

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the ministry) reconsideration decision dated February 11, 2019 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.

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

With the oral consent of the appellant, a ministry observer attended but did not participate in the hearing.

The evidence before the ministry at the time of the reconsideration decision included the Persons With Disabilities (PWD) Application comprised of the appellant's information and self-report dated June 28, 2018, a medical report (MR) and an assessor report (AR) both dated October 7, 2018 and completed by a general practitioner (GP) who has known the appellant since July 2012 and has met with her 2 to 10 times in the past 12 months.

The evidence also included the following documents:

- 1) Medical Imaging Report dated June 21, 2016 relating to X-Rays of the appellant's thoracic spine, lumbar spine and sacrum;
- 2) Medical Imaging Report dated September 2, 2016 relating to a CT scan of the appellant's lumbar spine;
- 3) Medical Imaging Report dated November 12, 2017 relating to an MRI of the appellant's lumbar spine;
- 4) Hospital report from the spine clinic dated January 15, 2018;
- 5) Letters dated May 24 and May 31, 2018 from an anesthesiologist regarding facet injections;
- 6) Letters dated January 31, 2019 from the GP who completed the MR and the AR; and,
- 7) Request for Reconsideration dated January 31, 2019, including a letter from the appellant dated January 31, 2019.

Diagnoses

In the MR, the GP diagnosed the appellant with chronic low back pain (degenerative disc disease), with "general pain" onset in 2012 and "worse," with chronic right sciatica in 2015. The GP also diagnosed chronic anxiety disorder "likely all her life," with an onset of depression in 2015. Asked to describe the appellant's mental or physical impairments that impact her ability to manage her daily living activities (DLA), the GP wrote in the AR: "severe chronic low back pain, anxiety and depression."

Physical Impairment

In the MR and the AR, the GP reported:

- In terms of the appellant's health history, the appellant's lower back pain became much more exacerbated one year ago "such that she could no longer work....She tried very hard to work but the lower back pain has been unrelenting despite treatment (physiotherapy, analgesics) and interventional therapies- such as facet joint injections." The GP also wrote that "the pain makes it very difficult for her to sit or stand for longer than 20 to 30 minutes. She cannot bend at her waist to do tasks at ground level. She cannot carry anything heavier than about 10 lbs."
- The appellant does not require any prostheses or aids for her impairment.
- In terms of functional skills, the GP reported that the appellant can 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 remain seated less than 1 hour, with a note added by the GP with respect to remaining seated: "less than 30 minutes."

- The appellant is not restricted with her mobility inside the home and she has continuous restrictions with her mobility outside the home.
- In the AR, the appellant is assessed as being independent with walking indoors (GP note: "but very slow- depends on level of pain"). The appellant takes significantly longer than typical with walking outdoors. The appellant also takes significantly longer with climbing stairs, standing, lifting (GP notes: "limited to less than 7 kg."), and for carrying and holding.
- In the section of the AR relating to assistance provided, the GP indicated that no assistance is provided through the use of an assisted device and no equipment is required that is not currently being used, and the GP noted "N/A" or not applicable.

In the Medical Imaging Report dated June 21, 2016 relating to X-Rays of the appellant's thoracic spine, lumbar spine and sacrum, the physician indicated the following:

- Regarding the sacrum, that there are "no aggressive osseous abnormalities present . there is symmetric mild SI joint degenerative changes which is slightly more progressive on the right side peri."
- Regarding the thoracic spine, "alignment is normal. Mild multilevel degenerative disc changes are present. Vertebral body heights are preserved."
- With respect to the lumbar spine, " there is grade 1 retrolisthesis of L4-L5 with associated disc space facet spondylosis. Vertebral body heights are preserved. Severe L5/S1 disc space and facet arthrosis is present likely resulting in neural foraminal and central canal compromise. Further assessment with CT or MRI can be performed."

In the Medical Imaging Report dated September 2, 2016 relating to a CT scan of the appellant's lumbar spine, the physician indicated that there are "degenerative changes at the L4-5 and L5 S1 levels, as described," "minimal bulging of the annulus of the L4-5 disc. No focal disc herniation is noted at the levels examined. There is no significant central spinal stenosis," and "mild narrowing involves the L5 nerve root exit foramina bilaterally due to marginal osteophytes."

In the Medical Imaging Report dated November 12, 2017 relating to an MRI of the appellant's lumbar spine, the physician indicated an overall impression of "moderate lower lumbar spondylitic change as outlined."

