

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 July 31, 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 Regulation, section 2

Employment and Assistance for Persons with Disabilities Act, section 2

PART E – Summary of Facts

Information before the minister at reconsideration included:

1. A letter from a physician To Whom It May Concern, dated January 13, 2017 stating that the appellant was assessed on January 13, 2017 and that she has a history of a severe motor vehicle accident in 1988 which required numerous surgeries and that she has been unable to work.
2. A letter from the appellant, undated, stating that she had a motor vehicle accident in 1988, which resulted in a year's hospitalization and has left her with arthritis and rheumatism, making it difficult to walk or carry or to stand or sit for long.
3. A PWD application comprised of the applicant information signed by the Appellant on February 12, 2017, a Medical Report (MR) signed March 13, 2017 and an Assessor Report (AR) dated April 12, 2017, completed by a social worker. In the MR, the physician reported that the Appellant has been his patient since December 2016, and that he has seen her 2 to 10 times in the past 12 months. The assessor reported that this was the first contact with the appellant and that she had seen her once. The Appellant completed a self-report.

The PWD application included the following information:

Diagnosis

MR

In the MR, the Appellant's diagnosis was reported as multiple musculoskeletal, Digestive and respiratory injuries, past severe MVA with an onset date of 1988.

Self-Report

The Appellant described her condition as difficulty breathing, difficulty chewing, painful neck with difficulty turning her head, painful left shoulder with difficulty moving or lifting her arm, pain in fingers, a slight limp due to missing bone, painful left leg, painful back and rheumatoid arthritis.

Degree and Course of Impairment

MR

The physician ticked "yes" to the question "Is the impairment likely to continue for two years or more from today?" with the comment, "Chronic injuries, indefinite."

Functional Skills

MR

The physician provided the following information regarding any functional limitations:

- The Appellant can walk 1 to 2 blocks unaided;
- Climb an unknown number of stairs;
- No lifting;
- Sit less than one hour;
- Has no difficulties with communication (other than lack of fluency in English);
- Has no significant deficits with cognitive and emotional function.

AR

The social worker, as assessor, provided the following information for Mental or Physical Impairment (Abilities):

- Ability to Communicate: Speaking, Reading, Writing are satisfactory. Hearing is poor.
- Mobility and Physical Ability: walking indoors and outdoors, climbing stairs and standing, lifting and carrying and holding are reported to take significantly longer than typical. Walking outdoors 1 to 2 blocks maximum, climbing stairs 5 to 6 very slowly, standing 5 minutes maximum, lifting 1 kilogram

maximum, carrying and holding 1 kilogram maximum, with the comment "All moving about takes at least 3-5x longer due to severe pain, fatigue, poor range of motion and poor respiration." The assessor reported no impacts on cognitive and emotional functioning.

Self-report

The Appellant reported that she cannot sit for any length of time, cannot carry, has difficulty walking up on stairs or just a few, cannot stand for longer than a few minutes.

Daily Living Activities (DLA)

MR

The physician checked Yes, the Appellant has been prescribed medication/treatment that interferes with her ability to perform DLA, with the comment "Occasional NSAIDs".

The physician reported that the appellant's impairment directly restricts her ability to perform DLA in the following areas:

Basic housework: continuous restriction.

Daily shopping: periodic restriction.

Mobility outside the home: periodic restriction.

Use of transportation: periodic restriction.

The comment explaining "periodic" is "Dependent upon pain flare ups." The physician also writes that the appellant requires occasional assistance putting her clothes on.

AR

Personal Care

The Appellant is reported to take significantly longer than typical with dressing, grooming, bathing, toileting, regulating diet and transfers in and out of bed. The explanation for dressing, grooming and bathing is "Pain, fatigue, poor R.O.M.". The explanation for regulating diet is "Digestive problems".

Basic Housekeeping

The appellant is reported to require periodic assistance and to take significantly longer with laundry and basic housekeeping, with the explanation "Needs help".

Shopping

The appellant is reported to require periodic assistance and to take significantly longer with going to and from stores, with the explanation "Needs help", and to take significantly longer with reading prices and labels, making appropriate choices and paying for purchases and to require continuous assistance and to take significantly longer carrying purchases home, with the explanation "Always needs help or unable".

