

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated June 19, 2017 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 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

nor was the ministry satisfied that the appellant fit with in one of the five classes of persons eligible for PWD designation under section 2.1 of the *Employment and Assistance for Persons with Disabilities Regulation* (EAPWDR).

## PART D – Relevant Legislation

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

*Employment and Assistance for Persons with Disabilities Regulation* (EAPWDR), Sections 2 and 2.1

## PART E – Summary of Facts

### **Documents and Information Before the Minister at Reconsideration**

The evidence before the ministry at the time of the reconsideration decision included:

#### **A. The Persons with Disabilities (PWD) application dated December 16, 2016**

**In the Applicant Information Section**, in which the appellant's medical conditions are described by the appellant as

- being overweight
- having problems with alcohol
- being a heavy smoker with Chronic Obstructive Pulmonary Disorder (COPD)
- being frequently ill with colds and bronchitis
- an injury 15 years ago (broken ankle) which was repaired with screws and bolts, but now swells when she is standing for any length of time
- difficulty with walking which combined with low back pain and low-paying jobs, she does not get much exercise other than walking, which has put strain on her back and hips such that she is in constant pain and cannot sit for any length of time without increased pain
- so much pain that she took a medical leave from her last job
- an employer who could not accommodate her need for frequent breaks from standing and ability to only work only 3 or 4 hour shifts
- difficulty with normal household chores such as washing dishes, vacuuming, and laundry as these tasks required bending over and standing, causing and increasing pain
- depression and constant pain
- inability to climb stairs
- difficult to walk more than a block due to COPD and hip, foot, and back pain
- inability to drive due to lack of funds to ensure her car, requiring that she walk to the bus to buy groceries or go on other errands, but limiting her to how much she can purchase and still be able to carry her purchases and walk home with them, so she is housebound most of the time.

#### **B. The Persons with Disabilities Designation Denial Decision Summary dated March 1, 2017**

The adjudicator reports that the appellant is 18 years of age or more and that her impairment is likely to continue for two or more years. The adjudicator, having reviewed the reports says that the appellant was diagnosed with lumbar back pain resulting from an L 4-5 disc protrusion. The adjudicator reported that the appellant experienced persistent pain in the lower back and groin area, limiting her ability to walk, sit and stand, but she does not require any assistive devices, and reviewing her physical ability is concluded that the level of functional skills does not indicate severe physical impairment and that her Daily Living Activities (DLA) are not directly and significantly restricted due to her impairment in adjudicator also reported that the appellant does not require help with her DLA because it is not been established that they are significantly restricted and therefore whether significant help is required cannot be determined.

#### **C. A Medical Report (MR) completed by a Physician (General Practitioner) dated December 8, 2016**, reporting that the appellant has been his patient for 15 years and he has seen her between two and 10 times in the past 12 months, and which included a section reporting

- that the appellant's diagnosis is lumbar back pain resulting from an L4-5 disc protrusion since 2013, and a health history of persistent lower back and right growing pain on a daily basis for more than two years, which limits her walking/sitting/standing and that she has been treated with steroid injections with no benefit; no other medication or treatments which interfere with her ability to perform DLA have been prescribed, and that she requires no aids for her impairment

- the GP states that the appellant's impairment is likely to continue for two or more years, and that given the degenerative nature of the specific diagnosis, there is not likely to be improvement
- on the Appellant's Functional Skills, reporting that the appellant
  - walk 2 to 4 blocks unaided,
  - climb 5 or more steps unaided, but with a railing
  - lift under 2 kilograms, and
  - remain seated for less than 1 hour,
  - and has no significant deficits with cognitive and emotional function

The panel notes that in the MR the family physician stated "No" in answer to the question "*Does the applicant require any prostheses or aids for his/her impairment?*"

**D. An Assessor's Report (AR) dated December 8, 2016** and completed by the same physician who completed the MR.

For DLA, the assessor reports that the information for the report was obtained from the file/chart, but not from an office interview with the appellant, a home assessment, family/friends/caregivers, other professionals, community services or other sources). The assessor reports that with the DLA of