In the hospital report from the spine clinic dated January 15, 2018, the physician indicated that a review of the MRI imaging report of November 12, 2017 revealed "at L3-4 there is a mild diffuse disc bulge which is slightly more prominent in the left paracentral location. This causes minimal posterior displacement of the traversing left L5 nerve root. At L5-S1 there is a mild disc height loss with Modic type 2 endplate changes. There is a mild diffuse disc bulge causing some moderate to marked bilateral foraminal narrowing with compression of the exiting L5 nerve roots bilaterally." The recommendation was for "conservative management", to follow up with a physiotherapist and possibly pursue trial of a right L5 selective nerve root block.

In the letters regarding the facet injections, the anesthesiologist indicated that the appellant's pain was "reduced by 50%" after the May 24, 2018 treatment and that, at the May 31, 2018 treatment the appellant's "pain is significantly decreased" and she is "able to sit for longer periods of time."

In the letters dated January 31, 2019, the GP who completed the MR and the AR indicated that:

- The appellant was seen and she has "moderate to severe low back pain with the symptoms in the lower extremities. At this point in time she is unable to work until further assessment investigations."
- The appellant has been his patient since 2012 and she suffers from a number of conditions.
- In the last year, the appellant has been unable to work due to the severity of her pain condition and she is now being considered for surgery.

In her self-report, the appellant indicated:

- She has chronic lower back pain with right side sciatica.
- She is unable to work or to perform any job duties such as lifting or carrying heavy objects.
- Her need to change body positions interferes with work. She is unable to sit or stand for prolonged periods of time and this causes discomfort that affects her ability to do any job.
- The pain worsens when bending or stretching. She gets muscle spasms and tightness in her lower back, pelvis and hips. She has nerve and muscle pain.
- The pain keeps her from doing simple things like walking, exercising, bending, cleaning, and cooking.
- She is unable to stand or sit for longer than 30 minutes. The pain worsens after prolonged sitting or standing.
- She has difficulty standing up straight, walking, or going from standing to sitting.

In the letter with her Request for Reconsideration, the appellant wrote:

- Her back is "wrecked" and she has severe lower chronic back pain, compressed disc lower lumbar, which cause direct pressure to the sciatic nerve. Sciatic damage "is some of the most severe pain a human being can feel."
- Outside the debilitating pain, she also has a legitimate mobility limitation because of the same problems. She is "forced to walk at a deep stoop, can't stand for more than 10 to 15 minutes at a time and have to sit at very specific angles so as not to irritate the nerve and send myself through hours of excruciating pain," and she has "to get facet joint injections for the rest of my life," which "makes employment impossible for me."

Mental Impairment

In the MR and the AR, the GP reported:

- In terms of the appellant's health history, from the interactions with the appellant the GP has "diagnosed her with generalized anxiety disorder, but it had not been disabling until about 1 year ago when her lower back pain became much more exacerbated such that she could no longer work."
- The appellant has difficulties with communication identified by the GP as "other" and "somewhat difficulties at times with communication as she becomes too anxious and tearful."
- The appellant has significant deficits with her cognitive and emotional functioning in the areas of memory, emotional disturbance, motor activity and attention or sustained concentration. The GP provided comments that "at times the above are significant due

to her anxiety and depression particularly when she is having a lot of pain.”

- The appellant is not restricted in her social functioning.
- The appellant has a good ability to communicate in reading, writing and hearing, and she has a satisfactory ability with speaking.
- With respect to the section of the AR relating to daily impacts to the appellant’s cognitive and emotional functioning, the GP assessed a major impact in the area of emotion and moderate impacts to of bodily functions, attention/concentration, motor activity and language, with “disorganization of speech” emphasized. There are minimal impacts in the areas of executive, memory, and motivation. There are no impacts to the remaining 6 listed areas of functioning. The GP did not provide any additional comments.
- For social functioning, the appellant is independent with making appropriate social decisions, with developing and maintaining relationships, interacting appropriately with others and securing assistance from others. The appellant requires periodic support/supervision from another person with dealing appropriately with unexpected demands (GP note: “due to her anxiety, and depression, she takes longer to make a decision”).
- The appellant has very disrupted functioning in her immediate social network. The GP wrote that “people in her life make her feel like she’s the problem and stigmatize her. She really tries to interact normally, but overall feels a lot of social isolation.” The appellant has good functioning in her extended social networks.
- Asked to describe the support/supervision required to maintain the appellant in the community, the GP left this section incomplete.

In her self-report, the appellant wrote:

- The pain is putting stress on her body, both mentally and physically, causing depression.
- The pain affects everything that she does from work to play and ultimately her quality of life.

