

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 June 11, 2019, 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* (EAPWDA) for designation as a person with disabilities (PWD). The ministry found that the appellant met the requirements of having reached 18 years of age and of a medical practitioner confirming 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 it has not been demonstrated that the appellant is in any of the prescribed 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

The appellant's request for PWD designation was received by the ministry on March 27, 2019. The request was denied on April 12, 2019. Reconsideration of that denial was requested on May 13, 2019, and the request was again denied on June 11, 2019. In support of his original and reconsideration requests, the appellant provided the following documents:

- PWD application comprised of a Medical Report (MR) and an Assessor Report (AR), both dated March 15, 2019, completed by a general practitioner (GP) who has known the appellant since 2016 and has seen the appellant 2 - 10 times in the past 12 months, and a 1-page typewritten self-report (SR);
- November 3, 2017, lumbar spine MRI report;
- May 29, 2018, right hip medical resonance imaging (MRI) report;
- April 23, 2019, lumbar spine MRI report [identified as being performed for comparison with the 2017 MRI];
- May 29, 2019, consult letter from an orthopaedic surgeon; and,
- June 11, 2019, letter from the GP.

Information provided on appeal and admissibility

Notice of Appeal (NOA) dated June 20, 2019, which contained no information.

At the hearing, the appellant provided oral testimony respecting his back pain which, on balance, was consistent with the information provided in his SR and was therefore admitted in accordance with section 22(4) of the *Employment and Assistance Act* (EAA) as being in support of the information and records available at the time of reconsideration.

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

Summary of relevant evidence

Diagnoses and Health History

In the PWD application, where asked to specify diagnoses related to the applicant's impairment and indicate the severity of the medical conditions relevant to the impairment, the GP reports:

- Degenerative disc disease (DDD)
- Renal stone
- Thrombocytopenia
- Psoriasis
- Right hip osteoarthritis

Suffers from ongoing low back pain and right sciatica and hip pain affecting ability to lift weight and push/bend. Unable to do physical jobs due to pain. Also suffers from recurrent itchy skin rash, worse with sweating. Diagnosed with psoriasis but plan is for skin biopsy.

Physical Impairment

The GP assesses the appellant's functional skills as:

- able to walk less than 1 block unaided on a flat surface;
- able to climb 2 to 5 steps unaided;
- limited to lifting under 5 lbs.;
- can remain seated for less than 1 hour; and,
- no difficulties with communication.

The GP also reports that no prostheses or aids are required for the appellant's impairment. Walking indoors is managed independently. Walking outdoors and climbing stairs take significantly longer than typical. Standing, lifting, and carrying and holding require continuous assistance from another person.

In the SR, the appellant writes that right sciatica in his lower back causes very excruciating pain, he cannot sleep at night and is totally debilitated. Pain medication makes him very dizzy and sleepy, with fatigue all the time. His symptoms include: lower back pain; pain down both sides of his legs (worse on right side – radiates down to foot); hip pain; burning or tingling down right leg; weakness, numbness and difficulty moving leg; constant pain in legs; and, shooting pain that makes it difficult to stand up or sit down.

May 29, 2018, right hip MRI: Impression - "Mild acetabular dysplasia. Early osteoarthritis of the hip."

November 3, 2017, lumbar spine MRI findings and impression include: "The lumbar spine shows normal alignment. Small right far lateral disc protrusion at L3-4, causing mild compression of the right L3 nerve root within the foramen and extraforaminal soft tissues. Moderate bilateral lateral recess stenosis at L4-5 with mild compression of the L5 nerve roots bilaterally."

In the May 29, 2019 consult letter, the orthopaedic surgeon notes that the appellant reports ongoing pain in his low back radiating to both legs. "Clinically I found him to be in no obvious discomfort. Gait was normal and he was able to toe and heel walk without difficulty. Evaluation of his back revealed no deformities. There was no localized tenderness. Trendelenburg test was negative bilaterally. On flexion he could get his hands to his calves and had a flexion increment of 5cm in 15. Extension and lateral flexion were slightly decreased. Lumbar spinal rhythm was abnormal." Respecting the 2017 and 2019 MRIs of the lumbar spine: "Images reveal sacralization of L5 and degenerative changes in the L4-5 motion segment. As a result of the degenerative changes there is mild central and lateral recess stenosis at the L4-5 level. No significant interval change is noted between the two studies."....."I do not believe that his symptoms are severe enough to warrant (sic) surgical management. Treatment should continue to be symptomatic. He does report himself to be having difficulty finding manual labour work because of his low back pain and I would therefore support his application for disability benefits."

