

PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Social Innovation (the ministry) dated May 15, 2017, which held that the appellant did not meet 3 of the 5 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 a medical practitioner has confirmed that the appellant's impairment is likely to continue for at least 2 years.

However, the ministry was not satisfied 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 those restrictions, in the opinion of a prescribed professional, 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 determined that the appellant is not in any of the classes of persons set out in section 2.1 of the *Employment and Assistance for Persons with Disabilities Regulation* who may be eligible for PWD designation on alternative grounds.

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 and section 2.1

PART E – Summary of Facts

On January 12, 2017, the ministry received the appellant's PWD application comprised of a Physician Report (PR) and an Assessor Report (AR) which were both completed on December 8, 2016 by the appellant's general practitioner (GP), and the appellant's Self-report (SR) section of the PWD application dated December 23, 2016.

The appellant's request for PWD designation was denied on March 9, 2017. On April 20, 2017, the ministry received the appellant's Request for Reconsideration and on April 24, 2017 a 2-page questionnaire ("the questionnaire") completed by the GP was received. On May 15, 2017, the ministry issued its reconsideration decision, which again denied the appellant's request for PWD designation.

Additional documents provided by the appellant on appeal comprised the appellant's Notice of Appeal (NOA), received by the tribunal on May 23, 2017, which included argument but no additional evidence, and a 2-page questionnaire dated June 6, 2017 completed by the GP and received by the tribunal on June 8, 2017. The arguments of both parties are set out in Part F of this decision.

The ministry did not provide additional evidence but in its written submission stated that had it had the information in the June 6, 2017 questionnaire it may have found that the appellant's request met the criteria for PWD designation. The ministry did not address the admissibility of the new information in its submission.

Section 22(4) of the *Employment and Assistance Act* (EAA) provides that panels may admit as evidence (i.e. take into account in making its decision) the information and records that were before the minister when the decision being appealed was made and "oral and written testimony in support of the information and records" before the minister when the decision being appealed was made – i.e. information that substantiates or corroborates the information that was before the minister at reconsideration. These limitations reflect the jurisdiction of the panel established under section 24 of the EAA – to determine whether the ministry's reconsideration decision is reasonably supported by the evidence or a reasonable application of the enactment in the circumstances of an appellant. That is, panels are limited to determining if the ministry's decision is reasonable and are not to assume the role of decision-makers of the first instance. Accordingly, panels cannot admit information that would place them in that role.

In this case, the panel determined that the information provided in the June 6, 2017 questionnaire is substantially different from the information available at reconsideration. In particular, the new information reports changes in the frequency of the need for assistance and most significantly, identifies limitations in functioning due to knee problems not previously identified by the GP.

As the additional information in large part relates to a medical condition not diagnosed by the GP at the time of reconsideration, the panel finds that the June 6, 2017 questionnaire does not support the information at reconsideration and is therefore not admissible in accordance with section 22(4) of the *Employment and Assistance Act*. Despite the panel's finding the information in this questionnaire is not admissible for this appeal, the appellant may wish to put this information before the ministry in the future.

Summary of relevant evidence

The summary includes information provided by the appellant and the GP in the PWD application as well as information provided by the GP in the questionnaire submitted at reconsideration. In the questionnaire, the appellant's advocate provided information and asked the GP to "Agree" or

“Disagree” and to provide comments. Information provided by the advocate in the questionnaire appears below in italics, with comments from the GP italicized within quotation marks.

Diagnoses and History provided by the GP

- Degenerative disc disease. Severe back pain and disc degeneration. Had to give up business as was unable to stand for work.
- Depression. Memory impairment.
- Tailbone fracture, rib fractures. Rib and chest pain since fractures – still hasn't improved.
- Possible sleep apnea. Needs testing.
- Hearing impaired.

Have all severely affected his functioning – doesn't socialize, has cut off relationships with a lot of his family. Having chest pains and sweating when does minimal work – will need to see cardiologist for assessment as may have heart disease. *Agrees that the combination of the appellant's conditions is severe. “Old fracture of tailbone.”*

Physical Impairment

The GP provides the following information:

- Requires a cane, high toilet seat, bath seat, and grab bars.
- In the PR, the GP reports that the appellant is able to walk 1 to 2 blocks unaided on a flat surface, climb 2 to 5 steps unaided, and lift 5 to 15 lbs. It is unknown how long the appellant can remain seated.
- In the AR, the GP reports that walking indoors is managed independently. Walking outdoors (can only walk 10 – 15 minutes) and climbing stairs (uses cane and railing) take significantly longer than typical. Standing also requires an assistive device (rarely stands – lays down or sits). Lifting and carrying/holding require continuous assistance from another person (only 5 kg or less).

