

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 23, 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 and duration requirement but 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 those restrictions, the appellant requires an assistive device, the significant help or supervision of another person 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

On March 1, 2017 the ministry received the appellant's PWD application comprised of a Medical Report (MR) completed by the appellant's orthopedic surgeon (the "Specialist") dated February 22, 2017, an Assessor Report (AR) completed by the appellant's family physician (the "Physician") dated February 28, 2017, and the appellant's Self-report (SR) dated March 1, 2017.

The appellant's request for PWD designation was denied on April 13, 2017. On May 10, 2017 the appellant submitted her completed Request for Reconsideration (RFR).

On June 1, 2017, the tribunal received the appellant's Notice of Appeal.

Summary of relevant evidence

Diagnoses

In the MR the Specialist indicates that the appellant is diagnosed with osteoarthritis in both knees, date of onset not indicated. The Specialist indicates that he met the appellant on one occasion. In the AR the Physician indicates that the appellant has severe arthritis in both knees. The Physician indicates that he has known the appellant for 10 months and has seen her 2-10 times during that time period.

Physical Impairment

In the Health History portion of the MR, the Specialist indicates that the appellant has severe osteoarthritis right knee and moderate osteoarthritis left knee, with pain in her right knee being 6-9/10 and the pain in the left knee being less. The Specialist indicates that the appellant cannot work or function and is awaiting right knee replacement. Under Degree and Course of Impairment, the Specialist indicates that the appellant will require bilateral knee replacement over the next 2-4 years.

The Specialist indicates that the appellant can walk 4+ blocks unaided on a flat surface, can climb 5+ steps unaided, has no limitation remaining seated, and her limitations in lifting are unknown. The Specialist indicates that the appellant does not require any prostheses or aids for her impairment.

In the AR the Physician indicates that the appellant is independent with walking indoors, standing, lifting, and carrying and holding but takes significantly longer with walking outdoors (can manage 2 blocks max) and climbing stairs (difficulty climbing down).

In the SR, the appellant indicates that she has severe pain in the right knee and that it is very difficult walking long distances. She indicates that for stairs she does one step at a time with much strain on her left leg.

In the RFR the appellant states that she has arthritis in both kneecaps, and the right knee is more severe than the left. She states that on some days she finds mobility very hard and uses a knee brace when she knows she has to do some walking which isn't too far. The appellant states that she has numbness in both feet, the right foot has three cysts and one is attached to nerves on the bottom of the foot, which is inoperable, and she finds it very hard putting shoes on. She states that on a good day she takes 12 tablets of over the counter pain medication and on a bad day she takes up to 20 tablets just to walk without pain.

Mental Impairment

In the MR the Specialist indicates that the appellant does not have any significant deficits with cognitive and emotional function and does not have any difficulties with communication. In the AR the Physician indicates that the appellant's ability to communicate in all areas is good. The Physician indicates that there is no impact to any of the listed areas for cognitive and emotional functioning.

DLA

In the MR, the Specialist indicates that the appellant's impairment does not restrict her in the areas of personal self care, meal preparation, management of medications, basic housework, mobility inside the home, management of finances, or social functioning. The Specialist indicates that the appellant requires continuous assistance with mobility outside the home and use of transportation. He indicates that it is unknown whether the appellant's impairment directly restricts the appellant's DLA of daily shopping. The Specialist comments that the appellant has significant pain on walking.

In the AR the Physician indicates that the appellant takes significantly longer with dressing as she has difficulty dressing the lower half of her body but is independent with all other aspects of personal care. The Physician indicates that the appellant is independent with laundry but takes significantly longer than typical with basic housekeeping, with any tasks involving kneeling. The Physician indicates that the appellant is independent with all aspects of shopping, meals, paying rent and bills, and medications. The Physician indicates that the appellant is independent with using transit schedules and arranging transportation but takes significantly longer than typical getting in and out of a vehicle and using public transit as it is difficult due to her bilateral knee pain.

The Physician indicates that the appellant is independent with DLA of social functioning.

