

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated December 12, 2016, which found that the appellant did not meet three of the five statutory requirements of Section 2 of the *Employment and Assistance for Persons with Disabilities Act* for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that her impairment is likely to continue for at least two years. However, the ministry was not satisfied that the evidence establishes that:

- the appellant has a severe physical or mental impairment;
- the appellant's daily living activities (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.

PART D – Relevant Legislation

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

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

PART E – Summary of Facts

The evidence before the ministry at the time of the reconsideration decision included the Persons With Disabilities (PWD) Application comprised of the applicant information and self-report dated June 28, 2016, a physician report (PR) and an assessor report (AR), both dated June 16, 2016 and completed by a general practitioner (GP) who met the appellant once to complete the application, with a note that the appellant has been seen at an affiliated walk-in clinic regarding back and neck pain in the past. The GP relied on information from an office interview with the appellant as well as “MRI reports from 2014 and 2012.”

The evidence also included the appellant’s Request for Reconsideration dated December 5, 2016, with the appellant’s attached notes.

Diagnoses

In the PR, the GP diagnosed the appellant with Degenerative Disc Disease (DDD) L3-S1 and C2-T-2 with an onset of May 2014 (“MRI”), and scoliosis of thoracic region and cervical, with an onset in May 2014 (“MRI”). The GP wrote “patient in pain [for] 15 years.” In the AR, when asked to describe the appellant’s mental or physical impairments that impact her ability to perform daily living activities, the GP wrote: “...anxiety/depression but controlled with medication.”

Physical Impairment

In the PR and AR, the GP reported that:

- In terms of health history, the appellant has “...osteoporosis diagnosed [when young] secondary to anorexia nervosa... she has some family in town that help with lifting heavy things at times. ...she is awaiting a visit with the pain clinic.”
- The appellant does not require any prostheses or aid for her impairment.
- For functional skills, the appellant can walk 4 or more blocks unaided, climb 5 or more steps unaided, lift 7 to 16 kg. (15 to 35 lbs.), and remain seated less than 1 hour.
- The appellant is independent with walking indoors, walking outdoors, climbing stairs, standing, lifting, and carrying and holding, with a note: “assistance from family members for heavy lifting and carrying.”
- In the section of the AR relating to assistance provided through the use of assistive devices, the GP indicated a cane is used by the appellant.

In her self-report and her Request for Reconsideration, the appellant wrote that:

- She has two herniated discs in her spine and she has been in a tremendous amount of pain for the last 15 years.
- She has always been very independent so she manages to do daily tasks but they take much longer to do than it would take the average person.
- The herniated disc will not repair itself and it is frustrating knowing that doctors cannot help.
- She is in severe pain 24 hours a day because of the herniated discs in her back and neck, which affects her entire body.
- She was diagnosed with osteoporosis and has broken numerous bones.

Mental Impairment

In the PR and AR, the GP reported:

- In terms of health history, the appellant’s “social life is non-existent due to the pain.”
- The appellant has no difficulties with communication.

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- The appellant has a significant deficit in her cognitive and emotional functioning in the area of emotional disturbance and she takes medication for anxiety/depression.
 - In the AR, the appellant has a good ability to communicate in all areas, specifically with speaking, reading, writing, and hearing.
 - For the sections of the AR assessing impacts to cognitive and emotional functioning, the GP indicated that there is a major impact in emotion and moderate impacts in attention/concentration, executive, motivation, and other emotional or mental problems. There were no impacts assessed in the remaining 9 areas of functioning, and no additional comments provided by the GP.
 - The appellant is independent with most aspects of social functioning, specifically making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others and securing assistance from others. The appellant requires periodic support/supervision for dealing appropriately with unexpected demands. The GP did not provide a further explanation or description of the support/supervision required.
 - The appellant has marginal functioning in her immediate social network, and good functioning in her extended social networks.
 - Asked to describe the support/supervision that would help to maintain the appellant in the community, the GP wrote “independent at present with occasional support from family members for lifting.”

In her self-report and her Request for Reconsideration, the appellant wrote that:

- She has been dealing with depression for as long as she can remember.
- For the last 15 years, she has become very isolated due to the pain she is in.
- She finds it hard to motivate herself socially, physically, and mentally/emotionally.