Daily Living Activities (DLA)

In the MR and the AR, the GP reported:

- The appellant has not been prescribed medication and/or treatment that interfere with her ability to perform DLA.
- The appellant is not restricted with several DLA, specifically: personal self care, meal preparation, management of medications, daily shopping, mobility inside the home, use of transportation, management of finances, and social functioning.
- The appellant is continuously restricted with basic housework and mobility outside the home. Asked to describe the assistance that the appellant requires with DLA, the GP wrote: “she manages to do most of DLA slowly through the day and spreads out over course of the week. She cannot do all the activities on one day due to persistent, unrelenting low back pain. She has to have her children or mother help with many activities and household tasks.”
- For the move about indoors and outdoors DLA, the appellant is independent with walking indoors (GP note: “but very slow- depends on level of pain”) and takes significantly longer than typical with walking outdoors.
- For the personal care DLA, the appellant is independent with the tasks of grooming, feeding self and regulating diet. She takes significantly longer than typical with dressing

(GP note: "takes at least 3 to 4 times longer to dress below the waist"), bathing, toileting, and transfers in/out of bed and on/off chair (GP note for transfers: "takes 2 to 3 times longer than someone without back pain").

- Regarding the DLA of basic housekeeping, the appellant takes significantly longer than typical with doing laundry and basic housekeeping, with a note by the GP that it is "hard to carry large loads. Has to carry multiple smaller loads. Unable to bend over for vacuuming and has her mother help out."
- For the shopping DLA, the appellant is independent with all tasks with the exception of carrying purchases home, for which she requires periodic assistance from another person and the GP wrote "depends on how much she buys and how heavy they are. Gets help from family." Specifically, she is independent with the tasks of going to and from stores, reading prices and labels, making appropriate choices and paying for purchases.
- The GP commented that the appellant's "children or mother may help out with some housework, shopping and carrying things."
- Regarding the meals DLA, the appellant is independent with meal planning and safe storage of food. She takes significantly longer than typical with the tasks of food preparation and cooking. The GP explained that it "takes much longer than it would if she had no pain as she has to change her body position frequently from sitting to standing and sitting again."
- For the pay rent and bills DLA, the appellant is independent with all tasks, including banking and budgeting.
- Regarding the medications DLA, the appellant is independent with all of the tasks, specifically: filling/refilling prescriptions, taking as directed, with safe handling and storage.
- For the transportation DLA, the appellant is independent with using public transit (GP note: "unknown as she drives") and takes significantly longer than typical with getting in and out of a vehicle (GP note: "takes at least 3 times longer than someone with no problem"). The GP indicated that the task of using transit schedules and arranging transportation is not applicable to the appellant's situation.

In her self-report, the appellant indicated:

- The pain keeps her from doing simple things like walking, exercising, bending, cleaning, cooking.
- She is unable to bend down to put her pants or shoes on or to bathe the kids.
- Traveling long distance causes severe lower back pain.
- The pain affects everything she does, from work to play and ultimately her quality of life.

In the letter with her Request for Reconsideration, the appellant wrote that she has been unable to work for a year and she needs money for her family to live on.

Need for Help

The GP reported in the AR that the appellant receives help from family and wrote that "her children and mother try to help within their abilities." The GP indicated that the appellant does not use any assistive devices to help compensate for her impairment and no equipment is

needed.

Additional information

In her Notice of Appeal dated February 25, 2019, the appellant expressed her disagreement with the ministry's reconsideration decision and wrote that she has a severe condition with her chronic lower back pain that has disabled her from working. Her personal life has been drastically affected. Her recent CT Scan on February 12, 2019 states that her lower back is getting worse and the GP mentioned to her on February 20, 2019 that she has severe arthritis on her L5-S1 lumbar spine. As well, there is severe bilateral foraminal narrowing that limits her ability to perform every day activities due to severe pain, inflammation and discomfort.

Prior to the hearing, the appellant provided additional documents, specifically:

- 1) Medical Imaging Report dated February 12, 2019 relating to a CT Scan of her lumbar spine, with the overall impression described as: "multilevel lumbar degenerative changes are worse at L5-S1, where there is severe bilateral foraminal narrowing that is not significantly changed compared to the prior MRI of November 2017. Moderate right foraminal narrowing at L4-5 has/may have progressed slightly compared to the prior studies;" and,
- 2) Letter dated March 19, 2019 in which the GP who prepared the MR and the AR wrote:
 - The appellant experiences severe, debilitating pain from degenerative disc disease- lumbar spine and this condition has not been responsive to facet joint injections so her pain is relentless;
 - Due to severe anxiety, she often has difficulty with communication. This, along with depression, present symptoms that restrict her ability to deal with everyday life. These conditions are exacerbated by pain and inability to get restful sleep.
 - The appellant is restricted in almost all aspects of her life as well as being unable to work.
 - The appellant worries about not being able to provide for her children.
 - The combined effects of the appellant's medical conditions result in her having continuous restrictions with performing her DLA. She is continuously restricted with all activities that involve focusing, standing, walking, bending, twisting, lifting and carrying. These activities include: personal self-care, shopping, laundry, housework, cooking and meal preparation. She needs help and is assisted with most of these activities by her mother and children.
 - The appellant has significant restrictions with personal self-care and dressing causing her to take an inordinate amount of time to do these activities.