In the June 11, 2019 letter, the GP provides the following information. "[Patient name] is suffering from ongoing low back pain, MRI was done lately and showed degenerative disc disease at multiple levels, moderate to severe. This condition is affecting his ability to work particularly he is unable to do physical job and was advised medically to avoid any wt lifting even more than 5 pounds and also the same applies to pushing and standing for long time."

At the hearing, the appellant stated that his situation is very significant for him as he can't stand for more than 5 - 10 minutes and can't sit or walk for more than 5 minutes, either. He questions who would hire him in his condition. He wishes he was healthy and could work. He wishes there were jobs that match his abilities, maybe

just sitting, but then it comes back to his language [the appellant is not fluent in English]. He states that is very willing to see specialists to check his abilities and see if he can work.

In response to ministry's review of the reconsideration decision at the hearing, the appellant wanted to clarify that he worked 2 months at a store but got a very severe pain and his body was in an "L" shape. Movement and activities were very limited. Afterward he got a bad cold followed by bad influenza that affected his back pain. He can't sleep at night – last night he slept for only 1 hour – because of extreme back pain. In general, he's not the kind of person to ask for disability assistance but he has asked for other items (bandages for his feet, devices and medications for his back) but has been denied and can't afford the items on income assistance. He feels like he is improving and is asking for support for only as long as he needs it, which looks to him as being for a short period of time.

Ability to Communicate

- No cognitive, motor or sensory difficulties with communication.
- Speaking, reading, writing, and hearing abilities are satisfactory "Due to ongoing pain" [good, poor and unable are the other listed options].

Mental Impairment

In the MR, the GP reports:

- Significant deficits with 2 of the 11 listed areas of cognitive and emotional function – motivation and attention or sustained concentration – "Due to ongoing pain."

In the AR, the GP reports:

- Moderate impact on daily cognitive and emotional functioning in 3 areas – bodily functions, consciousness, and motivation. Minimal impact on daily functioning in 3 areas – emotion, attention/concentration, and memory. No impact for the remaining 8 listed areas.
- All listed areas of social functioning require periodic support/supervision – appropriate social decisions, develop and maintain relationships, interact appropriately with others, deal appropriately with unexpected demands, and secure assistance from others (provided by family and friends).
- Marginal functioning with both immediate and extended social networks.

DLA

The GP reports the following:

- The appellant has been prescribed medication and/or treatments that interfere with the ability to perform DLA – medications may cause drowsiness. Anticipated duration of medications and/or treatments is described as "On and off use as needed, likely for the foreseeable future."
- Chronic low back pain and sciatica are the impairments that impact the appellant's ability to manage DLA.
- Information respecting the DLA "move about indoors and outdoors" is as described above under the heading Physical Impairment.
- Respecting the DLA "personal care" dressing, grooming, bathing, regulating diet, transfers in/out of bed and on/off chair require periodic assistance from another person (due to back pain wife helps). Toileting and feeding self are managed independently.
- Respecting the DLA "basic housekeeping," both basic housekeeping and laundry require continuous assistance.

- For the DLA “shopping,” going to and from stores, making appropriate choices, and paying for purchases require periodic assistance from another person. Carrying purchases home requires continuous assistance from another person. Reading prices and labels is managed independently.
- For the DLA “meals,” meal planning requires periodic assistance from another person. Food preparation, cooking, and safe storage of food require continuous assistance from another person.
- All listed tasks of the DLA “pay rent and bills” require periodic assistance from another person.
- For the DLA “medications,” filling/refilling prescriptions and safe handling and storage are managed independently. Taking as directed requires periodic assistance from another person.
- For the DLA “transportation,” getting in and out of a vehicle and using public transit require periodic assistance from another person. Using transit schedules and arranging transportation is managed independently.
- Where asked for additional comments, the GP writes “Due to ongoing pain and while on medications – adverse reactions.”

