

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the ministry) reconsideration decision dated December 15, 2017 that found that the appellant did not meet two 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 he has a severe physical impairment, though not a severe mental impairment, which, in the opinion of a medical practitioner, is likely to continue for at least two years.

However, the ministry was not satisfied that the evidence establishes that:

- the appellant's daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and
- as a result of these restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

PART D – RELEVANT LEGISLATION

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

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

PART E – SUMMARY OF FACTS

The appellant did not attend the hearing. After confirming that the appellant was notified, the hearing proceeded under Section 86(b) of the Employment and Assistance Regulation.

The evidence before the ministry at the time of the reconsideration decision included the Person With Disabilities (PWD) Application comprised of the applicant information and separate, typed self-report dated May 11, 2017, a medical report (MR) dated August 8, 2017 and an assessor report (AR) dated August 15, 2017, both completed by a general practitioner (GP) who has known the appellant for seven months and has seen him 2 to 10 times.

The evidence also included the following documents:

- 1) Pain Management/Neurological Assessment dated September 10 and 26, and October 15, 2013;
- 2) Medical Imaging Report dated April 27, 2017 for an MRI of the appellant's lumbar spine; and,
- 3) Request for Reconsideration dated November 17, 2017, written by the GP, and Request for Reconsideration dated December 8, 2017.

Diagnoses

In the MR, the appellant was diagnosed by the GP with degenerative disc disease and bilateral S1 radiculopathy with an onset in June 2013, as well as scoliosis with no date of onset, and depressive disorder secondary to chronic lumbar pain, with an onset in 2014. In the AR, when asked to describe the mental or physical impairments that impact the appellant's ability to manage daily living activities, the GP wrote: "unable to stand or sit for more than 30 minutes at a time, and so he cannot cook, clean or carry heavy groceries without having a severe increase in back pain, which leaves him unable to move around for several days afterwards."

Daily Living Activities (DLA)

In the MR and the AR, the GP reported:

- Regarding the appellant's health history, the appellant "injured his back while lifting an object at work in June 2013, sustaining a L5-S1 disc herniation. His lumbo-sacral pain has increased over the years and is now severely debilitating. His recent lumbar MRI displays a disc protrusion with a tear at L5-S1, as well as moderate bilateral foraminal stenosis at that level, causing him to experience shooting pain down both his thighs. ...He is still experiencing severe lumbar pain despite his compliance to regularly scheduled [medications]. Some of his ADLs are affected. He developed moderate depression as a result of his chronic pain and inability to work or pursue his usual hobbies."
- The appellant has been prescribed medication that interfered with his ability to perform DLA, with a note that the medication "made him too drowsy, so it was discontinued in May 2017."
- The appellant does not require any prostheses or aids for his impairment.
- For functional skills, the appellant is able to walk 2 to 4 blocks unaided on a flat surface, climb 5 or more steps unaided, lift 2 to 7 kg. (5 to 15 lbs.), and can remain seated for less than 1 hour.
- The appellant is independent with walking indoors and with walking outdoors, and "takes

2 to 3 times longer than a normal person his age” with walking outdoors.

- The appellant is independently able to perform every assessed task of the personal care DLA, the pay rent and bills DLA (including banking, budgeting), the medications DLA (including filling/refilling prescriptions, taking as directed, and safe handling and storage), and the transportation DLA (including getting in and out of a vehicle, using public transit, and using transit schedules and arranging transportation).
- For the basic housekeeping DLA, the appellant requires continuous assistance with the task of laundry and periodic assistance with basic housekeeping.
- Regarding the shopping DLA, the appellant is independent with the tasks of reading prices and labels, making appropriate choices, and paying for purchases, and requires periodic assistance with going to and from stores and carrying purchases home. The GP wrote that the appellant “needs help from family or friends on days where his lumbar pain is more severe” and “there are days when his back pain flares-up, during which he is hardly able to walk indoors. This usually happens after he has over-exerted his back muscles by doing regular daily activities like vacuuming or standing up to cook.”
- For the meals DLA, the appellant is independent with meal planning and safe storage of food and requires periodic assistance from another person with food preparation and cooking, with the explanation from the GP that the appellant “cannot stand for a continuous period long enough to prepare regular meals on a stove. He mainly eats micro-waved food.”
- Regarding social functioning, the appellant is independent in all aspects, specifically: making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others, dealing appropriately with unexpected demands, and securing assistance from others.
- The appellant’s functioning in his immediate social network is assessed as “in between marginal and good” and the GP commented that the appellant “still has positive relationships, but has been a lot more socially isolated due to his depression.” For the extended social networks, the GP indicated that the appellant has good functioning and wrote: “good social functioning, but unable to participate in activities with others due to his severe lumbar pain.”
- The GP indicated that the need for help and any safety issues do not apply to the appellant.