Meals

The appellant is reported to require periodic assistance with food preparation with the explanation "Pain, fatigue, poor ROM" and cooking with the explanation "Needs help" and to take significantly longer with meal planning, food preparation and cooking.

Pay Rent and Bills

The appellant is reported to take significantly longer with banking with the explanation "Pain & fatigue" and to take significantly longer with budgeting and paying rent and bills.

Medications

The appellant is reported to take longer with filling and refilling prescriptions with the explanation "Pain & fatigue" to take longer with taking as directed and to be independent with safe storage and handling.

Transportation

The appellant is reported to take longer with getting in and out of a vehicle and using public transportation, using an assistive device ("Needs seat".) and to be independent in using transit schedules.

Under additional comments, the assessor wrote, "Requires assistance with meal prep & cooking and seat on transportation as a direct result of her impairments. All moving about/attempting tasks takes at least 3 – 5x longer due to severe pain, poor ROM and restricted respiration."

The section dealing with Social Functioning is left blank.

Self Report

The Appellant wrote that she has a hard time dressing and brushing her hair but she does it by herself, she cooks, but sits down half the time and uses alternative positions, she can peel vegetables, but it takes time and is painful, she cannot write by hand, she cannot carry but has someone to help. She wrote that it is very painful to find a position to sleep, taking over an hour to fall asleep.

Need for Help

MR

- The physician reported "yes", the appellant requires prostheses or aids for her impairment, specifying a dental appliance.
- Under Additional comments (*relevant to understanding the significance of the person's medical condition*), the physician wrote "[The appellant] was in a severe MVA in 1988. She required numerous surgeries while in [another country]. She suffers from ongoing musculoskeletal pain, breathing difficulties and digestive symptoms."

AR

- The assessor reported that assistance is provided by her roommate and a friend.
- The section asking if help is required but there is none available is left blank. Assistance provided through the use of assistive devices is blank.
- Assistance provided by assistance animals is marked *No*.

Self Report

The Appellant wrote that neighbours and friends help her with shopping and with things she has to do in her home.

4. The ministry's PWD Designation Denial Decision Summary dated June 1, 2017.
5. The ministry's letter to the appellant advising her of their decision, dated June 1, 2017.
6. The appellant's Request for Reconsideration, signed July 6, 2017.
7. A copy of a consultation report in the appellant's name from the BC Cancer Agency, dated June 9, 2017, reporting evidence of asthma, suspicion of restrictive lung disease, recurrent lung infections,

recommending a CT scan and gastrointestinal referral.

8. A black and white photograph of an automobile collision.

The Appellant submitted the following documents to the Panel at the hearing:

1. A colour reproduction of the black and white photograph previously provided with her Request for Reconsideration
2. A letter from a physician previously involved in the appellant's care, confirming her diagnoses and restrictions on her DLA restating facts previously noted - that she has severe permanent impairment in all spheres of physical activity.

The Ministry had no objection to the admission of these documents. The Panel admitted the documents under section 22(4) of the Employment and Assistance Act as written testimony in support of the information that was before the minister at reconsideration as they are in support of statements made by the Appellant and her physician in her PWD application and subsequently. The photograph is the same as that submitted by the appellant previously.

At the hearing, the Appellant stated that she was very badly injured in an automobile accident in another country in 1988. She was in the hospital for over a year, had to have over 100 surgeries and years of therapy to recover her ability to walk. She said that in 1991 she lost all her immunities and, out of fear for her life, became pregnant in order to gain immunities through her fetus. While that attempt was successful, the birth of her baby was complicated. She stated that when she moved approximately 10 years ago, it was difficult to find a suitable doctor. She stated that she is still in pain and it is impossible for her to work. She stated that it takes her 30 minutes to get out of bed and then 3 hours to prepare for the day, that sometimes she can walk without a cane and sometimes she cannot, and that it is likely she will need a walker at some point in the future. The appellant stated that she saw her assessor only once and she was not interviewed before the assessor report was completed. She stated that she has sleep disturbance but no mental problems, that she cooks a great deal, that she sometimes needs assistance with dressing, bathing or feeding herself, but does need assistance with diet, food preparation and carrying, and that her roommate and friends help her. She said that her roommate must help her get out of chairs if she sits for too long, and that either her roommate or a friend helps her to get out of bed in the morning. She said there have been times when she has stayed in bed for 4-5 hours in the morning waiting until someone was able to come help her out. Finally, she said her doctors are very concerned about her lungs and the possibility of heart attacks.