Daily Living Activities (DLA)

In the PR and AR, the GP indicated that:

- The appellant has not been prescribed medication that interferes with her ability to perform DLA.
- In the additional comments to the PR, the GP wrote that the appellant “has tried multiple modalities of treatment and is unable to function well for work or other physical activities due to her degenerative disc disease and osteoporosis.”
- In the AR, the appellant is independently able to perform every task of all listed DLA, specifically: move about indoors and outdoors, personal care, basic housekeeping, meals, pay rent and bills, medications, and transportation.
- For the shopping DLA, the appellant is independent with going to and from stores, reading prices and labels, making appropriate choices, and paying for purchases. She requires periodic assistance from another person with the task of carrying purchases home, with no explanation or description provided by the GP.

In her self-report and her Request for Reconsideration, the appellant wrote that:

- She has always been very independent so she manages to do daily tasks but they take much longer to do than it would take the average person.
- The pain restricts her ability to function in her daily living routine.
- She also suffers from severe depression which brings on anxiety/stress and that too inhibits her ability to go on with her daily routine.
- At this stage, she is unable to find employment.

Need for Help

In the AR, the GP indicated that the appellant's family provides help required for DLA. In the section of the AR relating to assistance provided through the use of assistive devices, the GP identified a cane.

Additional Information submitted after reconsideration

In her Notice of Appeal dated December 19, 2016, the appellant expressed her disagreement with the ministry's reconsideration decision and wrote that:

- Her severe pain inhibits her ability to perform daily activities. This in turn creates great anxiety and depression.
- Her present state of health has not allowed her to seek employment.

The ministry relied on its reconsideration decision. At the hearing, the ministry clarified that there is no time restriction on re-applying for PWD designation, which can be done at any time. The ministry also stated that a person's employability is not a consideration for the PWD designation, unlike the Persons with Persistent Multiple Barriers to employment (PPMB) status.

Prior to the hearing, the appellant submitted a letter dated January 16, 2017 in which a doctor of chiropractic wrote:

- The appellant presented to the clinic in February 2015 for chronic neck and back pain due to multi-level disc protrusions/herniations of the cervical and lumbar spine.
- There also appears to be mild osteoarthritis of the entire spine along with a significant functional scoliosis.
- The pain has forced the appellant to develop compensatory movement patterns that have lead to muscular imbalances causing pain and restriction in her ankles, hips, right knee, shoulders and elbows.
- These ongoing issues have made it progressively more difficult for the appellant to perform her daily activities and maintain her usual level of exercise.
- Given the appellant's age, numerous issues, chronicity of conditions, full and permanent recovery is unlikely.
- The appellant will require ongoing maintenance care to maintain current level of function.

At the hearing, the appellant provided the following documents:

- 1) Report dated May 15, 2014 for an MRI of the cervical spine;
- 2) Report dated May 15, 2014 for an MRI of the lumbar spine;
- 3) Report dated May 17, 2014 for an MRI of the thoracic spine; and,
- 4) Letter dated February 25, 2016 in which a physician wrote that she supports the appellant's claim for disability due to chronic low back pain impairing ability to perform her work duties. She is unable to sit or stand for prolonged periods of time due to the pain. The appellant is currently awaiting specialty consultation to further assess and manage the pain.

At the hearing, the appellant stated that:

- Many years ago, she was hit by a car while riding her bicycle. It was the driver's fault but she did not report the accident because she thought she would get better.
- She had pain in her hip and eventually found out she had broke her hip. She had surgery on her hip and then, when she was recovering, fell and broke the other hip.
- This caused her body alignment to be off and resulted in a herniated disc.