- Personal Care, where there are 8 listed tasks, the appellant is independent in all 8,
- Basic Housekeeping, where there are 2 listed tasks, the appellant is independent in 1, and requires periodic assistance is independent in 1, and explains that the periodic assistance required is that it takes the appellant significantly longer than typical to perform the task because of limitations in bending and standing
- Shopping, where there are 5 listed tasks the appellant is independent in 4, requires continuous assistance in 1, such assistance being described as continuously needing assistance in carrying purchases that way more than 5 pounds home, and that her son assistance with lifting/carrying and that activities which involve a standing are limited in duration\*
- Meals, where there are 4 listed tasks, the appellant is independent in all 4
- Pay Rent and Bills, where there are 3 listed tasks, the appellant is independent in all 3
- Medications, where there are 3 listed tasks, the appellant is independent in all 3
- Transportation, where there are 3 listed tasks, the appellant is independent in all 3
- Social Functioning, which is only to be completed if the appellant has an identified mental impairment, the physician has marked as Not Applicable.

**E. Physician's Letter dated May 19, 2017**

The appellant's family physician, the same physician who completed the MR and the AR, wrote the ministry adding a diagnosis of moderate COPD causing the appellant shortness of breath on exertion which, together with the appellant's lumbar degenerative disc disease restricts her walking into about one block before having to sit down, as the appellant reported to the physician. He reported she can stand for three or four minutes at most before the back pain causes her to sit. These difficulties impair the appellant's ability to prepare meals or do laundry housework. She is not able to vacuum or bend over to do housework. He has difficulty getting up after sitting but she can negotiate stairs slowly if there are rails. The physician says that the appellant would benefit from tub and bathroom rails for toilet use and that public transport is difficult given her "ambulation difficulties unquote because of back pain and shortness of breath."<sup>1</sup>

## **Information Provided on Appeal**

### **Appellant's Additional Evidence**

#### *Appellant's Witness' Additional Oral Evidence*

The witness, the appellant's sister, gave additional evidence that the appellant has a severe physical impairment due to severe back pain which impairs the appellant's ability to perform DLA such as housework, vacuuming, meal preparation, using the bathroom and the shower. She requires regular assistance with those activities. She is assisted by her son who lives with her and who does most of the cleaning and cooking. The witness said the appellant has difficulty using the toilet, can walk upstairs but needs to hold on to something, and after walking a short distance needs to find a place to sit while she recovers. Witness said that the appellant sometimes needs help getting up out of the chair, and that often when her son was away she does not eat because there is no one there to cook. The witness took issue with the physician reporting in the AR that the appellant is independent in walking both indoors and outdoors and said that the appellant needs a walker but cannot afford one. The witness said that the appellant's son goes shopping for her as he can carry the purchases home whereas the appellant can carry less than 5 pounds. Witness also gave evidence of the appellant losing her job because of being unable to stand or sit for any length of time because after a short while her legs go numb.

#### *Ministry Position on Appellant's Witness' Additional Oral Evidence*

The ministry was not opposed to admission of the witness' additional oral evidence.

#### *Panel Finding on Appellant's Witness' Additional Oral Evidence*

The witness' additional evidence further explained the appellant's difficulties with and assistance needed with those at DLA referred to in the AR under "Basic Housekeeping" and "Shopping". Her additional evidence also expanded upon and explained why the appellant takes significantly longer than typical to perform those DLA. Her additional evidence also expanded upon the information in the physician's letter of May 19, 2017. Because the additional evidence further explained and expanded upon the appellant's difficulties with DLA, the panel finds that the witness' additional oral evidence is in support of the information and records that were before the minister when the reconsideration decision being appealed was made and admits that additional evidence pursuant to section 22(4) EAA.