In his SR, the appellant confirms the rib and tailbone fractures, noting that he has lower and upper back pain and spasms, constant hip spasms, and constant knee and shoulder pain. Neck and upper spinal disc pain causes headaches. Lately, his physical condition has gotten severe enough that he cannot even lift more than 5kg. of weight without suffering muscle spasms and pains. Normal actions, like going to the washroom or walking up the stairs or driving more than half an hour, have become a serious challenge because of his other body pain and spasms. Often he gets sudden, sharp spasms that are painful enough to leave him breathless. He is sleep deprived because he cannot sleep on his back or sides for more than 15-30 minutes. His eyesight and hearing are getting weaker. Normal activities are more difficult to complete on his own, and chronic muscle and joint pains restrict him to his bed most of the day.

Mental Impairment

The GP provides the following information:

- Depression – memory impairment have all severely affected his functioning – doesn't socialize. Has cut off relationships with a lot of his family.
- In the PR, no significant deficits with cognitive and emotional function are identified for any of the 11 specified areas, including emotional disturbance (e.g. depression, anxiety). In the AR, a major impact on daily functioning is reported in four areas – bodily functions (Poor sleep – pain in back + chest + has trouble breathing); executive, memory, and motivation (No motivation – took a long time to come as didn't feel motivated to do anything). A moderate impact is

reported for emotion and attention/concentration. Either minimal or no impact is reported for the remaining eight listed areas.

- No cognitive, motor, sensory, or other difficulties with communication are identified in the PR. In the AR, the appellant is reported to have good ability with speaking, satisfactory ability with writing, and poor ability for reading and hearing (others have to talk loud).
- In the AR, continuous support/supervision is required for all five specified aspects of social functioning: appropriate social decisions; ability to develop and maintain relationships (has “cut off relationships with family as can’t deal with them”; interact appropriately with others; ability to deal appropriately with unexpected demands; and, ability to secure assistance from others. Where asked to describe the support/supervision required and identify any safety issues, the GP has not provided any response.
- Very disrupted functioning is reported for immediate and extended social networks.

In his SR, the appellant writes that he forgets common things. He lost his business, which was based on physical labour, and it has been impossible for him to pass any physical tests for jobs. Losing his only source of income made his depression and stress worse. All of his pains have left him very anxious about his health and well-being. He gets anxiety problems such as jittery hands and memory problems.

DLA

The GP reports that disc degeneration, chronic back pain and GERD are the impairments impacting the appellant’s ability to manage DLA. *Agrees the appellant has significant restrictions with his ADL’s.*

Medications or treatments have been prescribed that interfere with the ability to perform DLA – makes him dizzy and sleepy.

Information about the prescribed DLA is as follows:

Move about indoor/outdoors

- As described above under *Physical Impairment.*

Personal care

- Toileting and feeding self are managed independently without assistance from another person or an assistive device.
- Dressing (has to sit), bathing (only once per week), and transfers in/out of bed (needs periodic assistance from wife) take significantly longer than typical. *Agrees that the appellant showers only once per week due to lack of motivation. “Has depression.”*
- Grooming (has to sit) requires an assistive device.
- Transfers on/off chairs requires periodic assistance from another person.

Basic Housekeeping

- All listed tasks require continuous assistance from another person - laundry and basic housekeeping - (children do them). *Agrees that appellant is not able to do his laundry and basic housekeeping tasks such as vacuuming, sweeping, cleaning the bathroom, and doing the dishes because of the bending up/down to load/unload machines and shooting pain and spasms in ribs and back when bending, twisting or reaching forward.*

Shopping

- All listed tasks require continuous assistance from another person - going to and from stores, reading prices and labels, making appropriate choices, paying for purchases, and carrying purchases home (son has to do it as appellant can't drive too far or walk/stand too long). *Agrees appellant can't shop for himself because he can't walk throughout the store, bend to retrieve items from lower shelves or carry purchases and that while he is able to lift up to 5 kg., this is not from ground level.*

Meals

- All listed tasks require continuous assistance from another person (wife does that) - meal planning, food preparation, cooking, and safe storage of food. *Agrees that appellant is not able to prepare or cook meals independently due to the bending required to retrieve pots and pans and as standing is limited to a couple of minutes.*

Paying Rent and Bills

- All listed tasks are managed independently – banking, budgeting, and pay rent and bills.

Medications

- All listed tasks are managed independently - filling/refilling prescriptions taking as directed, and safe handling and storage.

Transportation

- Getting in and out of a vehicle takes significantly longer than typical (sometimes wife needs to help). Using public transit and using transit schedules/arranging transportation are crossed out.

Social Functioning

- As described above under *Mental Impairment.*

Need for Help

The GP reports that assistance is provided by family and that the appellant uses a cane, high toilet seat, bath seat and grab bars.