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- She spent thousands of dollars on various alternative medicines and stretching treatments at the best back clinic in the country, and the treatments have her no relief from the pain and seems to have made it worse.
 - There are no other options available to help with the pain.
 - All of her DLA takes so much longer than it used to. It takes longer to do any cleaning or walking, and she gets frustrated.
 - She could not go out in the winter weather conditions and she feels like a prisoner.
 - She has Raynaud's disease in her hands, she has had it since she was a child, and it causes her to be unable to do her work. She has bacteria in her hands. She will be seeing a dermatologist about the condition.
 - She lives on her own and has to take care of her place. It is hard for her to lift things and hard to clean the floor and windows.
 - She does not have much of a social life since she has no desire to go out.
 - She estimates it takes her about twice as long as a healthy person to do her daily activities. Her family is usually surprised with how slow she is when they ask how long it takes her to do things.
 - For carrying purchases home when she is shopping, her family helps her about once a week.
 - She can lift about 20 lbs. without putting herself in danger, although it hurts no matter how much she lifts.
 - She takes a few hours "down time", or to rest, every day.
 - She has used a cane in the past, but not on a regular basis.
 - She takes alternative pain medications and not prescription medication because she believes that dulling the pain is dangerous. She is concerned about the long-term effects of taking addictive, strong pain medications.
 - She has been on the wait list for an appointment with the pain clinic and she hopes she will get in soon.

Admissibility of Additional Information

The ministry did not object to the admissibility of the additional documents submitted by the appellant. The panel considered the information in the Notice of Appeal, the letters from the physician and the doctor of chiropractic, the reports of the MRI of the appellant's spine, and most of the appellant's oral testimony as corroborating the previous information from the appellant in her PWD application and her Request for Reconsideration regarding the impacts of her medical conditions, which was before the ministry at reconsideration. Therefore, the panel admitted this additional information as being in support of information and records that were before the ministry at the time of the reconsideration, in accordance with Section 22(4)(b) of the *Employment and Assistance Act*.

The panel did not admit the information in the appellant's oral testimony regarding the Raynaud's disease in her hands and the panel, therefore, did not consider this evidence in reaching a decision on the appeal as this was not a medical condition diagnosed by the GP or referred to in the information and records before the ministry at reconsideration.

PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry's reconsideration decision, which found that the appellant is not eligible for designation as a person with disabilities (PWD), was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. The ministry found that the appellant does not have a severe mental or physical impairment and that her daily living activities (DLA) are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods and that, as a result of those restrictions, it could not be determined that 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.

The criteria for being designated as a PWD are set out in Section 2 of the EAPWDA as follows:

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.

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

The EAPWDR provides as follows:

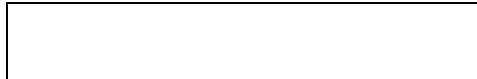
Definitions for Act

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).

The positions of the parties

Appellant's position

The appellant's position is that she has a severe physical impairment as her doctor diagnosed her with degenerative disc disease, scoliosis and osteoporosis, and she is in severe pain 24 hours a day. The appellant argued that she has tried many different treatments to alleviate the pain and they have not helped and she has been on the waiting list for the pain clinic for over a year. The appellant argued that she has always been very independent so she manages to do daily tasks but they take much longer, about twice as long, to do than it would take the average person. The appellant's position is that she has a mental impairment that is severe as she has been dealing with depression for as long as she can remember and, for the last 15 years, she has become very isolated due to the pain and she finds it hard to motivate herself socially, physically, and mentally/emotionally. The appellant's position is that her severe physical and mental impairments directly and significantly restrict her ability to perform DLA on an ongoing basis and her family has to help her with lifting and shopping about once a week.

Ministry's position

The ministry's position, as set out in the reconsideration decision, is that there is insufficient evidence to establish that the appellant has a severe physical or mental impairment as required by Section 2(2) of the EAPWDA. The ministry wrote that the GP indicated that the appellant is able to walk 4 or more blocks unaided, climb 5 or more steps unaided, lift 15 to 35 lbs., and remain seated less than 1 hour. The ministry also wrote that the GP reported that the appellant is independently able to manage walking indoors, walking outdoors, climbing stairs, standing, lifting, and carrying and holding, although the GP noted that she receives assistance from family members for "heavy lifting and carrying." The ministry wrote that the GP reported that the appellant has been assessed with one major impact in cognitive and emotional functioning in the area of emotion and four moderate impacts, with no difficulties with communication, and mostly independent social functioning and, therefore, does not have a severe mental impairment.

As to DLA, the ministry's position is that the information from the prescribed professional does not establish that the appellant's impairment significantly restricts her DLA either continuously or periodically for extended periods of time. The ministry wrote that the GP indicated that the appellant is able to manage all aspects of her DLA independently, with the exception of requiring periodic assistance with carrying purchases home when shopping. The ministry's position is that because it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required.

