

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the ministry) reconsideration decision dated May 2, 2019 which found that the appellant did not meet four 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. However, the ministry was not satisfied the evidence establishes that:

- the appellant has a severe physical or mental impairment;
- in the opinion of a medical practitioner or nurse practitioner, her impairment is likely to continue for at least 2 years;
- 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

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

The evidence before the ministry at the time of the reconsideration decision included the Persons With Disabilities (PWD) Application comprised of the appellant's information and self-report dated December 29, 2018, a medical report (MR) dated January 26, 2019 and an assessor report (AR) dated February 4, 2019, both completed by a general practitioner (GP) who has known the appellant for 18 years and has met with her 2 to 6 times in the past 12 months .

The evidence also included the following documents:

- 1) Undated handwritten statement entitled "Emotional Impact;"
- 2) Series of photographs of items inside a trailer;
- 3) Copy of the PWD application with handwritten notations added;
- 4) Page from a Diagnostic Imaging Report for an exam September 7, 2014;
- 5) Letter dated December 5, 2014 from the GP to a lawyer;
- 6) Letter dated January 7, 2015 to a lawyer from a physician who is a specialist in physical medicine and rehabilitation;
- 7) Letter dated August 17, 2015 to the GP from a physician;
- 8) Consultation Report dated April 19, 2016;
- 9) Chart Summary dated May 11, 2016;
- 10) Letter dated May 13, 2016 to the GP from a physician who is a specialist in sport and exercise medicine;
- 11) Letter dated May 24, 2016 from a lawyer to a physical therapy clinic;
- 12) Letter dated June 18, 2016 from a registered physical therapist to the lawyer;
- 13) Letter dated July 5, 2016 from the GP to the lawyer;
- 14) Letter dated July 12, 2016 from a lawyer to an Occupational Therapist (OT);
- 15) Functional Capacity Evaluation dated August 31, 2016 by an OT;
- 16) Letter dated September 19, 2016 from a lawyer to a vocational rehabilitation consultant;
- 17) Letter dated November 23, 2016 from a lawyer to a clinical counsellor;
- 18) Medical Legal Report dated December 29, 2016 by a clinical counsellor;
- 19) Letter dated January 8, 2017 to a lawyer from a physician who is a specialist in physical medicine and rehabilitation;
- 20) Letter dated February 20, 2017 from a physical therapist to a lawyer;
- 21) Vocational Rehabilitation Assessment Report dated March 20, 2017;
- 22) Letter dated April 28, 2017 to a lawyer from an orthopedic surgeon;
- 23) Letter dated January 9, 2018 to the GP from another physician;
- 24) Handwritten letter dated April 13, 2019 from the appellant; and,
- 25) Request for Reconsideration dated April 18, 2019.

Diagnoses

In the MR, the GP diagnosed the appellant with depression, with an onset in 2016, and chronic soft tissue lumbar back pain and chronic left knee pain with diffuse tenderness of soft tissues, with an onset in 2012. Asked to describe the appellant's mental or physical impairments that impact the appellant's ability to manage her daily living activities (DLA), the GP wrote in the AR: "back pain and knee pain; anxiety, low mood."

Duration

In the MR and the AR, the GP reported:

- When asked if the impairment is likely to continue for 2 years or more, the GP did not indicate either “yes” or “no.”
- The GP wrote: “her youth indicates she could improve in future. She is motivated to restart working with the kinesiologist. Chronic pain syndromes are difficult to assess and some pain symptoms seem to be worse due to emotional symptoms.”

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

- Although her doctor says her youth indicates she could improve, she has not improved in 6 years.
- Her doctor referred to her pain as “chronic” which, according to the Oxford dictionary, means “persisting for a long time or constantly recurring, having a chronic illness, long-lasting, and having a bad habit.”

In the letter dated January 8, 2017 to a lawyer, a physician who is a specialist in physical medicine and rehabilitation wrote:

- The appellant’s prognosis is guarded.
- “Barring some as yet unachieved improvement,” he anticipated the appellant “remaining symptomatic and remaining limited for the foreseeable future.”