In the Request for Reconsideration, the GP wrote the appellant can only lift 5 lbs., only walk few steps, and lying down relieves his back pain.

In his self-report, the appellant wrote:

- He has become much more depressed as it “set in” that he would never overcome his injury and get his joy for life back. Most of his days are spent complaining to the point that his family does not want to be around.
- He spends most of his days in bed. He pushes himself every day to at least shower and get dressed, which alone wipes him out but also makes him feel a bit better. He needs to lie down after this and build up to attempt his “next adventure.”
- He gets excited and tries to do exercises and this only leads to more pain and, by the second day, he cannot continue due to the pain.
- His eating has gone significantly downhill and, unless a family member offers dinner, for

the most part he lives off of dried soups or frozen foods in the microwave. Standing and cooking anything is far too much work for him to handle. When he attempts this, that is his day and he ends up dealing with worse pain for the following days.

- Everything is a mission he needs to plan for. He pushes himself to walk as often as he can, but he cannot do this for long and he fears going alone in case he pinches his back.
- He has “zero enjoyment” for life now and does not get much company.
- It is “mind blowing” how a back injury affects one’s entire body and life. Everything hurts constantly from his neck to his feet and, when he starts moving around and attempting to do anything, it just gets worse until he cannot bare it anymore and needs to lie down.
- His condition has gotten worse over time, even though he has managed to find ways to get through his day. It seems the more he pushes to overcome and attempts to do more he notices worse pains and new pains from attempting to live a normal life.
- He used to pay people to assist him, but now that has run him dry and fears for how he will survive in the future.
- He has been against surgery/ narcotics as options in his recovery as he has heard too many bad things from both. He is willing to try anything at this point.

Need for Help

The GP reported in the MR that the appellant does not require an aid for his impairment. In the AR, the GP indicated that the help required for DLA is provided by family and friends. The GP did not indicate that the appellant requires any of the listed assistive devices, and indicated that the equipment and devices are “N/A,” or not applicable to the appellant.

Additional Information

In his Notice of Appeal dated December 27, 2017, the appellant expressed his disagreement with the ministry’s reconsideration decision and wrote that he will send more information.

The ministry relied on its reconsideration decision as summarized at the hearing.

Admissibility of Additional Information

The panel considered that there was no additional information for which a determination of admissibility was required under Section 22(4)(b) of the *Employment and Assistance Act*.

PART F – REASONS FOR PANEL DECISION

The issue on the appeal is whether the ministry's reconsideration decision, which found that the appellant is not eligible for PWD designation, was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. The ministry found that the appellant has a severe physical impairment, though not a severe mental impairment, but his DLA are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods and that it could not be determined, as a result of those restrictions, that the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

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

Persons with disabilities

2 (1) In this section:

"assistive device" means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform;

"daily living activity" has the prescribed meaning;

"prescribed professional" has the prescribed meaning.

(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person is in a prescribed class of persons or that the person has a severe mental or physical impairment that

(a) in the opinion of a medical practitioner or nurse practitioner is likely to continue for at least 2 years, and

(b) in the opinion of a prescribed professional

(i) directly and significantly restricts the person's ability to perform daily living activities either

(A) continuously, or

(B) periodically for extended periods, and

(ii) as a result of those restrictions, the person requires help to perform those activities.

(3) For the purposes of subsection (2),

(a) a person who has a severe mental impairment includes a person with a mental disorder, and

(b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires

(i) an assistive device,

(ii) the significant help or supervision of another person, or

(iii) the services of an assistance animal.

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

The EAPWDR provides as follows:

Definitions for Act

2 (1) For the purposes of the Act and this regulation, "**daily living activities**",

(a) in relation to a person who has a severe physical impairment or a severe

mental impairment, means the following

activities:

- (i) prepare own meals;
 - (ii) manage personal finances;
 - (iii) shop for personal needs;
 - (iv) use public or personal transportation facilities;
 - (v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
 - (vi) move about indoors and outdoors;
 - (vii) perform personal hygiene and self care;
 - (viii) manage personal medication, and
- (b) in relation to a person who has a severe mental impairment, includes the following activities:
- (i) make decisions about personal activities, care or finances;
 - (ii) relate to, communicate or interact with others effectively.

