctor also pointed out that when he has a flare up he cannot do any mobility activities without assistance.

Section 2(3)(b) of the EAPWDA states that for the purposes of subsection (2) 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. In this case the Panel notes that the prescribed professional indicated that no help was provided by an assistance animal. However, the doctor did report that the Appellant uses assistive devices to help with daily living activities impaired by his conditions. He uses a bathtub bar and a TENS unit to control pain. In addition the doctor specifically wrote that the Appellant's wife provides the needed support for the activities for which the Appellant needs help. The doctor further indicated that the Appellant needs periodic or continuous assistance with 14 of the daily living activities listed in the AR and that family provides assistance. He also wrote that the Appellant's wife has to carry heavy groceries. Based on all of the evidence the Panel finds that the Ministry was unreasonable when it did not consider the doctor's reports that the Appellant needs periodic or continuous assistance with at least 14 aspects of the daily living activities listed in the AR and that the Appellant's wife and family provide the needed assistance. Therefore based on all of the evidence and the applicable enactments, and given the Panel's finding above that the Ministry's determination that the Appellant's daily living activities were not directly and significantly restricted was not reasonable, the Panel further finds that the Ministry's determination that the Appellant does not meet the requirements of section 2(2)(b)(ii) of the EAPWDA was also not reasonable.

The Panel finds that the Ministry's reconsideration decision was not reasonably supported by the evidence and was not a reasonable application of the applicable enactments in the Appellant's circumstances. Therefore the Panel overturns and rescinds that decision in favor of the Appellant.