

PART C – DECISION UNDER APPEAL

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Poverty Reduction (the ministry) dated March 5, 2018, which held that the appellant did not meet 3 of the 5 statutory requirements of section 2 of the *Employment and Assistance for Persons with Disabilities Act* for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that a medical practitioner has confirmed that the appellant's impairment is likely to continue for at least 2 years.

However, the ministry was not satisfied that:

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

The ministry also determined that the appellant is not in any of the classes of persons set out in section 2.1 of the *Employment and Assistance for Persons with Disabilities Regulation* who may be eligible for PWD designation on alternative grounds.

PART D – RELEVANT LEGISLATION

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

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

PART E – SUMMARY OF FACTS

Information before the ministry at reconsideration

- 1) The appellant's PWD application comprised of:
 - A Medical Report (MR) dated October 19, 2017, bearing the stamp of the appellant's general practitioner (GP) of 10 years, who had seen the appellant 2 to 10 times in the past 12 months. The signature line on the MR bears an initial and a separate signature under the note "completed by", both of which are unknown, although the initial is presumed to be of the GP.
 - An Assessor Report (AR) dated November 6, 2017, completed by a nurse practitioner (NP) who had known the appellant for "2" and met with the appellant once in the past 12 months. The NP relied on an office interview with the appellant to complete the AR.
 - The appellant's self-report (SR) section of the PWD application, dated October 17, 2017.
- 2) The appellant's Request for Reconsideration, with the following attachments:
 - i) an August 8, 2017 note from a physician who works in the same clinic as the appellant's GP;
 - ii) a 3-page typewritten advocate's submission, providing argument respecting information previously provided and stating that the appellant and the NP have known each other for 2 years; and
 - iii) a 2-page handwritten submission from the appellant.

Documents provided on appeal

- 1) The appellant's Notice of Appeal (NOA) dated March 14, 2018.

The ministry did not introduce additional evidence on appeal and the panel determined that the information in the appellant's NOA as well as her oral submissions at the hearing did not introduce new evidence.

The arguments of both parties are set out in Part F of this decision.

Summary of relevant evidence

Diagnoses

In the MR, where asked to provide a specific diagnosis and indicate the severity of the medical conditions, the GP writes:

- Alcoholic liver disease and alcoholism (actively drinking, refuses help). Complete abstinence essential for prevention of fulminant liver failure and death. Refuses to consider help for sobriety.
- Osteoporosis. Compression fracture of L4 vertebra (has progressed slightly since 2014). Healing impaired by cigarette smoking and liver disease.
- Chronic left shoulder pain with tendinitis.
- Low back pain. Likely multifunctional, from lumbar disc disease at L5-S, L1 compression # [fracture], and poor core muscle strength.

Physical Impairment

The GP reports:

- Able to walk 1 to 2 blocks unaided on a flat surface and climb 5+ stairs unaided.
- Limited to lifting 5 to 15 lbs. "She states is unable to lift > 5 lbs., which prevents her from shopping and doing her own housework."
- Can remain seated for less than 1 hour.
- No aids or prostheses required. Does not come into office using a walker or cane, but does appear unsteady on her feet.

The NP reports:

- Walking indoors and outdoors and standing are managed independently.
- Climbing stairs requires supervision and occasional assistance walking down stairs. Takes double the time.
- Lifting and carrying/holding require continuous assistance from another person (patient reports cannot carry or lift > 5 lbs.)

In her SR, the appellant reports that she needs help with everything. Back pain makes it impossible to lift things over 5 lbs.

In her reconsideration submission, the appellant writes that she cannot walk up to 2 blocks and that the ability to lift 5 to 15 lbs. "is not on those papers." The appellant describes taking medication for osteoporosis and that 6 months ago because of osteoporosis she broke her left foot, which has not healed. She has attended "AA" quite a few times but after sitting for an hour and getting a ride home, she needs to lay down for about 2 hours. She requires help with basically living her day to day life, including assistance to help write the letter seeking reconsideration. The back fracture is now compressed and will remain like that, which is why she is in constant pain.

In her NOA and at the hearing, the appellant reiterated that she needs help with everything. She stated that her osteoporosis is so bad that she is in constant pain except when she is asleep, noting that it hurts to even turn to pick up a water bottle. She is unable to live by herself because if she falls, she will break something. The appellant said that her condition has worsened since the PWD application was completed and that she reported the changes to her GP during a visit on March 3, 2018. The appellant also stated that the application was completed by a physician who is not her regular physician.

Mental Impairment

In the MR, the GP reports:

- No significant deficit with any listed aspect of cognitive and emotional function.
- No difficulties with communication.
- Social functioning is not restricted.