(2) For the purposes of the Act, "**prescribed professional**" means a person who is

(a) authorized under an enactment to practise the profession of

- (i) medical practitioner,
- (ii) registered psychologist,
- (iii) registered nurse or registered psychiatric nurse,
- (iv) occupational therapist,
- (v) physical therapist,
- (vi) social worker,
- (vii) chiropractor, or
- (viii) nurse practitioner, or

(b) acting in the course of the person's employment as a school psychologist by

- (i) an authority, as that term is defined in section 1 (1) of the Independent School Act, or
 - (ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the School Act,
- if qualifications in psychology are a condition of such employment.

Part 1.1 — Persons with Disabilities

Alternative grounds for designation under section 2 of Act

2.1 The following classes of persons are prescribed for the purposes of section 2 (2) [persons with disabilities] of the Act:

- (a) a person who is enrolled in Plan P (Palliative Care) under the Drug Plans Regulation, B.C. Reg. 73/2015;
- (b) a person who has at any time been determined to be eligible to be the subject of payments made through the Ministry of Children and Family Development's At Home Program;
- (c) a person who has at any time been determined by Community Living British Columbia to be eligible to receive community living support under the Community Living Authority Act;

- (d) a person whose family has at any time been determined by Community Living British Columbia to be eligible to receive community living support under the Community Living Authority Act to assist that family in caring for the person;
- (e) a person who is considered to be disabled under section 42 (2) of the Canada Pension Plan (Canada).

At reconsideration, the ministry was satisfied that the information provided is sufficient evidence of a severe physical impairment.

Direct and Significant Restrictions in the ability to perform DLA

In the reconsideration decision, the ministry was satisfied that the appellant has a severe physical impairment. However, the determination that a person has a severe impairment does not itself determine eligibility for the PWD designation as Section 2(2)(b) of the EAPWDA requires that a prescribed professional provide an opinion that an applicant's severe impairment directly and significantly restricts his ability to perform DLA, either continuously or periodically for extended periods. In this case, the GP is the prescribed professional.

According to Section 2(2)(b) of the EAPWDA, the ministry must assess direct and significant restrictions to DLA in consideration of the opinion of a prescribed professional. This does not mean that the other evidence is not factored in as required to provide clarification of the professional evidence, but the legislative language makes it clear that a prescribed professional's evidence is fundamental to the ministry's determination as to whether it is "satisfied." Therefore, the prescribed professional completing the assessments has the opportunity to indicate which, if any, DLA are significantly restricted by the appellant's impairments either continuously or periodically for extended periods.

In the reconsideration decision, the ministry reviewed the information provided in the AR and considered that the GP indicated that the appellant requires continuous assistance with the task of laundry and periodic assistance from another person with the tasks of basic housekeeping, going to and from stores and carrying purchases home when shopping, food preparation and cooking. The ministry wrote that the descriptions provided by the GP: "needs help from family or friends on days when his lumbar pain is more severe" and "he cannot stand for a continuous period long enough to prepare regular meals on a stove" do not explain the degree, type, or duration of the periodic assistance required to manage these tasks of DLA.

When asked in the AR to describe the mental or physical impairments that impact the appellant's ability to manage DLA, the GP wrote: "unable to stand or sit for more than 30 minutes at a time, and so he cannot cook, clean or carry heavy groceries without having a severe increase in back pain, which leaves him unable to move around for several days afterwards." The ministry also considered the GP's comments that "there are days when his back pain flares-up, during which he is hardly able to walk indoors" and "this usually happens after he has over-exerted his back muscles by doing regular daily activities like vacuuming or standing up to cook" and the ministry wrote that the frequency, the degree and the duration of the assistance required remains unclear. The appellant wrote in his self-report that his eating has gone significantly downhill and, unless a family member offers dinner, for the most part he lives off of dried soups or frozen foods in the microwave. The appellant wrote that standing and cooking anything is far too much work for him to handle and, when he attempts this, he ends up

dealing with worse pain for the following days. The panel finds that the GP refers to “over-exertion” of the appellant’s back muscles as the most common trigger to a flare-up of the appellant’s pain and that this occurs when the appellant is engaged in physically demanding cleaning activities such as vacuuming, standing more than 30 minutes at a time to cook, and carrying “heavy” groceries, and that the ministry reasonably considered that the degree of assistance required remains unclear.

Section 2(2) of the EAPWDA requires that a severe impairment directly and significantly restricts the appellant’s ability to perform the DLA either continuously or periodically for extended periods. The direct and significant restriction may be either continuous or periodic. If the restriction is periodic, it must be for an extended time. Inherently, any analysis of periodicity must also include consideration of the frequency. Accordingly, in circumstances where the evidence indicates that a restriction arises periodically, it is appropriate for the ministry to require evidence from the prescribed professional of the duration and frequency of the restriction in order to be “satisfied” that this legislative criterion is met.