The ministry referred to the Reconsideration Decision. The ministry stated that due to inconsistencies between the physician's report and the assessor's report, it was hard to get a "good picture" of the disabilities and they placed more emphasis on the assessments provided in the physician's report, because the assessor saw the appellant one time and the physician had known the appellant since 2016, seeing her 2 to 10 times in the past 12 months. The ministry stated that with respect to frequency and duration of the impacts on the appellant's DLA, not enough detail is provided. The ministry noted the Appellant had some barriers but that the application did not serve to explain the severity of the impairments.

PART F – Reasons for Panel Decision

The issue in this appeal is the reasonableness of the ministry's decision that 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.

Legislation

The eligibility criteria for PWD designation are set out in section 2(2) of the EAPWDA as follows:

- (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.

The "daily living activities" referred to in EAPWDA section 2(2)(b) are defined in section 2 of the EAPWDR:

Definitions for Act

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;

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.

Severe physical or mental impairment

The diagnosis of a serious medical condition does not in itself determine PWD eligibility or provide evidence of a severe impairment. To satisfy the requirements in section 2(2) of the EAPWDA, evidence of how, and the extent to which, a medical condition restricts daily functioning must be considered. This includes the evidence from the Appellant and from a prescribed professional regarding the nature of the impairment and its impact on the Appellant's ability to manage the DLA listed in section 2(1) of the EAPWDR. However, section 2(2)(b) of the EAPWDA clearly sets out that the fundamental basis for the analysis of restrictions is the evidence from a prescribed professional - in this case, the physician and social worker.

Appellant's position - Severe physical impairment

The Appellant's position is that she has a great deal of pain due to the effects of a motor vehicle accident in 1988 which left her with musculoskeletal, digestive and respiratory problems that affect her ability to stand, walk lift and carry.

Ministry position – severe physical impairment

The Ministry's position is that due to the inconsistencies between the medical and assessor reports, it is difficult to develop a clear and coherent picture of the degree of impacts to the appellant's ability to perform DLA and the assistance required as a result. The ministry noted in the Reconsideration Decision that the appellant can walk 1 to 2 blocks unaided, it is unknown how many stairs she can climb, she cannot lift any weight and she can remain seated for less than one hour. The ministry commented that the physician did not state how much less than one hour the appellant can sit and that the ability to walk 1 to 2 blocks is not considered to be indicative of a severe impairment. The ministry also noted that although the physician did not indicate how many stairs the appellant can climb, the assessor reported that she can climb 5 to 6 stairs, which makes it difficult to establish a severe impairment of physical functioning. In addition, the ministry stated that the assessor did not describe the frequency of periods during which mobility takes three times longer than typical versus five times longer than typical, noting that taking three times longer than typical with mobility/physical ability is not considered indicative of a severe impairment of physical functioning, and that the assessor did not describe the frequency or duration of periodic assistance from another person with lifting and carrying/holding. Although the assessor stated the appellant can stand for a maximum of 5 minutes, the ministry noted that the physician did not describe limitations with standing.

Panel decision – Severe physical impairment

The panel finds that the ministry reasonably determined a severe physical impairment has not been established on the basis of the information provided. The Panel notes that the Reconsideration Decision contains statements about such requirements as the ability to stand, which is not requested in the medical report section of the application form, and comments about frequency of periods during which mobility takes three times longer than typical versus five times longer than typical, which the Panel notes are not requirements that could be reasonably anticipated by the assessor. However, as both the physician and the social worker report that the appellant can independently walk 1-2 blocks and the information about the appellant's functional abilities in the physician's medical report and the social worker's assessor report is inconsistent in the areas of climbing stairs and lifting, the ministry reasonably concluded that it is difficult to establish a severe impairment of physical functioning.

Appellant's position - Severe mental impairment

The Appellant's position is that she does not suffer from a mental impairment.

Ministry's position – Severe mental impairment

The ministry's position is that the appellant does not have a severe mental impairment.

Panel decision – Severe mental impairment

The panel finds that the ministry reasonably determined the appellant does not have a severe mental impairment based on the information provided. In addition to no diagnosis of a mental impairment, the Appellant's physician and assessor have not indicated any significant impacts of a mental impairment on daily functioning.