In the AR, the NP reports:

- Good ability to communicate in the areas of speaking, writing and hearing. Satisfactory ability with reading (20/40 vision bilaterally with corrective lenses, unable to afford prescription glasses, instead using reading glasses from drug store).
- The sections respecting cognitive and emotional functioning and social functioning were not completed.

DLA

The GP reports the following:

- “Yes”, the appellant has been prescribed any medication and/or treatments that interfere with the ability to perform DLA – “pain medication is sedating.”
- The ability to perform personal self-care, management of medications, mobility inside the home, management of finances, and social functioning is not restricted.
- The ability to perform basic housework and daily shopping is periodically restricted. Mobility outside the home is restricted, but not identified as a periodic or continuous restriction. Assistance required is not described.
- Lives in a remote location with no local public transportation, taxi carrier, or grocery store. Says she is relying on the kindness of friends to bring her groceries and help her with housework.

The NP reports the following:

- Chronic low back pain and left shoulder pain are the impairments that impact the ability to manage DLA.
- The ability to move about indoors and outdoors is as described above under Physical Impairment.
- All listed tasks of the DLA personal care and paying rent and bills are managed independently.
- For the DLA medications, taking as directed and safe handling and storage are managed independently. Filling/refilling prescriptions requires assistance, as does driving the appellant to and from medical appointments and other engagements.
- For the DLA basic housekeeping, laundry requires continuous assistance (done by landlord) and basic housekeeping requires periodic assistance (cleans bathroom independently; floors are swept, tables are cleaned and dishes are done by the landlord).
- For the DLA shopping, going to and from stores and carrying purchases home require continuous assistance from another person (friends, ex-husband and landlord provide this assistance).
- All listed tasks of the DLA meals require periodic assistance from another person. Friends and landlord bring food approx. 3 times/week. Eats out of can. Rarely cooks for self, due to back pain, cannot bend down to put food in or take out of oven. Avoids food prep as it causes low back pain when standing up and cooking.
- For the DLA transportation, getting in and out of a vehicle requires periodic assistance from another person and takes twice as long. Independently able to arrange transportation.

The August 8, 2017, physician’s note states “housework is excessively slow/painful. Unable to carry/pack in groceries – need 100% of time help.”

In her SR, the appellant reports that friends and neighbours have been helping with everything including, picking mail up, buying all groceries, doing dishes and providing rides. Cooking is opening a can.

At the hearing, the appellant confirmed her previous description of assistance with rides, meals, and housekeeping.

Need for Help

The GP states that the appellant reports that groceries are brought into her house and packed away by friends and that laundry is completed by landlord all of the time.

The NP reports that assistance, as described above, is provided by friends and that the appellant requires a stool and rail in the shower, as well as a rail to use 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. That is, was the ministry reasonable when determining that the appellant is not a person described in section 2.1 of the EAPWDR and that the requirements of section 2(2) of the EAPWDA were not met because:

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

Relevant Legislation

EAPWDA

2 (1) In this section:

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

"**daily living activity**" has the prescribed meaning;

"**prescribed professional**" has the prescribed meaning.

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

- (a) in the opinion of a medical practitioner or nurse practitioner is likely to continue for at least 2 years, and
- (b) in the opinion of a prescribed professional
 - (i) directly and significantly restricts the person's ability to perform daily living activities either
 - (A) continuously, or
 - (B) periodically for extended periods, and
 - (ii) as a result of those restrictions, the person requires help to perform those activities.

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

- (a) a person who has a severe mental impairment includes a person with a mental disorder, and
- (b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires
 - (i) an assistive device,
 - (ii) the significant help or supervision of another person, or
 - (iii) the services of an assistance animal.

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

EAPWDR

Definitions for Act

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

(a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:

- (i) prepare own meals;
- (ii) manage personal finances;
- (iii) shop for personal needs;
- (iv) use public or personal transportation facilities;
- (v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
- (vi) move about indoors and outdoors;
- (vii) perform personal hygiene and self-care;
- (viii) manage personal medication, and

(b) in relation to a person who has a severe mental impairment, includes the following activities:

- (i) make decisions about personal activities, care or finances;
- (ii) relate to, communicate or interact with others effectively.

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

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

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

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

(i) an authority, as that term is defined in section 1 (1) of the [Independent School Act](#), or

(ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the [School Act](#),

if qualifications in psychology are a condition of such employment.

(3) The definition of "parent" in section 1 (1) applies for the purposes of the definition of "dependent child" in section 1 (1) of the Act.