Panel Decision

Severe Physical Impairment

A diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a "severe" impairment. An "impairment" is a medical condition that results in restrictions to a person's ability to function independently or effectively.

To assess the severity of an impairment, the ministry must consider both the nature of the impairment and the extent of its impact on daily functioning as evidenced by functional skill limitations and the degree to which the ability to perform DLA is restricted. In making its determination the ministry must consider all the relevant evidence, including that of the appellant. However, the legislation is clear that the fundamental basis for the analysis is the evidence from a prescribed professional – in this

case the appellant's GP.

In the PR, the GP diagnosed the appellant with degenerative disc disease L3-S1 and C2-T-2 and scoliosis of thoracic region and cervical, both with an onset in May 2014, as confirmed by the reports of the MRI taken of the appellant's cervical, lumbar and thoracic spine. The GP wrote that the appellant has been in pain for 15 years. The GP also indicated that the appellant has osteoporosis diagnosed when she was young and she has previously broken both of her hips. In the letter dated January 16, 2017, a doctor of chiropractic wrote that the appellant presented to the clinic in February 2015 for chronic neck and back pain due to multi-level disc protrusions/herniations of the cervical and lumbar spine, and the resulting pain has forced the appellant to develop compensatory movement patterns that have lead to muscular imbalances causing pain and restriction in her ankles, hips, right knee, shoulders and elbows. The chiropractor wrote that these ongoing issues have made it progressively more difficult for the appellant to perform her daily activities and maintain her usual level of exercise. In her Request for Reconsideration, the appellant wrote that she is in severe pain 24 hours a day because of the herniated discs in her back and neck, she has tried several types of treatments, nothing has alleviated the pain and she is on the waiting list for the pain clinic.

In the PR, the GP reported functional skill limitations at the high end of the scale as the appellant can walk 4 or more blocks unaided, climb 5 or more steps unaided, lift 15 to 35 lbs., and remain seated less than 1 hour. At the hearing, the appellant confirmed that she can lift about 20 lbs. without putting herself in danger, although it hurts no matter how much she lifts. In her self-report, the appellant wrote that she has always been very independent so she manages to do daily tasks but they take much longer to do than it would take the average person. At the hearing, the appellant estimated that it takes her about twice as long as a healthy person to do her daily activities. However, the GP reported in the AR that the appellant is independent with all mobility and physical ability [walking indoors, walking outdoors, climbing stairs, standing, lifting, and carrying and holding], with no indication by the GP that these activities take the appellant significantly longer than typical. The GP wrote a comment: "assistance from family members for heavy lifting and carrying," which the appellant agreed at the hearing occurs about once per week. While the GP indicated in the AR that a cane is used by the appellant, the appellant stated at the hearing that she has used a cane in the past, but not on a regular basis.

As discussed in more detail in these reasons for decision under the heading "Restrictions in the Ability to Perform DLA", the evidence indicates that the limitations to the appellant's physical functioning have not directly and significantly restricted her ability to perform her DLA either continuously or for extended periods, as required by the EAPWDA

Given the GP's report of a high level of functional skills and independent physical functioning, the panel finds that the ministry reasonably determined that there is not sufficient evidence to establish that the appellant has a severe physical impairment under Section 2(2) of the EAPWDA.

Severe Mental Impairment

The GP did not diagnose the appellant with a mental disorder in the PR but, when asked in the AR to describe the appellant's mental or physical impairments that impact her ability to perform DLA, the GP wrote: "...anxiety/depression but controlled with medication." In her self-report and her Request for Reconsideration, the appellant wrote that she has been dealing with depression for as long as she can remember and she has become very isolated due to the pain. She finds it hard to motivate herself. The GP reported that the appellant has a significant deficit in her cognitive and emotional

functioning in the area of emotional disturbance and she takes medication for anxiety/depression. Regarding daily impacts to cognitive and emotional functioning, the GP indicated that there is a major impact in emotion and moderate impacts in attention/concentration, executive, motivation, and other emotional or mental problems, but the GP did not provide additional comments to describe the “other emotional or mental problems” or the other areas of moderate impact.