At the hearing, the appellant's advocate stated:

- The ministry decided that the appellant does not have a severe mental and physical impairment. The GP wrote in the MR that the appellant "cannot carry anything heavier than about 10 lbs." and the ministry has interpreted this as being able to lift up to 10 lbs. and that this is a lot of weight.
- The appellant focuses on her employability because she has worked since she was a teenager and this is a big concern for her.
- The ministry considered the treatments that the appellant has tried, including analgesics and facet joint injections, but these treatments have not worked for the appellant. The

GP described the appellant's pain as "relentless."

- The GP also described the appellant's pain as "severe" and "debilitating" and that is not even considering that the appellant also has a mental impairment.
- The appellant has seen a psychiatrist in the past but even if she had not seen a specialist, this should not undermine the opinion of the GP.
- The appellant's own statements mention that the pain keeps her from doing the simple things like walking, exercising, bending, cleaning, and cooking.
- The GP is not in close contact with the appellant and is not aware of when she requires help with many activities.
- The appellant's pain also causes sleep disruptions.
- The appellant takes significantly longer with many activities and this indicates a need for assistance although there is no assistance available. She "manages" but that does not mean she does not require assistance.
- In the MR, the GP reported that the appellant has continuous restrictions with doing housework and with her mobility outside the home. The GP wrote that the appellant cannot do all of activities on one day because of the pain. It is an indication that that the appellant's impairment is severe when the appellant cannot complete her activities in a normal time period.
- Although the GP indicated in the AR that the appellant is independent with walking indoors, the GP also wrote that this is done "very slow" and that it "depends on level of pain."
- The GP also specified that the appellant takes "3 to 4 times" longer with the task of dressing and "2 to 3 times" longer with transfers in and out of bed and on and off of a chair. The GP wrote that the appellant's mother "may help out with some housework, shopping and carrying things." The appellant's mother is elderly and is limited herself in how much she can help.
- The appellant has no choice but to get things done slowly or they do not get done at all.
- For food preparation and cooking, the GP indicated that the appellant has to "change her body position frequently," which is indicative of a person with severe pain.
- It is not just the physical pain that should be considered as there are also mental health issues which need to be considered together and not in isolation.
- The new letter from the GP indicates that the appellant has continuous restrictions with almost all aspects of her life. The GP has also emphasized the continuous and significant restriction with personal self-care.
- The GP indicated that the appellant is assisted with most activities and the need for assistance has been demonstrated.
- The GP may not have had much knowledge about filling out the forms when she indicated in the MR that there are no restrictions in most DLA, especially since the report in the AR is that the appellant takes significantly longer with many tasks.
- The GP indicated in the MR that the appellant's anxiety has become "disabling."
- Although there is a focus on employability, the GP also mentions that the appellant cannot bend at her waist to do tasks at ground level and this would impact several activities even though the activities are not identified specifically. The GP identifies the restrictions that would affect those activities.
- Not everyone with severe back pain has an assistive device.

At the hearing, the appellant stated:

- Her pain is very severe.
- She has a lot of restrictions, especially with her DLA and with her children. She cannot get up in the morning to get one child to school and he has missed many days.
- She has not been referred by her GP for home support for help with her DLA.
- She has not been hospitalized due to her back pain.
- Her pain stays at a rating of 8. The facet injections numb the pain right away but the pain comes back within a day. The next day, her pain will be back to a rating of 8 or 8.5.
- The pain gets worse with sitting or standing, and especially when she is sleeping. She cannot get enough sleep.
- Her GP will be referring her for surgery.

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

Admissibility of Additional Information

The ministry did not raise an objection to the admissibility of either document. The advocate argued in favor of admissibility on the basis that the letter from the GP dated March 19, 2019 identified continuous restrictions that are important to the Tribunal decision and the Medical Imaging Report dated February 12, 2019 confirms the severe bilateral foraminal narrowing that was information provided in documents before the ministry at reconsideration. The panel considered the Medical Imaging Report as confirming the information in the previous reports and a comparison was made with the November 2017 report and was, therefore, in support of, and tending to corroborate, the investigations of the medical conditions referred to in the PWD application which was before the ministry at reconsideration. Therefore, the panel admitted this additional information in accordance with Section 22(4)(b) of the *Employment and Assistance Act*.