In the letter dated April 28, 2017 to a lawyer, the orthopedic surgeon wrote “with respect to the long-term outlook, the fact that [the appellant] has been experiencing knee pain for 4 ½ years and that there is an element of CRPS [Chronic Refractory Pain Syndrome], are poor prognostic factors.”

Physical Impairment

In the MR and the AR, the GP reported:

- In terms of the appellant’s health history, the appellant’s “lumbar back x-rays have been normal and two MRI’s of the knee have been normal,” and the GP has “encouraged her to increase her fitness and she will be reconnecting with a kinesiologist.” The GP noted that the sports medicine doctor “felt she may have had a superficial nerve irritation contributing to the pain” and the orthopedic surgeon saw the appellant in 2015 and “felt that she did not have a surgical issue.”
- 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 2 to 3 hours.
- In the AR, the appellant is assessed as being independent with walking indoors and with walking outdoors, with standing, lifting, and carrying and holding. The appellant takes significantly longer with climbing stairs “due to pain.” The GP did not provide further comment regarding the appellant’s ability to climb stairs.
- 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 letter dated February 20, 2017 to a lawyer, the physical therapist wrote regarding the motor vehicle accidents in 2012 and 2016, that the appellant “subjectively reports a high level of symptoms, demonstrates a degree of sensitized behaviors, and has mild to moderate objective findings in the mechanical realm, without serious signs of harm.”

In the letter dated April 28, 2017 to a lawyer, the orthopedic surgeon wrote:

- He examined the appellant on April 18, 2017 and, in addition to the pain in her neck, back, and left knee, she reported some pain occasionally in the left hip and occasionally in her right hip. Her knee pain and back pain are her most significant areas of complaint.
- He noted that the MRI in July 2014 was reported to be normal.
- He believes there is no meniscal or ligamentous pathology in either knee. The findings in the left knee and the symptoms in the left knee are “more likely to be attributable to direct soft tissue injuries of an impact type mechanism.”
- It would be worthwhile for the appellant to try to improve her fitness level and to get her weight back down to her ideal body weight.
- He recommended that she get a new MRI.

In the letter dated January 9, 2018 to the GP, another physician wrote:

- The nerve conduction studies were consistent with a moderate carpal tunnel syndrome on the left.
- She also has evidence of generalized myofascial pain and chronic pain syndrome.

In her self-report, the appellant indicated:

- In 2016 she was involved in a head-on collision and now she suffers from back and knee pain.
- With her back pain, she cannot stand for more than 10 minutes at one time. She cannot sit for long either, maybe 30 minutes before she has to switch, which hurts her knee and back.

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

- Her doctor does not take into consideration what she has to say about the issues.
- She cannot sit for too long and she cannot stand for too long. She cannot lift much and she cannot squat down, bend over, lift above her head, and cannot sit at a desk without pain.
- She has provided some professional reports to show that she is not just making up her injuries. She has included reports from specialists she has seen over the years.
- Her doctor says she can walk 2 to 4 blocks, but she can only do 1 to 2 blocks. She can climb 2 to 5 steps or 5+ steps, but it depends on what she has done that day. She can lift 2 to 7 kg. but she could only hold the weight for under 2 minutes. She can sit for 2 to 3 hours “but again there are variables.”
- She questions her doctor’s assessment of her mobility and physical ability because she does not live with her and only sees her for 10 minutes every visit. She does not listen. She needs periodic assistance with walking indoors and outdoors, with climbing stairs, and standing. She requires continuous assistance with lifting and carrying and holding.