Significant Restrictions in the ability to perform DLA

Appellant's position

The Appellant argued that she cannot carry anything, she has difficulties with grooming, she cannot stand at the stove for long and she needs assistance with dressing and housework.

Ministry's position

The ministry's position is that the information provided does not establish that the Appellant's ability to manage DLA is significantly restricted either continuously or periodically for extended periods. The ministry, in the Reconsideration Decision, wrote that the physician reported that the appellant is continuously restricted with basic housework and periodically restricted with shopping, mobility outside the home and with basic housework, but did not describe the frequency or duration of the pain flare-ups that affects the appellant's periodic restrictions. The physician did not report restrictions with personal self-care, meal preparation, management of medications, mobility inside the home or management of finances, although the assessor indicated restrictions to aspects of personal care, meals, medications and paying rent and bills. The ministry noted that taking three times longer to perform a DLA is not considered indicative of significant restrictions to DLA. In addition, the ministry noted that the assessor did not describe the frequency or duration of periodic assistance required with regulating diet, laundry, basic housekeeping, going to and from stores, food preparation and cooking.

Panel decision – Restrictions to DLA

Subsection 2(2)(b)(i) of the EAPWDA requires the ministry to be satisfied that in the opinion of a prescribed professional an applicant's severe impairment directly and significantly restricts DLA either continuously or periodically for extended periods. In this case, the Appellant's physician is the prescribed professional. DLA are defined in section 2(1) of the EAPWDR and are also listed in the PR, with additional details in the AR. Therefore, a 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 a circumstance where the evidence indicates that an applicant has periodic restrictions to her ability to perform DLA or requires significantly longer than typical to perform them, it is appropriate for the Ministry to require evidence of the duration and frequency of the restriction in order to determine if the legislative criterion is met.

The physician, in the MR, made no indication whether personal self-care, meal preparation, management of medications, mobility inside the home or management of finances are restricted. A continuous restriction was noted for 1 DLA, housework, but no additional comments were provided, as requested, describing the degree of restriction, and for the remaining DLA, which were reported to be periodically restricted, the physician noted that the restriction was dependent upon pain flare ups but did not describe either the frequency or duration of the flare-ups. Under "What assistance does your patient need with DLA?", the physician wrote "Requires occ [sic] assistance for putting [on] clothes." The assessor reported that all aspects of personal care except feeding self take significantly longer than typical, all aspects of paying rent and bills take significantly longer than typical, all aspects of meal preparation except safe storage of food either require periodic assistance or take significantly longer than typical, or both. As the ministry notes, there is no diagnoses of a mental impairment to establish the cause of restrictions identified by the social worker with cognitive aspects of DLA. Additionally, it is unclear when activities take 3 times longer, as opposed to 5 times longer, and there is no description of the

frequency or duration of the periodic assistance required. Finally, as the ministry notes, the social worker identifies restrictions with DLA that are not reported by the physician. Based on the above analysis, the Panel finds that the ministry reasonably concluded that there is not enough evidence to 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

Appellant's position – Help with DLA

The Appellant argued that she needs to rely on her roommate and friends to complete DLA.

Ministry's position – Help with DLA

The Ministry's position is that as it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required from other persons.

Panel decision – Help with DLA

The AR indicates that the Appellant does not require any prosthesis or aids, but if help is required she has help from her family and friends. Although the panel notes that the Appellant may require help with some tasks, a finding that a severe impairment directly and significantly restricts a person's ability to manage his DLA either continuously or periodically for an extended period is a precondition to a person requiring help as defined by section 2(3)(b) of the EAPWDA.

As the panel finds that the Ministry was reasonable in determining that the Appellant does not have a severe impairment that directly and significantly restricts his ability to manage her DLA either continuously or periodically for an extended period of time, the necessary precondition is not satisfied. Accordingly, the panel finds that the ministry's decision that the Appellant did not satisfy the legislative criteria of EAPWDA section 2(3)(b) was reasonable.

The panel finds that the ministry's decision finding the appellant ineligible for PWD designation is reasonable based on the evidence and is a reasonable application of the legislation in the circumstances of the appellant. The panel therefore confirms the ministry's decision. The appellant is not successful in her appeal.