However, the panel did not admit the letter from the GP dated March 19, 2019 as the GP provided information in the letter that was contradictory to the information in the MR and AR. For example, the GP reported in the MR that there were no restrictions to any DLA, with the exception of the basic housework DLA as well as mobility outside the home, whereas in the letter the GP indicated that the appellant is continuously restricted with housework as well as several other tasks of DLA, namely: personal self care, shopping, laundry, cooking and meal preparation and for which she needs assistance with “most” of these activities. In the AR, the GP reported that the appellant only required periodic assistance with the task of carrying purchases home when shopping. The panel finds that the information in the GP’s letter changes the character of the appellant’s application and that the ministry has not had an opportunity to consider this evidence. As the information was not before the ministry at reconsideration and was not in support of information before the ministry at reconsideration, the GP’s letter does not meet the requirements of Section 22(4)(b) of the *Employment and Assistance Act*.

The arguments made by the advocate at the hearing will be addressed in Part F- Reasons for Panel Decision, below.

PART F – REASONS FOR PANEL DECISION

The issue on 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 evidence does not establish that the appellant has a severe mental or physical impairment and that her DLA are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods. Also, it could not be determined that, as a result of those 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.

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).

Severe Physical Impairment

In the reconsideration decision, the ministry was not satisfied that the information provided establishes a severe physical impairment. The ministry acknowledged that the appellant was diagnosed by the GP with chronic low back pain (degenerative disc disease), with "general pain" onset in 2012 and "worse," with chronic right sciatica in 2015. The ministry considered that the GP wrote in the MR that the appellant's lower back pain became much more exacerbated one year ago "such that she could no longer work....She tried very hard to work but the lower back pain has been unrelenting despite treatment (physiotherapy, analgesics) and interventional therapies- such as facet joint injections," and pointed out the emphasis by the GP on the effect to the appellant's ability to be employed. The advocate acknowledged at the hearing that the GP focuses on the appellant's employability and explained that the appellant has worked since she was young and her current inability to work is a very significant issue for her. As employability is not a criterion in Section 2(2) of the EAPWDA nor is it listed among the prescribed DLA in Section 2 of the EAPWDR, the panel finds that the ministry reasonably concluded that an assessment of employability or vocational abilities is not part of the PWD application.

The ministry also considered the Medical Imaging Reports dated June 21, 2016, September 2, 2016 and November 12, 2017, as well as the hospital physiotherapy consult dated January 15, 2018 and reasonably assigned little weight to this evidence as they are dated and not necessarily a reflection of the appellant's current condition. However, prior to the hearing, the appellant provided a Medical Imaging Report dated February 12, 2019 for a CT Scan of her lumbar spine, with the overall impression described as: "multilevel lumbar degenerative changes are worse at L5-S1, where there is severe bilateral foraminal narrowing that is not significantly changed compared to the prior MRI of November 2017." As well, there is a finding that there is

"moderate right foraminal narrowing at L4-5" that "has/may have progressed slightly compared to the prior studies."

The panel finds that the updated Medical Report confirms the previous report of severe bilateral foraminal narrowing at L5-S1, as argued by the advocate, and reports moderate right foraminal narrowing at L4-5 that either has or may have "progressed slightly," indicating that the appellant's condition is degenerative and deteriorating. In the reconsideration decision, the ministry considered that the GP wrote in the letter dated January 31, 2019 that the appellant's pain has become "debilitating," there have been "failed facet joint injections" and she is "being considered for surgery." At the hearing, the appellant stated that her pain stays at a rating of 8 and the facet injections numb the pain right away but the pain comes back within a day at a rating of 8 or 8.5. The ministry reasonably considered that the anesthesiologist indicated that the appellant's pain was "reduced by 50%" after the May 24, 2018 facet joint injection and, at the May 31, 2018 treatment, the appellant's pain was "significantly decreased" and she is "able to sit for longer periods of time."