For social functioning, while the appellant stated that her social life is non-existent and she feels isolated, the GP reported that the appellant is independent in all aspects, with the exception of a requirement for periodic support/supervision for dealing appropriately with unexpected demands. The extent of the need for support/supervision has not been explained or described by the GP and, although the GP assessed marginal functioning in the appellant’s immediate social network, when asked to describe the support/supervision that would help to maintain the appellant in the community, the GP wrote “independent at present with occasional support from family members for lifting.” As well, the GP reported that the appellant has no difficulties with communication, with a good ability to communicate in all areas.

Given the absence of evidence from the GP of significant impacts to the appellant’s cognitive, emotional and social functioning, the panel finds that the ministry reasonably determined that a severe mental impairment was not established under Section 2(2) of the EAPWDA.

Significant restrictions in the ability to perform DLA

Section 2(2)(b) of the EAPWDA requires that the ministry be satisfied that a prescribed professional has provided an opinion that an applicant’s severe impairment directly and significantly restricts her DLA, continuously or periodically for extended periods. In this case, the GP is the prescribed professional. DLA are defined in Section 2(1) of the EAPWDR and are also listed in the PR and, with additional details, in the AR. Therefore, the prescribed professional completing these forms has the opportunity to indicate which, if any, DLA are significantly restricted by the appellant’s impairments either continuously or periodically for extended periods.

In the appellant’s circumstances, the GP reported in the PR that the appellant has not been prescribed medication that interferes with her ability to perform DLA. In her self-report, the appellant wrote that she has always been very independent so she manages to do daily tasks but they take much longer to do than it would take the average person and she estimated at the hearing that it takes twice as long as a healthy person. However, the GP reported that appellant is independently able to perform every task of most listed DLA, specifically: the ‘move about indoors and outdoors’ DLA, the personal care DLA, the basic housekeeping DLA, the meals DLA, the pay rent and bills DLA, the medications DLA, and the transportation DLA, with no indication by the GP that these DLA take the appellant significantly longer than typical. The GP reported that the appellant requires periodic assistance from another person with one task of the DLA shopping (going to and from stores), with no explanation or description provided by the GP to allow the ministry to determine that the periodic assistance is required for extended periods of time. At the hearing, the appellant stated that her family helps her about once a week with lifting items weighing over 20 lbs.

In her Notice of Appeal, the appellant argued that her present state of health has not allowed her to seek employment. The appellant wrote in her Request for Reconsideration that pain restricts her ability to function in her daily living routine and she also suffers from severe depression which brings on anxiety/stress and that also inhibits her ability to go on with her daily routine. The appellant wrote that at this stage, she is unable to find employment. In the additional comments to the PR, the GP

wrote that the appellant "...has tried multiple modalities of treatment and is unable to function well for work or other physical activities due to her degenerative disc disease and osteoporosis." As for finding work and/or working, the panel notes that employability is not a criterion in section 2(2) of the EAPWDA nor is it listed among the prescribed daily living activities in section 2 of the EAPWDR.

Considering the absence of evidence from the GP, as the prescribed professional, of the need for significant assistance with DLA, or that the DLA take the appellant significantly longer than typical, the panel finds that the ministry reasonably concluded that there is not enough evidence from the prescribed professional to establish that the appellant's impairment significantly restricts her ability to manage her DLA either continuously or periodically for extended periods, thereby not satisfying the legislative criterion of Section 2(2)(b)(i) of the EAPWDA.

Help to perform DLA

Section 2(2)(b)(ii) of the EAPWDA requires that, as a result of direct and significant restrictions in the ability to perform DLA, a person requires help to perform those activities. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

While the GP and the appellant indicated that the appellant's family provides occasional help with lifting and that the appellant has used a cane, the panel finds that the ministry reasonably determined that as direct and significant restrictions in the appellant's ability to perform DLA have not been established, it cannot be determined that the appellant requires help to perform DLA as a result of those restrictions, as defined by Section 2(3)(b) of the EAPWDA.

Conclusion

Having reviewed and considered all of the evidence and relevant legislation, the panel finds that the ministry's reconsideration decision, which determined that the appellant was not eligible for PWD designation under Section 2 of the EAPWDA, was reasonably supported by the evidence and therefore confirms the decision. The appellant's appeal, therefore, is not successful.