Need for Help

The GP reports that help is provided by family, wife mostly, and that the appellant “will need another person to assist him in his activities with pain flare up.” No assistive devices or equipment are used or needed.

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 prescribed person as described in section 2.1 of the EAPWDA, 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

Eligibility under section 2.1 of the EAPWDR

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.

Eligibility under section 2 of the EAPWDA

Physical Impairment

The appellant's position is that he is severely impaired by back pain which leaves him unable to sit, stand or walk for more than 5 to 10 minutes and therefore makes him unemployable.

The ministry states that a diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment; rather, the nature of the impairment and the extent of its impact on daily functioning as evidenced by limitations/restrictions in mobility, physical ability and functional skills must be assessed. Reviewing the information from the GP in the PWD application and subsequent letter, the medical imaging results and the orthopaedic surgeon's consult letter, the ministry concludes that the information supports that the appellant likely has a moderate impairment with chronic pain and recurrent sciatica, but that it does not demonstrate a severe overall physical impairment. The ministry finds that it is unclear why the GP reports significant restrictions in many areas, such as walking, climbing stairs, lifting, and sitting, when both the GP and the orthopaedic surgeon report independent walking indoors and that no assistive devices are used or required. The ministry also finds that the nature of assistance from family is not explained and is reported primarily as being periodic, making it difficult to determine the extent of help required. The ministry also notes that the appellant's medical condition prevents him from doing physical work but that employability is not a factor when determining PWD designation.

Panel Analysis

The legislation, section 2 of the EAPWDA, requires that the minister “is satisfied” that a person has a severe physical or mental impairment which gives the ministry discretion when making the determination. In duly exercising this discretion, the ministry must consider and assess all of the information before it and where there are discrepancies on the evidence, make determinations as to the weight given to the conflicting information. In this case, the ministry has placed the most reliance, or weight, on the assessments provided by the GP where there is a conflict with the appellant’s self-reported information. The panel considers this to be reasonable given that the legislation does, as the ministry notes, make it clear that the fundamental basis for assessing PWD eligibility is information from a prescribed professional. The panel also notes that the legislation does not identify employability or financial constraints as considerations when determining PWD eligibility.

The GP diagnoses the appellant with a number of medical conditions but both the GP and appellant describe limitations to physical functioning as resulting only from degenerative disc disease (low back pain and sciatica) and osteoarthritis of the right hip. While the GP, the appellant and the orthopaedic surgeon consistently identify an impact on the appellant’s ability to engage in physical labour for employment, which is not the basis upon which PWD eligibility is determined, the information respecting the impact on routine daily physical functioning is not clear. As the ministry notes, it is unclear why there is no reported impact on the ability to walk indoors and no assistive devices are required given that the GP reports that the appellant is unable to walk 1 block on a flat surface. The panel also notes that in the AR the GP reports that “standing” requires continuous assistance from another person but in the subsequent letter the GP reports that the appellant has been medically advised to avoid “standing for [a] long time.” Aside from these inconsistencies in the GP’s information, the information from the orthopaedic surgeon appears to be at odds with the GP’s assessment: the orthopaedic surgeon describes the 2019 medical imaging results as showing “mild” stenosis at the L4-5 level, with no significant change since the 2017 results and observed that the appellant was able to walk normally and appeared to have no discomfort. There also appears to be disparity between the MRI reports, which identify mostly “mild” or “minimal” degenerative changes with a few “moderate” changes and are consistent with the surgeon’s assessment that the symptoms are not severe enough to warrant surgery, and the GP’s description of moderate to severe degenerative disc disease. The appellant’s own information is also somewhat contradictory: he reports that he is unable to sit for more than 5-10 minutes but also indicates that a “sitting” job could be suitable but for his language difficulties. The appellant has also described his situation as improving and likely being short-term. Finally, the GP’s information respecting the need for assistance from other people (family) was reasonably viewed as not establishing severe impairment: most assistance required is periodic and the GP describes that the appellant needs the assistance of another person “to assist him in his activities with pain flare up” but there is no description of how often this flare ups occur or how long they last.