In her self-report, the appellant wrote that she has chronic lower back pain with right side sciatica and she is unable to work or to perform any job duties such as lifting or carrying heavy objects. The appellant also wrote that her need to change body positions interferes with work. At the hearing, the advocate stated that a need to change body positions is an indication of severe pain. The appellant wrote that she is unable to sit or stand for prolonged periods of time and this causes discomfort that affects her ability to do any job. She is unable to stand or sit for longer than 30 minutes. The appellant also focused on her inability to work in her Request for Reconsideration, as she wrote that she has been unable to work for a year and she needs money for her family to live on. The appellant wrote that her back is "wrecked" and she has severe lower chronic back pain, compressed disc lower lumbar, which cause direct pressure to the sciatic nerve, and sciatic damage "is some of the most severe pain a human being can feel." The appellant wrote that she is "forced to walk at a deep stoop, can't stand for more than 10 to 15 minutes at a time" and she has to get facet joint injections for the rest of her life, which "makes employment impossible for me."

A diagnosis of a serious medical condition or conditions does not in itself determine PWD eligibility or establish a severe impairment. Section 2(2) of the EAPWDA requires that the ministry must be satisfied that the impairment is severe before the ministry may designate an applicant as a PWD. At the hearing, the advocate argued that there is no definition of "severe" in the legislation and that it must be interpreted in accordance with the provisions of the *Interpretation Act* [RSBC 1996] c. 238 with a liberal construction and interpretation in favor of the appellant. The ministry acknowledged that the term must be interpreted by the ministry based on an evaluation of the degree of impairment demonstrated and the ministry must be "satisfied" of severity in each case. An "impairment" involves 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. To

assess the severity of the impairment, the ministry must consider the nature of the impairment and the extent of its impact on daily functioning.

The ministry considered the impacts of the appellant's diagnosed medical conditions on her daily functioning, reviewing the assessments provided in the MR and the AR as well as in the letters dated May 24 and May 31, 2018 from an anesthesiologist and the letters dated January 31, 2019 from the GP. The ministry wrote that the GP reported in the MR that the appellant can 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 remain seated less than 1 hour, with a note added by the GP with respect to remaining seated: "less than 30 minutes," and that this assessment indicated a moderate rather than a severe impairment. The GP specified in the MR that the appellant "cannot carry anything heavier than about 10 lbs." The ministry wrote that the GP reported in the MR that the appellant does not require any prostheses or aids for her impairment and, in the AR, that no assistance is provided through the use of an assistive device and no equipment is required that is not currently being used.

Given an opportunity to provide an update of this assessment, the GP wrote in her January 31, 2019 letters that the appellant has "moderate to severe" low back pain, which is "now debilitating," and she is unable to work "due to severity of her pain" and "until further assessment investigations." The ministry reasonably considered that the GP did not specify any change to the assessment of the appellant's functional skills and did not indicate the need for an assistive device, such as a cane or walker with a seat, or toileting and bathing aids. Although the advocate argued at the hearing that not everyone with severe back pain has an assistive device, in the appellant's case the GP has reported that there is no requirement for an assistive device and there is also no requirement for assistance from another person with any of the mobility and physical activities.

The ministry considered that the GP assessed the appellant in the AR as being independent with walking indoors (GP note: "but very slow- depends on level of pain"), and she takes significantly longer than typical with walking outdoors. The appellant also takes significantly longer with climbing stairs, standing, lifting, and carrying and holding. The GP noted for lifting that the appellant is limited to "less than 7 kg., or 15 lbs. The advocate argued at the hearing that by taking significantly longer than typical, there is an indication that the appellant requires assistance but she manages because that assistance is not always available. The panel finds that the ministry reasonably considered that the GP had not reported the need for either periodic or continuous assistance or the use of an assistive device with any of the mobility and physical activities, although presented with that opportunity in the AR.

For the ministry to be "satisfied" that an impairment is severe, the panel considers it reasonable for the ministry to expect that the information provided by the medical practitioner and prescribed professional presents a comprehensive overview of the nature and extent of the impacts of the medical conditions on daily functioning, including explanations, descriptions or

examples in the spaces provided in the MR and in the AR forms.

Given the GP's assessment of physical functioning in the moderate range of functional skills limitations, and with an emphasis by both the GP and the appellant on the restrictions to the appellant's employability and no clear indication of a need for assistance with her mobility and physical activities from another person or through the use of an assistive device, the panel finds that the ministry reasonably determined that the evidence is not sufficient to establish that the appellant has a severe physical impairment under Section 2(2) of the EAPWDA.

Severe Mental Impairment

In the reconsideration decision, the ministry was not satisfied that the information provided was sufficient evidence of a severe mental impairment. The ministry wrote that the GP reported in the MR that the appellant has been diagnosed with chronic anxiety disorder "likely all her life," with an onset of depression in 2015. The ministry considered that the GP indicated that she had diagnosed the appellant with generalized anxiety disorder and "it had not been disabling until about 1 year ago when her lower back pain became much more exacerbated such that she could no longer work." As previously discussed, the panel finds that the ministry reasonably concluded that an assessment of employability or vocational abilities is not part of the PWD application. The ministry considered that the GP had not indicated that there was a referral her to a mental health specialist despite the deterioration in the appellant's mental health in the past year. The advocate argued that the GP's diagnosis is sufficient, although the appellant has been seen by a psychiatrist in the past.