Mental Impairment

In the MR and the AR, the GP reported:

- In terms of the appellant's health history, the appellant's "depression was diagnosed in August 2016 and she started [medication] and she has had ongoing counseling. She has restarted [medication] recently but she also has several life stressors."
- The appellant has no difficulties with communication.
- The appellant has a significant deficit with her cognitive and emotional functioning in the area of emotional disturbance. The GP provided comments that "PHQ-9=20 but she also has a lot of situational stressors (especially financial) and relationships."
- In the AR, the appellant has a good ability to communicate in speaking, reading, and hearing, and she has a satisfactory ability with writing. The GP did not provide further comment.
- With respect to the section of the AR relating to daily impacts to the appellant's cognitive and emotional functioning, the GP assessed no major impacts, with moderate impacts in the areas of emotion and executive. There are minimal impacts in the areas of bodily functions and attention/concentration. There are no impacts to the remaining 8 listed areas of functioning, with a comment by the GP regarding impulse control "uncertain, she denies drug use." The GP did not provide further comments.
- For social functioning, there was no assessment for making appropriate social decisions and developing and maintaining relationships and the GP commented "unstable relationships. She may need DBT [Dialectical Behavior Therapy]" and the GP wrote she would be reviewing this at their next visit. The appellant is independent with 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: "poor stress tolerance").
- The appellant has very disrupted functioning in her immediate social network. The GP did not assess the appellant's functioning in her extended social networks, and provided no further comments.
- 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:

- Since the head-on collision in 2016, she has become anti-social and somewhat of a shut-in. She has lost communication with family and friends. She thought she was going to die and now she is suffering from PTSD [Post Traumatic Stress Disorder] and severe depression.
- She sees a counsellor every other week since the collision.
- She is always in a rut and cannot get out. She struggles with drugs. She has had a hard time with that since her mother died in 2004 and it is an every day battle.
- She has lost the support of her family since they distanced themselves from her.

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

- Regarding her ability to communicate, she has lost contact with many people because of her accident. She cannot speak or think the same and she has fallen out of contact with her own family.

- She has reverted back to her speech impediment and she slurs her words and sometimes has a slight lisp. She cannot always remember what she is talking about or comprehend what is being said to her.
- She believes her ability to communicate is more accurately assessed as satisfactory for speaking, reading and hearing and poor for writing.
- The medication she takes makes her “get numb in the head.”
- Regarding the impacts to her cognitive and emotional functioning, she believes she has eating problems with variations in her weight. She has confusion as she does not understand things around her or what is going on. She has anxiety and severe depression. She is “back on and off again” with drug use. She does random things that she cannot control anymore. She speeds when she is driving almost to the point that she is completely unsafe, with no care for her personal safety.
- She has poor short-term memory, she loses her train of thought, she has no motivation for anything and she has “bizarre behaviors for sure” with tension and agitation. She has disorganized thinking, delusions, and learning disabilities.

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.
- For the move about indoors and outdoors DLA, the appellant is independent with walking indoors and walking outdoors.
- For the personal care DLA, the appellant is independent with the tasks of dressing, grooming, bathing, feeding self, regulating diet, transfers in/out of bed and on/off chair. The GP did not provide an assessment regarding the task of toileting.
- Regarding the DLA of basic housekeeping, the appellant is independent with doing laundry and takes significantly longer than typical with the task of basic housekeeping, with a note by the GP that “she states that housework is difficult due to pain but she was able to move homes and hands appear dirty and calloused, seems to have done some physical work.”
- For the shopping DLA, the appellant is independent with all of the tasks, specifically with going to and from stores, reading prices and labels, making appropriate choices, paying for purchases, and carrying purchases home. There are no further comments by the GP.
- Regarding the meals DLA, the appellant is independent with all of the tasks, specifically with meal planning, food preparation, cooking, and safe storage of food.
- 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 all of the tasks, specifically getting in and out of a vehicle, using public transit (GP note: “N/A but could”) and using transit schedules and arranging transportation.

In the Vocational Rehabilitation Assessment Report dated March 20, 2017, the vocational rehabilitation consultant wrote:

- Given limited education and modest skills training potential, the appellant likely depended significantly on her physical capacity as an important underpinning of her employability.
- As a result of the post-accident symptoms and limitations, there are fewer occupations available to her.
- Because her medical prognosis is guarded, her vocational prognosis is similarly guarded.