PART F – Reasons for Panel Decision

Issue on Appeal

The issue on appeal is whether the ministry's decision to deny the appellant designation as a PWD was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. In particular, was the ministry reasonable in determining that the appellant is not a person described in section 2.1 of the EAPWDR and that the requirements of section 2(2) of the EAPWDA were not met because:

- a severe physical or mental impairment was not established;
- the appellant's DLA are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and
- as a result of those restrictions, in the opinion of a prescribed professional, the appellant does not require an assistive device, the significant help or supervision of another person, or the services of an assistance animal to perform DLA?

Relevant Legislation

EAPWDA

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 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).

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.

(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.

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).

Panel Decision

As the appellant has not provided any information or argument respecting eligibility for PWD designation under section 2.1 of the EAPWDR, the panel finds that the ministry reasonably determined that it has not been established that the appellant falls within the prescribed classes of persons under that section. The panel's discussion below is limited to eligibility for PWD designation under section 2 of the EAPWDA and section 2 of the EAPWDR.

Severe Physical or Mental Impairment

The legislation provides that the determination of severity of impairment is at the discretion of the minister, taking into account all of the evidence including that of the appellant. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a prescribed professional respecting the nature of the impairment and its impact on daily functioning. While the legislation does not define "impairment", the PR and AR define "impairment" as a "loss or abnormality of psychological, anatomical or physiological structure or functioning causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration." While this is not a legislative definition, and is therefore not binding on the panel, in the panel's opinion, it reflects the legislative intent and provides an appropriate analytical framework for assessing the degree of impairment resulting from a medical condition.

When considering the evidence provided respecting the severity of impairment, the ministry must exercise its decision-making discretion reasonably by weighing and assessing all of the relevant evidence and cannot simply defer to the opinion of a prescribed professional as that would be an improper fettering of its decision-making authority.

Physical Impairment

The appellant is diagnosed with degenerative disc disease and past fractures of the tailbone and ribs. The GP also diagnoses a hearing impairment and indicates that the appellant may have sleep apnea and heart disease. However, aside from noting poor hearing, the GP does not describe limitations to functioning due to hearing loss and does not confirm the other diagnoses.

In his NOA, the appellant argues that he fits within the PWD guidelines. Acknowledging the appellant's use of a cane, the ministry notes that the GP does not describe how much longer than typical it takes the appellant to walk outdoors or climb stairs, making it difficult to determine the overall level of restriction with these activities. In addition to the lack of clarity respecting how much longer the appellant takes with these activities, the panel finds that there is a lack of clarity respecting other aspects of the appellant's mobility. In particular, it is unclear when the appellant uses a cane. In the AR, the GP reports the use of a cane and railings when climbing stairs, but in the PR assesses the appellant as able to manage 2 to 5 steps unaided. It is also unclear if a cane is required for walking as the appellant is assessed in the PR as being able to walk 1 – 2 blocks unaided and, in the AR, as able to walk 10 – 15 minutes without use of an assistive device. The panel notes that the use of a cane is not addressed in the appellant's SR or the questionnaire. Additionally, as the ministry notes, handrails are not assistive devices as defined in the legislation. The impact of the appellant's medical conditions on his ability to remain seated is not known. For the remaining physical functional skills, lifting and carrying and holding, the GP and the appellant report a weight limit of up to 5 kg., while in the questionnaire the GP agrees "not from ground level" but does not explain why this is the case.

Based on the foregoing analysis respecting the level of independent physical functioning reported, the panel concludes that the ministry was reasonable to determine that the functional abilities assessed in the PWD application demonstrate limitations to physical functioning due to back, rib and chest pain that speak to a moderate not severe physical impairment.

Mental Impairment

The appellant is diagnosed with depression by his GP, and both the GP and the appellant report that the appellant has impaired memory. However, the GP also reports that there are no significant deficits in any of the 11 areas of cognitive and emotional function listed in the PR, including the areas of memory and emotional disturbance (i.e. depression and anxiety). In the AR, the GP identifies major impacts on daily functioning for 4 of 14 listed areas - memory, executive, motivation, and bodily functions. The panel notes that only a moderate impact on daily functioning is reported for emotion, despite the diagnosis of depression. The narrative respecting the impact on bodily functions identifies problems with sleep caused by pain and breathing difficulties, not a mental impairment. Additionally, the impact on daily functioning due to problems with memory, executive and motivation problems is not apparent when looking at the GP's assessment of DLA given that with the exception of "appropriate social decisions", cognitive or decision-making tasks are either managed independently or described as taking longer or requiring assistance due to physical not mental limitations. For example, cognitive or executive tasks of banking and medications are managed independently and making appropriate shopping choices is done by the appellant's son as it is too far to walk or stand. The questionnaire does identify an impact for one aspect of the DLA personal care, as the appellant showers only once per week due to lack of motivation.