The ministry also considered that the GP reported in the MR that the appellant has significant deficits with her cognitive and emotional functioning in the areas of memory, emotional disturbance, motor activity and attention or sustained concentration, and the GP wrote: "at times the above are significant due to her anxiety and depression particularly when she is having a lot of pain." In her self-report, the appellant wrote that her pain is putting stress on her body, both mentally and physically, causing depression. The appellant wrote that the pain affects everything that she does from work to play and ultimately her quality of life. In assessing daily impacts to the appellant's cognitive and emotional functioning, the GP assessed a major impact in the one area of emotion. The areas of motor activity and attention/concentration were assessed by the GP with moderate impacts, as well as the areas of bodily functions and language. The GP indicated a minimal impact in the area of memory. The GP did not provide further comments regarding the appellant's cognitive and emotional functioning.

Considering the two "social functioning" DLA, as set out in Section 2(1)(b) of the EAPWDR, that are specific to mental impairment – make decisions about personal activities, care or finances (decision making), and relate to, communicate or interact with others effectively (relate effectively), the panel finds that the ministry reasonably concluded that there is insufficient evidence to establish that the appellant is significantly restricted in either. Regarding the

'decision making' DLA, the GP reported in the AR that the appellant independently manages all of the applicable decision-making components of DLA, specifically: personal care (regulating diet), shopping (making appropriate choices and paying for purchases), meals (meal planning and safe storage of food), pay rent and bills (including budgeting), and medications (taking as directed and safe handling and storage). For the decision-making component of the transportation DLA (using public transit schedules and arranging transportation), the GP indicated that this was not applicable to the appellant. The GP reported in the AR that the appellant is independent with making appropriate social decisions, although the GP also commented with respect to her ability to deal appropriately with unexpected demands that "due to her anxiety and depression, she takes longer to make a decision."

Regarding the DLA of 'relating effectively', the GP reported in the MR that the appellant has no restrictions with social functioning and, in the AR, that the appellant is independent with developing and maintaining relationships and interacting appropriately with others. While the GP assessed the appellant with 'very disrupted' functioning in her immediate social network, the ministry reasonably considered the GP's comments that the appellant "really tries to interact normally, but overall feels a lot of social isolation" and that "people in her life make her feel like she's the problem and stigmatize her" relate primarily to the behaviors of others and not that of the appellant. The ministry considered that, when asked to describe the support/supervision required to maintain the appellant in the community, the GP left this section incomplete and the GP assessed good functioning in the appellant's extended social networks. In the MR, the GP assessed the appellant as having difficulties with communication described as "other" and wrote "somewhat difficulties at times with communication as she become too anxious and tearful." In the AR, the GP assessed the appellant as having a good ability to communicate with reading, writing and hearing, and a satisfactory ability with speaking.

Given the absence of evidence of significant impacts to the appellant's cognitive and emotional functioning, as well as the insufficient evidence of significant impacts to the two social functioning DLA that are specific to a mental impairment, and with an emphasis by the GP on the restrictions to the appellant's employability, the panel finds that the ministry reasonably determined that a severe mental impairment was not established under Section 2(2) of the EAPWDA.

Restrictions in the ability to perform DLA

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, as confirmed by the opinion of a prescribed professional. The direct and significant restriction may be either continuous or periodic. If the restriction is periodic, it must be for an extended time. DLA are defined in Section 2(1) of the EAPWDR and are also listed in the MR and, 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 impairment continuously or periodically for extended periods. In this case, the GP is the prescribed professional.

In the reconsideration decision, the ministry was not satisfied that the appellant has a severe physical or mental impairment that, in the opinion of the prescribed professional, directly and significantly restricts DLA either continuously or periodically for extended periods of time. At the hearing, the appellant stated that she has a lot of restrictions, especially with her DLA and with her children. She cannot get up in the morning to get one child to school and he has missed many days. In her Request for Reconsideration, the appellant wrote that she has been unable to work for a year and she needs money for her family to live on. In her self-report, the appellant wrote that her pain keeps her from doing simple things like walking, exercising, bending, cleaning, cooking. The appellant wrote that she is unable to bend down to put on her pants or shoes or to bathe the kids, and traveling long distance causes severe lower back pain. The appellant wrote that the pain affects everything she does, from work to play and ultimately her quality of life. The advocate argued at the hearing that the appellant has described her restrictions with tasks of DLA as the GP is not in close contact with the appellant and is not aware of when she requires help with many activities; however, pursuant to Section 2(2) of the EAPWDA, all restrictions to DLA must be confirmed in the opinion of a prescribed professional.