In the letter dated February 20, 2017 to a lawyer, the physical therapist wrote:

- The injuries sustained in the accidents have led to a reported marked degree of limitation in the appellant's activities of daily living, functional abilities and work.
- At initial evaluation, the appellant stated limitations in walking, decreased standing and sitting endurance, and inability in general housekeeping such as laundry.
- Presently, the appellant reports carrying on with general ADL [activities of daily living] but is not performing activities such as hiking.

In her self-report, the appellant indicated:

- She is used to working 12 hours a day when she could work and now she cannot do anything. She cannot do work at a desk as she cannot sit for more than 45 minutes.
- She cannot do her own dishes in one washing, she has to do it in intervals and it could take her days to finish. Vacuuming is a chore in itself, or making the bed, having a shower is troublesome. Her house is always a mess it seems. It takes her about 4 times longer to clean her house and do laundry than most people.

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

- She wants to work but she cannot.
- She has a hard time preparing her own meals because she cannot stand long enough to cook anything.
- She can manage her personal finances "if she had more money."
- Regarding shopping for her personal needs, she can "kinda" do that, but she has to go in intervals and has to "take many breaks" if she has a lot to do.
- She needs to use public transportation due to losing her insurance and being unable to drive her car, which is a manual transmission so it is hard on her knee.
- The photographs of her trailer show the condition due to her being unable to keep up with cleaning. Regarding the GP's comments about her ability to do housekeeping, she believes the GP only hears what she wants to hear. She was moving and she had to start the work or else it would not have gotten done. People saw how much pain she was in so they finally helped. She had calloused and dirty hands because it was winter, which dried her hands due to the cold weather and she does small projects at home to keep busy and so she does not "kill people."
- She has a hard time moving about indoors and outdoors but she tries to manage and sometimes she gets help when she needs it.
- She does "okay" with performing personal hygiene and she has to as there is no one to help.
- She needed help managing her medications and stopped taking pills due to her poor memory. She forgets if she had already taken them.

Need for Help

The GP reported in the AR that the appellant receives help from “other,” described as “friend gives her lifts and now husband driving. For help required where none is available, the GP wrote “she has been able to live by herself.” 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 May 16, 2019, the appellant expressed her disagreement with the ministry’s reconsideration decision and wrote that she believes her doctor is giving people the wrong idea of what is going on with her. It is hard to understand that she is truly injured and cannot do a lot of things for herself. She wishes she could have handed in letters to understand from other people’s voices. She would like a second opinion on the doctor part.

At the hearing, the appellant stated:

- She has been dealing with her injuries for over 6 years and she had to stop working for a while. It has been more than 6 years and it will be more than 2 years more as she will be dealing with this for the rest of her life.
- She is not the same person that she was before the accident and she has had to get help with everything.
- Her doctor sent in the form but she did not listen to anything she said. Her doctor does not know about her daily life.
- Her sister had to move to her community to help her. The photographs of her trailer show that she could not keep it clean and she is usually a clean person. Her sister would help her clean her trailer because she was unable. It was taking three days to clean one room and she cannot do much without too much pain.
- Because of the accidents, she goes to counseling every week. She has PTSD and has gone through everything because of her injuries. She is not currently getting counseling because of the money issue and being unable to afford the sessions. She wondered if her counselor could complete the PWD forms on her behalf since her counselor knows more about her situation than her GP.
- She is in constant pain and she needs constant help.
- For a while, she could not shower on her own, but that has improved.
- Getting to and from places is difficult because she cannot drive a manual transmission due to her knee.
- She cannot walk up stairs without using the railing or having someone with her to help.
- She has been riding a bike because she can go further distance on a bike.
- She needs assistance to do a lot of things but it is hard to accept that she needs assistance.
- She is not in agreement with the way her doctor filled out the forms.
- None of her injuries have changed over the years and she knows it will be another 2 years. Her doctor called her injuries “chronic,” which means constant.
- Her ability to communicate is worse than the doctor has assessed as she loses track of what she is saying and she has lost communication with everyone.
- She has seen a kinesiologist on and off over 6 years. She stopped for a while because of her money situation and being unable to afford the cost.