#### *Appellant's Additional Oral Evidence*

The appellant gave additional evidence, saying that as far as the DLA cooking is concerned she can do some as long as she can hold onto a counter, but she sometimes gets spasms if she uses a utensil in the wrong way and that will end her cooking for the time being. She said it is difficult to shower because there is nothing to hold on to. She said it takes her a long time to walk even less than a block; there is a store located about a block away from her home and when she walks there and back there is a wall to steady herself and benches to sit on but it is difficult to walk up hill from the store back to her home. She said that her condition has deteriorated since she made the initial application for PWD designation in December 2016, and that is reflected in her physician's letter of May 19, 2017 submitted as part of her reconsideration application, and that her condition has further deteriorated since then. She says she has Chronic Obstructive Pulmonary Disorder and while her family physician did not provide that diagnosis as part of her original application he did provide it in his May 19, 2017 letter which was before the minister at reconsideration.

#### *Ministry Position on Appellant's Additional Oral Evidence*

The ministry was not opposed to admission of the appellant's additional oral evidence.

*Panel Finding on Appellant's Additional Oral Evidence*

The appellant's additional evidence further explained and expanded upon her difficulties with and the periodic and continuous assistance needed with those DLA identified in the AR and in the physician's letter of May 19, 2017. Her additional evidence also expanded upon and explained why she takes significantly longer than typical to perform those DLA. Because the appellant's evidence further explained information and records that were before the minister when the reconsideration decision being appealed was made the panel the panel admits that additional evidence pursuant to section 22(4) EAA.

**Ministry's Additional Evidence**

The ministry did not submit additional evidence.

## PART F – Reasons for Panel Decision

### Issue on Appeal

The issue on appeal is whether the Ministry's reconsideration decision to deny the Appellant designation as a PWD was reasonably supported by the evidence or was a reasonable application of the applicable enactment, namely section 2(2) *EAPWDA* and sections 2 and 2.1 *EAPWDR*, in the circumstances of the appellant. The Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated June 19, 2017 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 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

nor was the ministry satisfied that the appellant fit with in one of the five classes of persons eligible for PWD designation under section 2.1 of the *EAPWDR*.

### Relevant Legislation

#### ***Employment and Assistance for Persons with Disabilities Act (EAPWDA)***

(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.

#### ***Employment and Assistance for Persons with Disabilities Regulation (EAPWDR)***

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.

#### **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).

#### **General Scheme of the Legislation**

The general scheme of section 2 *EAPDWA* and sections 2 and 2.1 *EAPDWR* is that in order to be designated as a Person With Disabilities (PWD), an applicant must satisfy the Minister that she has a severe mental or physical impairment which is likely to continue for at least 2 years, and that impairment, in the opinion of one of the members of a prescribed class of professionals, directly and significantly restricts her ability to perform Daily Living Activities continuously or periodically for extended periods, and as a result she requires help to perform them. Alternatively, if an applicant fits within any 1 of 5 classes of people described in section 2.1 *EAPDWR*, the person may be designated as a PWD.

#### **Parties' Positions at Appeal**

#### **Analysis**

##### **Section 2(2) *EAPDWA***

##### **Age and Duration and Severe Impairment Requirement**

Section 2(2) *EAPDWA* requires that an applicant for PWD status must be 18 years of age or older, have a severe mental or physical impairment, and that in the opinion of a prescribed professional, is likely to continue for at least 2 years.

At reconsideration the ministry found that the Appellant met the age requirement, and that the Appellant, in the opinion of a physician, had neither a severe physical impairment nor a severe mental impairment. The physician indicated that the appellant's impairment was minimal to moderate, not severe, and that it likely to continue for at least 2 years.

Thus the requirements of section 2(2) of the *EAPWDA* as to age and duration had been met.

### **Severe Physical Impairment**

At reconsideration the ministry found that the appellant did not have a severe physical impairment.