Alternative grounds for designation under section 2 of Act

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

- (a) a person who is enrolled in Plan P (Palliative Care) under the Drug Plans Regulation, B.C. Reg. 73/2015;
- (b) a person who has at any time been determined to be eligible to be the subject of payments made through the Ministry of Children and Family Development's At Home Program;
- (c) a person who has at any time been determined by Community Living British Columbia to be eligible to receive community living support under the [Community Living Authority Act](#);
- (d) a person whose family has at any time been determined by Community Living British Columbia to be eligible to receive community living support under the [Community Living Authority Act](#) to assist that family in caring for the person;
- (e) a person who is considered to be disabled under section 42 (2) of the [Canada Pension Plan](#) (Canada).

Panel Decision

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

Severe Physical or Mental Impairment

The legislation provides that the determination of severity of impairment is at the discretion of the minister, taking into account all of the evidence including that of the appellant. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a prescribed professional respecting the nature of the impairment and its impact on daily functioning. While the legislation does not define "impairment", the 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 impairment, the ministry must exercise its decision-making discretion reasonably by weighing and assessing all of the relevant evidence and cannot simply defer to the opinion of a prescribed professional as that would be an improper fettering of its decision-making authority.

Physical Impairment

The appellant is diagnosed by a medical practitioner, the GP, with alcoholic liver disease, osteoporosis, vertebral compression fracture, chronic left shoulder pain (tendinitis), and low back pain. Limitations to functioning are not attributed to the liver disease in any of the information from the health care professionals, the appellant or her advocate.

The appellant's position is that she is severely physically disabled due to back pain and osteoporosis. The appellant's advocate argues that the information provided by both the GP and the NP establishes that the appellant has a severe physical impairment, adding that the appellant has clarified that she and the NP have known each other for 2 years. The ministry's position is that while the legislation does not require an applicant to have a long-standing relationship with the prescribed professionals completing the PWD application, the legislation clearly provides that determination of severity of impairment is at the discretion of the minister, taking into account all of the information provided, which must be weighed. On this basis, while taken into account, the ministry placed little weight on the information from the NP, questioning the accuracy of the assessment given "the limited understanding she would no doubt have after only two visits," in comparison to the GP who has been the appellant's family physician for 10 years. In reaching this conclusion, the ministry notes that the NP indicated that her information came from the appellant, and that some of the NP's language reflects that the appellant was reported the information (essentially hearsay not from professional assessment). As it was unclear how many visits the appellant had with the physician who provided the subsequent note, how well he knows her conditions and where he got the information, the ministry considers the possibility that the information is simply a reiteration of limitations reported to the physician by the appellant, not necessarily a direct reflection of his medical opinion based on knowledge of the appellant's medical conditions. For these reasons, the ministry states that it is unable to conclude that the appellant experiences the degree of restriction described in the physician's note.

In looking at the assessments provided by the GP, the ministry argues that the level of physical capability, while indicating some degree of impairment, is not indicative of a severe physical impairment as the appellant remains capable of basic mobility, including walking 1 to 2 blocks and climbing 5+ steps, without assistive devices. The ministry is not satisfied that being unsteady on her feet and not requiring any assistive devices suggests severe physical impairment. Similarly, the ministry argues that while there is a degree of limitation with lifting, which in part of the application is expressed as under 5 lbs. but elsewhere greater than that, the appellant is capable of lifting small amounts of weight which would enable her to perform basic daily tasks. In reaching this conclusion, the ministry notes that the appellant is reported by both the GP and the NP as independently managing all aspects of personal care which means the appellant is capable of lifting lighter weights such as a hairbrush or shampoo bottle. The ministry further notes that when assessing the ability to manage DLA, the GP does not identify a continuous restriction with any of the DLA. In support of its conclusion, the ministry also notes the GP's comment respecting the remoteness of the appellant's location and lack of public transportation, taxi service or grocery store, and reliance on friends, the GP's comment that the vertebral compression fracture has only progressed "slightly" since 2014, and that there is no referral to a specialist.