In the SR, the appellant indicates that she has difficulty walking long distances and can only manage stairs one step at a time. In the RFR the appellant states that when she goes grocery shopping she uses a shopping cart for support and at home she uses a chair lift rather than the stairs as she finds the stairs too difficult.

Need for Help

In the MR, the Specialist does not provide any information regarding the appellant's need for assistance with DLA. In the AR, the Physician indicates that the appellant receives help from family. The Physician indicates that the appellant is not using a walker or crutches at present but will likely need them in the future. The appellant does not have an Assistance Animal.

Additional information provided

In her Notice of Appeal dated June 1, 2017, the appellant states that "*[m]y mobility a lot where I rely on family members stress level is getting out of control*".

Prior to the hearing the appellant provided a written submission dated June 12, 2017 indicating that she is not sure what more information is needed. The appellant states that she understands that she is too independent, that all she has left is her independence and dignity, and the system want's to take that away from her. The appellant states that her independence comes with a price, and on a good day she can walk two blocks, stop and rest for a while and turn around. She states that she avoids stairs at all possible and uses a chairlift at home. She states that to be mobile she has to take

painkillers and wait before starting another task. She states that she has already sent in all medical records and nothing has changed.

With the consent of both parties, the hearing was conducted as a written hearing pursuant to section 22(3)(b) of the *Employment and Assistance Act*.

Admissibility of New Information

The panel has admitted the information in the appellant's Notice of Appeal and submission as it is evidence in support of information and records that were before the ministry at the time of reconsideration, in accordance with section 22(4) of the *Employment and Assistance Act*. In particular, the information relates to information at reconsideration respecting the self-reported severity of the appellant's impairment, particularly her ability to walk and climb stairs.

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 when concluding it was not satisfied that

- a severe physical or mental impairment was established;
- 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 help, as it is defined in the legislation, 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

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 MR 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 an 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 argues that she has a severe impairment due to her osteoarthritis in both knees, right worse than left, which impacts her ability to walk and climb stairs. The appellant's position is that she can walk two blocks, then has to rest before she can walk any further and that she avoids stairs if at all possible, using a chair lift at home.

The ministry's position is that while it is acknowledged that the appellant has significant pain in both knees and is expected to have knee replacement, she is currently independent in all of her DLA with minimal functioning impairment in only a few areas. The ministry's position is that this does not represent a severe overall restriction to her mobility to function independently or effectively; therefore, it has not been established that she has a severe physical impairment.

In particular the ministry notes that the Specialist indicates that the appellant can walk 4+ blocks unaided, can climb 5+ steps unaided, and has no limitations with sitting. The ministry also states that the appellant's self-report of having bunions and cysts cannot be considered, as these medical conditions have not been confirmed by either the Specialist or the Physician.

The medical evidence indicates that the appellant has osteoarthritis in both knees, right worse than left, and is expected to have bilateral knee replacements over the next 2-4 years. The appellant's

evidence is that she has significant pain, which impacts her mobility, particularly walking and climbing stairs. However the appellant's reported level of functioning, being able to walk 4+ blocks unaided, climb 5+ steps unaided and no limitations with sitting, does not indicate a level of functioning as being at the more restricted end of the rating scale in the MR. While the Specialist and the Physician both describe the appellant's impairment as severe, the use of the word severe, without further information describing the appellant's actual function and limitations, is not sufficient.

While the Specialist indicates that the appellant cannot work or function, the panel notes that employability is not a criteria for designation of PWD. It is not clear what the Specialist means when he states that the appellant cannot function, given the high level of reported functional skills and minimal restrictions to DLA. The Specialist has not provided any further explanation of his comments in that regard.

In the RFR the appellant states that she has severe bunions on both feet and three cysts on her right foot but neither the Specialist nor the Physician confirm that diagnosis or mention this medical condition in the MR or the AR. While the appellant states that she uses a knee brace, the Specialist in the MR indicates that the appellant does not require any prosthesis or aids for her impairment. In the MR, the Physician does not indicate that the appellant is using a brace so the information provided as between the appellant and the prescribed professionals is inconsistent in this regard.

While the evidence establishes that the appellant has pain and some restrictions to her mobility, based on all of the information, the panel finds that the ministry reasonably determined that a severe physical impairment has not been established.