The ministry relied on the reconsideration decision.

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

PART F – REASONS FOR PANEL DECISION

The issue on 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 that, in the opinion of a medical or nurse practitioner, is likely to continue for at least 2 years 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).

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.

Duration

In the reconsideration decision, the ministry wrote that the GP did not indicate in the MR whether the appellant's impairment is likely to continue for 2 years or more from the date of the report, and the GP commented "her youth indicates she could improve in future. She is motivated to restart working with the kinesiologist. Chronic pain syndromes are difficult to assess and some pain symptoms seem to be worse due to emotional symptoms." The ministry also considered the information in the supplementary medical documents written by medical practitioners and wrote that although these documents describe the appellant's medical history and medical conditions, they do not speak to the expected duration of impairment caused by her medical conditions. The ministry also wrote that these documents are not current and do not represent the appellant's current level of functioning.

In the letter with her Request for Reconsideration, the appellant argued that, although her doctor says her youth indicates she could improve, her condition has not improved in 6 years. The appellant wrote that the GP referred to her pain in her lumbar back and left knee as "chronic" which, according to the Oxford dictionary, means "persisting for a long time or constantly recurring." At the hearing, the appellant stated that none of her injuries have changed over the years and she knows she will be experiencing her chronic pain for another 2 years. In the letter

dated January 8, 2017, a physician who is a specialist in physical medicine and rehabilitation wrote that the appellant's prognosis is "guarded" and "barring some as yet unachieved improvement," he anticipated the appellant "remaining symptomatic and remaining limited for the foreseeable future." As well, an orthopedic surgeon wrote, in the letter dated April 28, 2017, that "with respect to the long-term outlook, the fact that [the appellant] has been experiencing knee pain for 4 ½ years and that there is an element of CRPS [Chronic Refractory Pain Syndrome], are poor prognostic factors." The panel notes that these opinions from medical practitioners referring to the appellant's chronic pain, were provided over 2 years ago and confirm the appellant's information that her condition has not changed over the years and is unlikely to change in the "foreseeable future."

Section 2(2)(a) of the EAPWDA stipulates that the ministry must be satisfied that the appellant's impairment is, in the opinion of a medical practitioner or nurse practitioner, likely to continue for at least 2 years. The GP confirmed a diagnosis in January 2019 with "chronic" soft tissue lumbar back pain and "chronic" left knee pain with an onset in 2012 and, when considered with the many reports from medical specialists that indicate chronic pain that has persisted since 2012, the panel finds that the ministry was not reasonable to conclude that a medical practitioner has not provided an opinion that the impairment of the appellant's physical functioning is likely to continue for at least 2 years. Therefore, the panel finds that the ministry's conclusion that there was insufficient evidence to establish that, in the opinion of the medical practitioner, the appellant's impairment is likely to continue for at least 2 years was not reasonable.

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 soft tissue lumbar back pain and chronic left knee pain with diffuse tenderness of soft tissues. The ministry considered that the GP, who is the appellant's long-standing physician, wrote in the MR that the appellant's "lumbar back x-rays have been normal and two MRI's of the knee have been normal," and the GP has "encouraged her to increase her fitness and she will be reconnecting with a kinesiologist." The GP also noted that the sports medicine doctor "felt she may have had a superficial nerve irritation contributing to the pain" and the orthopedic surgeon saw the appellant in 2015 and "felt that she did not have a surgical issue."