Based on the above analysis, the panel concludes that the ministry was reasonable in determining that the information does not establish a severe impairment of physical functioning.

Mental Impairment

The appellant does not expressly argue that he has a mental impairment, though he notes that his pain medication makes him dizzy and sleepy.

The ministry’s position is that the appellant has not been diagnosed with a mental impairment and while the GP reports that chronic pain impacts aspects of mental functioning, including concentration and motivation, either minimal or no impact is assessed for most aspects of cognitive and emotional functioning.

Panel Analysis

The GP does not diagnose a mental impairment, and that the appellant did not mention mental impairment at the hearing. Additionally, the appellant is reported to have satisfactory communication abilities, no areas of social

functioning require continuous support/supervision, and there are no major impacts on daily cognitive and emotional functioning. Based on this information, the panel concludes that the ministry was reasonable in determining that a severe mental impairment is not established.

Restrictions in the ability to perform DLA

The appellant's position is that he depends on his spouse for his daily activities, noting that she helps with dressing and bathing which he cannot do on his own.

The ministry notes that a prescribed professional's opinion is fundamental in its determination of whether it is satisfied that the impairment directly and significantly restricts DLA and that while the legislation does not specifically require the frequency and duration of restrictions to be explained, this information is valuable in determining the significance of restrictions. The ministry notes that continuous assistance is required with basic housekeeping, meals and carrying purchases home and that other DLA tasks require periodic assistance/support, with the GP commenting that the assistance of another person is needed for activities with pain flare-ups. The ministry concludes that while the appellant experiences chronic pain, sciatica and flare-ups, only periodic assistance is required in most areas and the amount of that assistance does not appear to be extensive or required for extended periods. It is also unclear why the appellant requires continuous assistance with meals when he is reported to be independent with walking indoors. Again noting that employability is not a factor when determining PWD eligibility, the ministry finds that the information does not establish that a severe impairment significantly restricts the appellant's ability to perform DLA, either continuously or periodically for extended periods.

Panel Analysis

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.

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. While there is likely some crossover between restrictions impacting the ability to work and those impacting the ability to perform DLA, the demands of employment are routinely more demanding in terms of frequency and duration than managing DLA tasks, and more importantly, only restrictions on the ability to perform the DLA set out in the legislation are considered under section 2(b)(i) of the EAPWDA.

In this case, both the GP and the orthopaedic surgeon are prescribed professionals and both have provided information relating to the appellant's ability to perform his DLA. As previously discussed under the heading Physical Impairment, the appellant is reported as managing walking indoors independently and other information respecting the ability to walk is inconsistent (relates to the DLA "move about outdoors and indoors"). The panel also finds that the information provided by the GP respecting the need for assistance with DLA is not entirely clear: continuous assistance is identified for most listed tasks of the DLA "meals," both tasks of "basic housekeeping" and one task of the DLA "shopping" (carrying purchases home) but the GP also reports that assistance is needed with pain flare-ups. The GP also reports the need for periodic assistance with tasks of the DLA "shopping" and with the remaining DLA but does not provided information that establishes that the periodic assistance is required for extended periods.

Noting again that the ability of the appellant to be employed doing physical work is not at issue, the panel concludes that the ministry was reasonable to determine that the information does not establish that in the

opinion of a prescribed professional a severe impairment significantly restricts the 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 daily living “activities” is a precondition of requiring “help to perform those activities.” In this case, the panel found the ministry was reasonable in concluding that direct and significant restrictions with DLA were not established. Accordingly, the panel also finds that the ministry reasonably concluded that it cannot be determined that the appellant requires help to perform “those activities” as a result of direct and significant restrictions with daily living “activities” 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 therefore confirms the decision. The appellant is not successful on appeal.

APPEAL NUMBER

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 Jane Nielsen	
SIGNATURE OF CHAIR	DATE (YEAR/MONTH/DAY) 2019/07/16

PRINT NAME Carla Tibbo	
SIGNATURE OF MEMBER	DATE (YEAR/MONTH/DAY) 2019/07/16

PRINT NAME Carlos Garcia	
SIGNATURE OF MEMBER	DATE (YEAR/MONTH/DAY) 2019/07/16