The ministry reviewed the information in the MR and considered that the GP, as the prescribed professional, reported that the appellant is not restricted with most DLA, specifically: the personal self care DLA, the meal preparation DLA, the management of medications DLA, the daily shopping DLA, the use of transportation DLA, the management of finances DLA, the social functioning DLA, as well as mobility inside the home. The GP reported that the appellant is continuously restricted with the basic housework DLA as well as with mobility outside the home. Asked to describe the assistance that the appellant requires with DLA, the GP wrote: "she manages to do most of DLA slowly through the day and spreads out over course of the week. She cannot do all the activities on one day due to persistent, unrelenting low back pain. She has to have her children or mother help with many activities and household tasks." The advocate argued at the hearing that the GP wrote that the appellant cannot do all of activities on one day because of the pain and the appellant's inability to complete her activities in a normal time period indicates that that the appellant's impairment is severe and she needs help even though she does not always receive help.

The advocate also argued that the GP may not have had much knowledge about filling out the forms when she indicated in the MR that there are no restrictions in most DLA, especially since the report in the AR is that the appellant takes significantly longer with many tasks. The ministry also considered the GP's assessments in the AR, which indicated that the appellant takes significantly longer than typical with the basic housework DLA, noting that it is "hard to carry large loads" and the appellant "has to carry multiple smaller loads" and she is "unable to bend over for vacuuming and has her mother help out." The GP also commented that the appellant's "children or mother may help out with some housework, shopping and carrying things."

The ministry considered that the GP assessed the appellant as being independent with performing all tasks of the shopping DLA, with the exception of carrying purchases home, for which the appellant requires periodic assistance. The ministry reasonably considered that there was insufficient information to determine that the periodic assistance with this task was for extended periods of time. For her mobility outside the home, the appellant also takes significantly longer but there is no indication of how much longer and she does not require assistance from another person or through the use of an assistive device, as previously discussed.

The ministry acknowledged in the reconsideration decision that there are tasks of DLA that take the appellant longer than typical to perform, such as "at least 3 to 4 times longer to dress below the waist", "2 to 3 times longer than someone without back pain" to perform transfers in and out of bed and on and off a chair, tasks of food preparation and cooking "takes much longer than it would if she had no pain as she has to change her body position frequently from sitting to standing and sitting again," and getting in and out of a vehicle "takes at least 3 times longer than someone with no problem." The ministry wrote that these restrictions are not considered significant as the appellant is capable of performing these tasks despite the pain she experiences. The ministry reasonably considered that there was insufficient information from the prescribed professional to establish a need for assistance with tasks of DLA as the GP indicated that the appellant's children or mother "may" help out with "some" tasks. The ministry wrote that an indication of occasional help by family with some tasks of DLA does not necessarily establish that assistance is required with a DLA, or whether the assistance is needed continuously or periodically for extended periods of time.

Given the GP's assessment of no restrictions with all DLA except the basic housework DLA as well as mobility outside the home, together with the functional skills assessment in the moderate range, and insufficient evidence of significant impacts to the two social functioning DLA that are specific to a mental impairment, the panel finds that the ministry reasonably concluded that the evidence is insufficient to show that the appellant's overall ability to perform her 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.

The GP reported in the AR that the appellant receives help from family and wrote that “her children and mother try to help within their abilities.” The GP indicated that the appellant does not use any assistive devices to help compensate for her impairment and no equipment is needed. 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 confirms the ministry’s decision. The appellant’s appeal, therefore, is not successful.

PART G – ORDER

THE PANEL DECISION IS: (Check one) UNANIMOUS BY MAJORITY

THE PANEL CONFIRMS THE MINISTRY DECISION RESCINDS THE MINISTRY DECISION

If the ministry decision is rescinded, is the panel decision referred back to the Minister for a decision as to amount? Yes No

LEGISLATIVE AUTHORITY FOR THE DECISION:

Employment and Assistance Act

Section 24(1)(a) or Section 24(1)(b)

and

Section 24(2)(a) or Section 24(2)(b)

PART H – SIGNATURES

PRINT NAME

S. Walters

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2019-04-11

PRINT NAME

Rosalie Turcotte

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019-04-11

PRINT NAME

Kulwant Bal

DATE (YEAR/MONTH/DAY)

2019-04-11