The ministry also considered the supplementary medical documents and noted that these documents described the appellant's medical history and medical condition, and the ministry wrote that these documents do not speak to specific limitations/ restrictions in the appellant's physical functioning. In her self-report, the appellant wrote that in 2016 she was involved in a head-on collision and now she suffers from back and knee pain. In the letter with her Request for Reconsideration, the appellant wrote that her doctor does not take into consideration what

she has to say about the issues. The appellant wrote that she has provided some professional reports to show that she is not just “making up” her injuries. The ministry reasonably considered that many of these medical reports are dated and do not describe the appellant’s current level of functioning. In the letter dated April 28, 2017, the orthopedic surgeon wrote that he examined the appellant and her knee pain and back pain are her most significant areas of complaint. The orthopedic surgeon wrote that he believes there is no meniscal or ligamentous pathology in either knee and the findings and the symptoms in the left knee are “more likely to be attributable to direct soft tissue injuries of an impact type mechanism.” In the letter dated January 9, 2018, another physician wrote that there was evidence of generalized myofascial pain and chronic pain syndrome. In the letter dated February 20, 2017, the physical therapist wrote regarding the motor vehicle accidents in 2012 and 2016, that the appellant “subjectively reports a high level of symptoms, demonstrates a degree of sensitized behaviors, and has mild to moderate objective findings in the mechanical realm, without serious signs of harm.”

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. 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. The ministry wrote that the GP indicated that she has known the appellant since 2000, or close to 20 years, and the panel finds that the ministry reasonably concluded that, in the absence of contradictory information from another medical professional, there was no reason to question the GP’s assessments. The ministry considered 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 5 to 15 lbs., and remain seated for 2 to 3 hours. The ministry wrote that the GP reported in the AR that the appellant is independent with walking indoors and with walking outdoors, with standing, lifting, and carrying and holding. The ministry considered that the GP reported that the appellant takes significantly longer with climbing stairs “due to pain” and wrote that the GP did not describe how much longer than typical the appellant takes with climbing stairs. The ministry considered the appellant’s self reports and noted that the appellant’s descriptions of the severity of impairment and resulting restrictions do not align with the GP’s assessments in the PWD application.

At the hearing, the appellant stated that her doctor sent in the form but she did not listen to anything she said about her issues and her doctor does not know about her daily life. In her self-report, the appellant wrote that, with her back pain, she cannot stand for more than 10 minutes at one time. The appellant wrote that she cannot sit for long either, maybe 30 minutes,

before she has to switch, which hurts her knee and back. In her Request for Reconsideration, the appellant wrote that her doctor says she can walk 2 to 4 blocks, but she can only do 1 to 2 blocks. The appellant wrote that she can climb 2 to 5 steps or 5+ steps, but it depends on what she has done that day. The appellant wrote that she can lift 2 to 7 kg. but she could only hold the weight for under 2 minutes, and she can sit for 2 to 3 hours “but again there are variables.” The appellant questioned the GP’s assessment of her mobility and physical ability because the GP does not live with her and only sees her for 10 minutes every visit. The appellant wrote that she needs periodic assistance with walking indoors and outdoors, with climbing stairs, and standing and she requires continuous assistance with lifting and carrying and holding. At the hearing, the appellant stated that she cannot walk up stairs without using the railing or having someone with her to help. There was no additional information provided on the appeal from a medical professional to support the appellant’s description of her functional skill limitations.

Given the GP’s assessment of physical functioning in the moderate range of functional skills limitations, the overall “mild to moderate objective findings in the mechanical realm” indicated in the additional medical reports, and with no clear indication of a need for assistance with the appellant’s 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 depression, with an onset in 2016. The ministry considered the GP’s comment that the appellant had started medication for her depression and she also has experienced several life stressors.