Mental Impairment

In her Notice of Appeal the appellant states that her stress level is getting out of control, but she did not argue that she has a mental impairment. The information provided by the Specialist in the MR and the Physician in the AR indicates that there are no significant deficits to cognitive and emotional function and no impact on daily functioning in the areas of cognitive and emotional function,

The panel finds that ministry reasonably determined that the evidence respecting the appellant's cognitive, emotional, and social functioning does not establish a severe impairment of mental functioning.

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 that the legislative criteria are met, 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 how frequently the activity is restricted. 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 MR 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.

The appellant's position is that she has a severe physical impairment that makes mobility very difficult. In her submission she states that on a good day she can walk two blocks then has to stop and rest for a while, then turns around. She indicates that she avoids stairs if at all possible and uses a chair lift at home. She states that in order to be mobile she has to take painkillers and then wait before starting another task. She states that with shopping she has to use a shopping cart for support.

In the reconsideration decision, the ministry noted that the appellant has continuous restrictions with mobility outside of the home and with transportation but that there are no restrictions to personal self-care, meal preparation, managing medications, basic housework, mobility inside the home, managing finances, and with social function. The ministry notes that the Physician indicated that the appellant has difficulty dressing the lower half of her body and has trouble kneeling but uses no assistive devices at present, but will likely need to in the future.

The ministry's position is that while the appellant's arthritis causes pain in her knees with some limitations, she functions independently and is not reported to require assistance in any of her DLA's. The ministry's position is that the appellant's ability to perform DLA is not directly and significantly restricted.

The Specialist indicates that the appellant is continuously restricted with mobility outside the home and use of transportation but is not restricted with other DLA and he does not indicate that the appellant requires assistance with the DLA of mobility outside the home and use of transportation. In the AR, the Physician indicates that the appellant is independent in most areas but takes significantly longer than typical with dressing, basic housekeeping, getting in and out of a vehicle and using public transportation. However, with dressing the delay is in difficulty dressing the lower half of her body and with basic housekeeping it takes the appellant longer with tasks involving kneeling. There is no information provided as to how much longer than typical it takes the appellant to perform these aspects of DLA.

While the appellant states that she uses a grocery cart while shopping she does not provide any information as to the assistance she needs or how much she receives from her family members. While the Physician indicates that the appellant takes significantly longer than typical with basic housework tasks that involve kneeling the Specialist indicates that the appellant is not restricted with basic housework and the appellant has not provided any information about difficulties with housework. While the appellant states that she uses between 10 and 20 painkillers per day the MR indicates that the appellant has not been prescribed any medications that interfere with her ability to perform DLA.

While the evidence establishes that the appellant has an impairment that impacts her ability to walk, that she avoids climbing stairs if possible and that she may have some difficulty with some aspects of housework that involve kneeling and some aspects of dressing her lower body, the panel finds that the ministry has reasonably determined that the independence with which the prescribed professionals report that the appellant manages her DLA does not confirm that the appellant has a severe impairment that significantly restricts her ability to perform DLA 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.

The appellant's position is that she requires help with DLA because of her severe physical impairment of osteoarthritis. The appellant states that she relies on family members.

The ministry argues that because it has not been established that DLA are significantly restricted, it cannot be determined that help is required.

The Specialist did not provide any information on help needed. The Physician indicates that the appellant obtains assistance from family and that although she is not using a walker or crutches at present she will likely need them in the future. The appellant does not provide any information regarding how much help she needs or how frequently she needs help. There is no information from the prescribed professionals regarding the frequency or duration of the help provided by family members.

Given that confirmation of direct and significant restrictions with DLA is a precondition of the need for help criterion and as the panel found that the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established, the panel also finds that the ministry reasonably concluded that it cannot be determined that the appellant requires help to perform DLA as required by section 2(2)(b)(ii) of the EAPWDA.

Conclusion

The panel finds that the ministry's reconsideration decision, which determined that the appellant was not eligible for PWD designation, was reasonably supported by the evidence and is a reasonable application of the applicable enactment, and therefore confirms the decision. The appellant is not successful on appeal.