The panel concludes that the ministry's determination that a severe physical impairment has not been established is reasonable. In reaching this conclusion, as noted above, in exercising its decision-making authority, the ministry is entitled to assess and assign weight to the information provided. Though, in this case, the panel considers that the disparity in information respecting physical functioning is not so great that it would have perceptibly altered the outcome, as the GP reports the ability to walk 1 to 2 blocks unaided and the NP reports that walking indoors and outdoors is managed independently, and both the GP and the NP state that the appellant reports that she cannot lift > 5 lbs. While the appellant argues that the information respecting the ability to walk 1 to 2 blocks and lift 5 to 15 lbs. "is not on those papers", the panel finds as fact that the GP has reported those abilities, noting that the MR form provides the option of indicating that lifting is limited to "Under 5 lbs." which the GP did not choose. While the information does establish limitations to physical functioning, most notably with lifting ability, as the ministry notes the GP reported no continuous restrictions in the ability to manage any DLA and both the GP and the NP assesses the ability to manage 5 lbs., and that the ability to manage light weights, is supported by the NP's assessment that the appellant independently manages personal care. Additionally, the panel notes that the NP indicates that the vast majority of DLA tasks are managed without continuous assistance. The appellant's assertion that she needs assistance from other people with everything is not supported by the information from the GP or the NP. Also, as noted by the ministry, the GP does not identify the need for assistive devices and the need for assistive devices reported by the NP is limited to bathing aids. The panel notes that while the NP also identified the need for rails to climb and go down stairs, stair railings do not fall within the definition of "assistive

devices” as they are not devices 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.” Rather, they are routinely used for the safeguard of all persons.

For these reasons, the panel concludes that the ministry was reasonable when concluding that it was not satisfied that the combination of the appellant’s functional skills and mobility and physical abilities establish a severe physical impairment.

Mental Impairment

The appellant does not expressly argue that she is mentally impaired and the information provided at reconsideration or on appeal does not address mental impairment. While the GP diagnoses active alcoholism in the MR, which is classified as a mental disorder, the GP reports that the appellant does not have any deficits with cognitive and emotional function. The GP also reports that there are no difficulties with communication and that the ability to manage social functioning is not restricted. The NP does not identify any impairment of mental functioning, having not completed the sections of the AR relating to cognitive, emotional and social functioning. Accordingly, the panel finds that the ministry was reasonable in concluding that a severe mental impairment was not established.

Restrictions in the ability to perform DLA

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

DLA are defined in section 2(1) of the EAPWDR and are listed in both the 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 is dependent on others to do everything for her, noting in particular the assistance provided with meals, housekeeping and transportation. The ministry argued that the GP’s assessment of no continuous restrictions in the ability to perform any of the prescribed DLA does not suggest a significant restriction. Additionally, the ministry noted that the GP’s assessment of a periodic restriction with basic housework and daily shopping was not accompanied by the requested explanation, making it difficult to determine if the restriction is for extended periods. Again, the ministry noted that it gave the NP’s information little weight. The ministry acknowledged that both the GP and the NP explained that the appellant lives in a remote area with limited services and experience limitations due to this (i.e. the grocery store is far away and there is no bus service). However, the ministry was not satisfied that the location and situation established that the appellant experiences significant restrictions in performing her DLA. The ministry acknowledged that the appellant has certain limitations as a result of her medical conditions, but found that the information provided did

not establish that an impairment significantly restricts the appellant's ability to perform DLA continuously or periodically for extended periods.

The panel considers the ministry's conclusion to be reasonable. In reaching this conclusion, the panel finds that it is unclear if a component of the assistance provided relates to the remoteness of the appellant's location, as opposed to physical impairment. Accordingly, the panel considers the ministry reasonable in concluding that the narrative from the GP and the NP respecting the appellant's location did not establish significant restrictions arising from impairment. Additionally, the panel finds the ministry's conclusion to be supported by the information from the GP that there are no continuous restrictions in the ability to manage any of the prescribed DLA, noting also that the NP reported that most DLA tasks are either managed independently or with periodic assistance from another person. Both of these assessments are consistent with the degree of independent functioning in terms of walking. As noted in the discussion of severe physical impairment, the ministry questioned whether the subsequent note from a different physician reflected a medical opinion or a reiteration of the appellant's self-reported information. The panel considers the ministry reasonable in placing little weight on this information given the absence of some indication of the basis of these statements or correlation with an assessment of basic physical functioning or a particular diagnosed medical condition. Finally, the panel finds that the information from the GP and the NP was reasonably viewed by the ministry as not identifying the identified periodic restrictions with DLA as being for extended periods.

Accordingly, the panel considers that the ministry acted reasonably when it concluded that it was not satisfied that in the opinion of a prescribed professional the appellant's impairment *significantly* restricts her ability to perform DLA either *continuously or periodically for extended periods*.

Help to perform DLA

Section 2(2)(b)(ii) of the EAPWDA requires that, *as a result of direct and significant restrictions in the ability to perform DLA*, a person requires help to perform those activities. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform DLA.

The establishment of direct and significant restrictions with DLA is a precondition of the need for help criterion. 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 a reasonable application of the applicable enactment, and therefore confirms the decision. The appellant is not successful on appeal.