The legislative requirement respecting DLA set out in section 2(2)(b) of the *EAPWDA* is that the minister be satisfied that as a result of a severe physical or mental impairment a person is, in the opinion of a prescribed professional, directly and significantly restricted in the ability to perform DLA either continuously or periodically for extended periods. Consequently, while other evidence - such as that of the witness and of the appellant - 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. 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.

While there was evidence from the appellant and her witness was to the effect that the appellant lost her job about 2 years ago due to her inability to sit or stand for lengthy periods and is still unable to work, DLA, as defined in the legislation, do not include the ability to work.

In this case, the prescribed professionals who have provided information respecting the appellant's ability to perform DLA are the appellant's family physician for both the MR, and the AR.

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 MR and AR completed by the appellant's family physician.

### *Appellant's Position*

The appellant's position was that she was severely physically impaired, and due to her severe back pain impairing her ability to perform the DLA, in the way that both she and her witness have given evidence of, despite the fact that she can, with pain and sometimes only for short periods of time, perform DLA.

### *Ministry's Position*

The ministry relied on the reconsideration decision. In that decision it was stated that the appellant did not require any aids or prosthesis. It was also stated that according to the family physician's opinion set out in the MR, the appellant was able to perform the functional skills set out in the MR unaided, except for needing a railing to climb stairs, and being limited to lifting under 5 pounds and



remain seated for less than an hour. It was also stated in the AR that the appellant has continuous or periodic restrictions with some DLA. However, reading the MR together with the AR indicates that the assistance required is because the appellant cannot lift or carry more than 5 pounds without requiring assistance from her son, and takes significantly longer than typical to manage some tasks, such as basic housekeeping in which she is limited by her difficulties with bending and standing. The physician also observed that she requires continuous assistance carrying purchases weighing more than 5 pounds home and she obtained that assistance from her son.

The ministry found these factors more indicative of a moderate rather than a severe physical impairment.

#### *Panel Finding*

The panel notes that the assessor completed the AR using only the file/chart information, and did not utilize an office interview with the appellant, had no home or other assessments, obtained no information from the appellant's family/friends/caregivers, other professionals, or community services.

The panel finds that the appellant's functional skills, as set out in both the MR and the AR, are indicative of an individual whose impairment, while it may directly restrict the appellant's ability to perform DLA, are more indicative of a moderate level of impairment causing the appellant to perform DLA more slowly, than they are of a severe impairment restricting the appellant from performing one or other DLA entirely.

The panel finds that the ministry's decision at reconsideration that the appellant does not have a severe physical impairment was reasonably supported by the evidence and was a reasonable application of the applicable enactment in the circumstances of the appellant.

#### **Severe Mental Impairment**

At reconsideration the ministry found that the appellant did not have a severe mental impairment.

#### *Appellant's Position*

The appellant did not claim that she had a mental impairment.

#### *Ministry's Position*

The ministry relied on the reconsideration decision. In the MR the family physician reported that the appellant did not experience significant deficits with cognitive and emotional functioning and in the AR wrote "N/A" indicating "not applicable" to this section dealing with Cognitive and Emotional Functioning.

The ministry therefore determined that the appellant did not have any severe mental impairment.

#### *Panel Finding*

Why the minister, at reconsideration, determined that the appellant had no mental impairment when she did not claim she had such an impairment and the physician did not give an opinion on mental impairment is not known, but as the ministry did make a finding, the panel finds that the ministry's decision at reconsideration that the appellant does not have a severe mental impairment was reasonably supported by the evidence and was a reasonable application of the applicable enactment in the circumstances of the appellant.

**Section 2(2)(b)(i) & (ii) EAPWDA**  
**Direct and Significant Restriction in the Ability to Perform Daily Living Activities**

Section 2(2)(b)(i) EAPWDA requires that a prescribed professional provide an opinion that the Appellant's mental or physical impairment directly and significantly restrict the person's ability to perform daily living activities either continuously or periodically for extended periods.