The appellant wrote in his self-report that it is “mind blowing” how a back injury affects one’s entire body and life. The appellant wrote that when he starts moving around and attempting to do anything, it just gets worse until he cannot bare it anymore and needs to lie down. The appellant wrote that his condition has gotten worse over time, even though he has managed to find ways to get through his day, and the more he pushes to overcome and attempts to do more things, he notices worse pains and new pains from attempting to live a normal life. The appellant also wrote in his self-report that he has been against narcotics and surgery as options in his recovery in the past, but he is willing to try anything at this point. The panel notes that the appellant does not specify how often he has flare-ups or exacerbations of his pain, or how often he “over-exerts” himself, and how long these episodes occur. As well, there was no further information provided on the appeal regarding the outcome of the appellant’s recent openness to the use of narcotics to ameliorate his pain during the exacerbations. The ministry reasonably determined that without this descriptive information, the evidence does not establish that the appellant’s ability to manage these tasks of DLA is significantly restricted for extended periods.

The ministry considered that the GP reported that the appellant is independently able to manage all of the tasks of the personal care DLA, the pay rent and bills DLA, the medications DLA, and the transportation DLA, as well as the balance of the tasks for the shopping DLA and the meals DLA, and concluded that this degree of independence does not establish significant restrictions in the overall ability to perform DLA. In his self-report, the appellant wrote that he has become much more depressed as it “set in” that he would never overcome his injury and get his joy for life back, and most of his days are spent complaining and in bed. He pushes himself every day to at least shower and get dressed, which alone wipes him out but also makes him feel a bit better. He needs to lie down after this and build up to attempt his “next adventure.” The appellant wrote that he has “zero enjoyment” for life now and does not get much company. While the appellant referred to impacts to his personal care DLA due to the state of his mental health, the GP assessed the appellant as independent with the personal care DLA, with no need for support or supervision, and the other impacts to some tasks of DLA are attributed by the GP to flare-ups of the appellant’s lumbar pain.

The ministry also considered that the GP indicated that the appellant is independent with all

aspects of his social functioning, not requiring support/supervision with making appropriate social decision, developing and maintaining relationships, interacting appropriately with others, dealing appropriately with unexpected demands, and securing assistance from others. The ministry wrote that the GP indicated that the appellant has marginal to good functioning in his immediate social network and good functioning with his extended social network. There was no further information from a mental health specialist provided on the appeal.

The GP reported that the appellant is independent with the moving about indoors and outdoors DLA, although the GP commented the appellant “takes 2 to 3 times longer than a normal person his age” with walking outdoors. In his self-report, the appellant wrote that he pushes himself to walk as often as he can, but he cannot do this for long and he fears going alone in case he pinches his back. In the Request for Reconsideration, the GP wrote the appellant can “only walk few steps”, and “lying down relieves his back pain;” however, the GP does not specify if this is during an exacerbation or “flare-up” of the appellant’s lumbar pain, or on one of the appellant’s “good days.” The ministry also reasonably considered that the GP reported that the appellant does not require the use of an aid to help compensate for his impairment, such as a cane or walker to assist with balance or braces for support to his back.

Given the GP’s report that the appellant is independent with most tasks of DLA, with no descriptive information from the GP regarding the frequency and duration of flare-ups to the appellant’s lumbar pain and the periodic assistance required with some tasks of DLA, the panel finds that the ministry reasonably determined that the evidence is insufficient to show that the appellant’s overall ability to perform his DLA is significantly restricted either continuously or periodically for extended periods, pursuant to Section 2(2)(b)(i) of the EAPWDA.

Help to perform DLA

In the reconsideration decision, the ministry held that, as it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required. Section 2(2)(b)(ii) of the EAPWDA requires that, as a result of being directly and significantly restricted in the ability to perform DLA either continuously or periodically for extended periods, a person must also require help to perform those activities. That is, the establishment of direct and significant restrictions under section 2(2)(b)(i) is a precondition of meeting the need for help criterion. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

While the GP reported that the appellant receives help from family and friends, as the ministry reasonably determined that direct and significant restrictions in the appellant’s ability to perform DLA have not been established, the panel finds that the ministry also reasonably concluded that, under section 2(2)(b)(ii) of the EAPWDA, it cannot be determined that the appellant requires help to perform DLA.

Conclusion

The panel finds that the ministry’s reconsideration decision, which determined that the appellant was not eligible for PWD designation pursuant to Section 2(2) of the EAPWDA, was reasonably supported by the evidence. The panel therefore confirms the ministry’s decision. The appellant’s appeal, therefore, is not successful.