Respecting social functioning, the GP identifies the need for continuous support/supervision but, as the ministry notes, it is difficult to understand why the GP reports that the appellant has very disrupted functioning with his immediate social networks given that the GP also notes that the appellant

receives assistance with DLA from his family. Additionally, the GP does not report any cognitive difficulties with communication and there is no description of the support/supervision required or of any safety issues.

Based on the foregoing, the panel concludes that the ministry reasonably determined that the information respecting cognitive, emotional and social functioning speaks to a moderate rather than a severe mental impairment.

Restrictions in the ability to perform DLA

Section 2(2)(b)(i) of the EAPWDA requires that the minister be satisfied that in the opinion of a prescribed professional, a severe mental or physical impairment directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods. While other evidence may be considered for clarification or support, the ministry's determination as to whether or not it is satisfied, is dependent upon the evidence from prescribed professionals. The term "directly" means that there must be a causal link between the severe impairment and the restriction. The direct restriction must also be significant. Finally, there is a component related to time or duration – the direct and significant restriction may be either continuous or periodic. If periodic, it must be for extended periods. Inherently, any analysis of periodicity must also include consideration of the frequency. All other things being equal, a restriction that only arises once a year is less likely to be significant than one that occurs several times a week. Accordingly, in circumstances where the evidence indicates that a restriction arises periodically, it is appropriate for the ministry to require evidence of the duration and frequency of the restriction in order to be "satisfied" that this legislative criterion is met.

DLA are defined in section 2(1) of the EAPWDR and are listed in both the PR and the AR sections of the PWD application with the opportunity for the prescribed professional to check marked boxes and provide additional narrative. DLA, as defined in the legislation, do not include the ability to work.

In his SR, the appellant writes that normal activities are more difficult to complete on his own, including going to the washroom, walking up the stairs or driving for more than half an hour. The ministry notes the areas of DLA for which the GP, a prescribed professional, reports the need for continuous assistance in the AR and the questionnaire (housekeeping, shopping and meals) but does not provide additional commentary. The panel notes that the GP does not explain why the appellant requires continuous assistance due to difficulties bending, given the GP's assessment of the ability to walk unaided 1-2 blocks outdoors (described as 10 -15 minutes in the AR), independently manage all walking indoors, and lift, carry and hold up to 5 kg. (albeit not from ground level). The panel also notes that this assessment of physical functional skills is consistent with the appellant's description of finding normal activities more difficult, which suggests he remains at least partially independent. Additionally, as the ministry notes, for those DLA tasks for which periodic assistance from another person is required (transfers on/off chair and in/out of bed) or which are reported to take significantly longer than typical to perform (dressing, bathing [once per week due to lack of motivation arising from depression], transfers in/out of bed, and getting in and out of a vehicle), there is no description of the frequency and duration of the periods or of how much longer in order to determine if they represent a significant restriction to overall level of functioning.

Respecting one of the two DLA specific to mental impairment, "make decisions about personal activities, care or finances", as previously discussed under Mental Impairment, these decision-making DLA tasks are either managed independently or described as taking longer or requiring assistance due to physical not mental limitations. The second DLA specific to mental impairment is defined in the

legislation as “relate to, communicate or interact with others effectively” and is reflected in the PWD application as “social functioning” and “communication.” As also previously discussed under *Mental Impairment*, while the GP identifies the need for continuous support/supervision with all areas of social functioning, described as having “cut off” relationships with family, as the ministry notes, the only persons who are reported to provide assistance to the appellant are family members. Additionally, the GP reports that there are no cognitive difficulties with communication.

Based on the foregoing analysis, the panel concludes that the ministry reasonably determined that the limitations in the appellant’s ability to manage his DLA due to back, rib and chest pain and lack of motivation established by the GP’s assessments are indicative of a moderate level of restriction. Therefore, the panel concludes that the ministry reasonably determined that there is not enough evidence to confirm that the appellant’s impairment *significantly* restricts his ability to perform DLA either continuously or periodically for extended periods.

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 DLA.

While the information establishes that the appellant requires and benefits from assistance from his family and the use of assistive devices, as the establishment of direct and significant restrictions with DLA is a precondition of the need for help, the panel concludes that the ministry reasonably determined that because it has not been established that DLA are significantly restricted, it cannot be determined that help is required.

Conclusion

The panel finds that the ministry’s reconsideration decision, which determined that the appellant was not eligible for PWD designation, was reasonably supported by the evidence and therefore confirms the decision. The appellant is not successful on appeal.