Section 2(2)(b)(ii) EAPWDA requires that a prescribed professional provide an opinion that as a result of the direct and significant restrictions of the Appellant's ability to perform Daily Living Activities, the Appellant requires help to perform those activities.

*Appellant's Position*

The appellant's position, from her evidence and that of her witness, was that she requires daily assistance with some DLA.

*Ministry's Position*

The ministry relied on the reconsideration decision. The ministry found that, because of the DLA as reported by the physician in both the MR and the AR, the appellant had limitations resulting from her lower back pain and shortness of breath, she could still independently perform most DLA but at a reduced pace or in a reduced capacity, that the appellant's physical impairment was more indicative of a moderate impairment as opposed to a severe impairment of the appellant's ability to perform DLA.

In that decision the ministry found that it could not be determined that the appellant had either a severe physical impairment or a severe mental impairment. The reconsideration decision stated that while it was to be expected that the appellant would encounter some restrictions in her ability to perform DLA and require assistance as a result, there was not enough evidence to confirm that the appellant's impairment significantly restricted her ability to perform DLA either continuously or periodically for extended periods.

*Panel Finding*

The panel notes that the determination of whether or not there is a direct and significant restriction of the Appellant's ability to perform Daily Living Activities is to be determined by the opinion of a prescribed professional and that while the opinion of the appellant or of another person is of assistance, the determination is that of the prescribed professional.

The panel finds that no prescribed professional determined that the appellant has a severe physical or mental impairment which directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically. The panel finds that the opinion of the physician in the MR, the AR, and his letter of May 19, 2017 all explain that the appellant had difficulty with a few tasks in the several DLA, but not that any of these tasks were impossible for her; that her limitations caused her to take significantly longer with some tasks or to require the continuous assistance of someone else with two tasks, specifically "lifting" and "carrying and holding" when she had to lift or carry heavier objects. The panel finds that none of the limitations found by the prescribed professional prevented the appellant from being able to perform any DLA but rather that she could perform all DLA, albeit more slowly or with assistance for part of a DLA.

The panel finds that the ministry's determination at reconsideration that the appellant does not have a severe physical or mental impairment that directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods was reasonably supported by the evidence and was a reasonable application of the applicable enactment in the circumstances of the appellant.

### **Alternative Grounds – Section 2.1 EAPWDR**

As an alternative to an applicant for a PWD designation under section 2(2) *EAPWDA*, where the applicant must show that she has a severe mental or severe physical impairment which in the opinion of a physician or nurse practitioner is likely to continue for at least two years, and which in the opinion of a prescribed professional directly and significantly restricts her ability to perform DLA either continuously or periodically and that as a result of such restrictions she requires help to perform those activities, an applicant for PWD designation will be granted that designation if she falls under any of five classes of persons prescribed in section 2.1 *EAPWDA*, which are:

- She is enrolled in Plan P under the Drugs Plans Regulation
- She has at any time been determined is an eligible individual to be the subject of payments made through the Ministry of Children and Family Development's At Home Program
- She has been at any time determined as eligible to receive community living support under the *Community Living Authority Act* by Community Living British Columbia
- She is a member of a family which has been at any time determined to be eligible to receive community living support under the *Community Living Authority Act* so as to assist his family in caring for the person, as determined by Community Living British Columbia, or
- She is a person considered to be disabled under section 42(2) of the *Canada Pension Plan*

#### *Appellant's Position*

The appellant did not make an application for PWD designation based on any of the 5 alternative grounds, and did not advance such a claim at the appeal.

#### *Ministry's Position*

The ministry determined at reconsideration that the appellant had not demonstrated that she fell within one of the 5 classes of people who may qualify for PWD designation on alternative grounds.

#### *Panel Finding*

The panel notes that although the reconsideration decision addressed the appellant's eligibility under section 2.1 *EAPWDR*, the appellant had not applied for PWD designation under section 2.1 *EAPWDR*.

### **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 was a reasonable application of the applicable enactment in the appellant's circumstances.

The appellant is not successful in her appeal.