The ministry also considered that the GP reported in the MR that the appellant has a significant deficit with her cognitive and emotional functioning in the area of emotional disturbance and the GP provided comments that the appellant “also has a lot of situational stressors (especially financial) and relationships.” The ministry further considered that, in assessing daily impacts to the appellant’s cognitive and emotional functioning, the GP reported no major impacts, with moderate impacts in the two areas of emotion and executive. In her Request for Reconsideration, the appellant wrote that she believes she has eating problems with variations in her weight, and she has confusion as she does not understand things around her or what is going on. The appellant wrote that she has anxiety and severe depression, and she is “back on and off again” with drug use. The appellant wrote that she does random things that she cannot control anymore, such as speeding when she is driving almost to the point that she is completely unsafe, with no care for her personal safety. The appellant wrote that she has poor short-term memory, she loses her train of thought, she has no motivation for anything and she

has “bizarre behaviors for sure” with tension and agitation. The appellant also wrote that she has disorganized thinking, delusions, and learning disabilities. Although the appellant provided a detailed description of the impacts to her cognitive, emotional and social functioning, the panel finds that the ministry reasonably considered that the appellant’s description of her restrictions does not align with the GP’s assessments in the MR and the AR.

At the hearing the appellant stated that because of the accidents, she had been attending counseling regularly, that she has “gone through everything” because of her injuries and she would like her counselor to complete the PWD forms on her behalf since her counselor knows more about her situation than her GP. The panel noted the definition of the “prescribed professional” in Section 1 of the EAPWDR as listing the professionals qualified to complete the AR, including an assessment of the impacts to cognitive and emotional functioning, which list of professionals includes a registered psychologist, a registered nurse or registered psychiatric nurse, a social worker, a nurse practitioner and, in some cases, a school psychologist.

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 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), medications (taking as directed and safe handling and storage), and transportation (using public transit schedules and arranging transportation). The GP did not assess the appellant’s ability with making appropriate social decisions.

Regarding the DLA of ‘relating effectively’, the GP reported in the AR, that the appellant is independent with interacting appropriately with others, with no assessment for her ability to develop and maintain relationships. The GP commented that the appellant has “unstable relationships” and “she may need DBT,” which was to be reviewed at their next visit. While the GP assessed the appellant with ‘very disrupted’ functioning in her immediate social network, the ministry reasonably considered the GP’s report that the appellant receives assistance from a friend who gives her lifts. 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 did not assess the appellant’s functioning in her extended social networks. In the MR, the GP assessed the appellant as having no difficulties with communication and, in the AR, the GP assessed the appellant as having a good ability to communicate with speaking, reading, and hearing, and a satisfactory ability with writing.

In her self-report, the appellant wrote that, since the head-on collision in 2016, she has become

anti-social and somewhat of a shut-in. In her Request for Reconsideration, the appellant wrote regarding her ability to communicate, that she has lost contact with many people because of her accident, that she cannot speak or think the same and she has fallen out of contact with her own family. The appellant wrote that she has reverted back to her speech impediment and she slurs her words and sometimes has a slight lisp. The appellant wrote that she cannot always remember what she is talking about or comprehend what is being said to her, and she believes her ability to communicate is more accurately assessed as satisfactory for speaking, reading and hearing and poor for writing. As previously discussed, the ministry wrote in the reconsideration decision that the appellant's description of her impairment and resulting restrictions does not align with the GP's assessments, and there were no further reports from the GP or a mental health specialist provided on the appeal to support the appellant's description.

Given the discrepancy between the information from the appellant and that from the GP, as the prescribed professional, regarding the significance 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, the panel finds that the ministry reasonably concluded that it was not satisfied that a severe mental impairment had been 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. In her self report and in her Request for Reconsideration, the appellant wrote about her inability to work, that she used to work 12 hours a day and now she cannot do anything. In the Vocational Rehabilitation Assessment Report dated March 20, 2017, the vocational rehabilitation consultant wrote that because the appellant's medical prognosis is guarded, "her vocational prognosis is similarly guarded." The panel notes that 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.

In her self report, the appellant wrote that she cannot do her own dishes in one washing, she

has to do it in intervals and it could take her days to finish. She wrote that vacuuming is a chore in itself, and her house is always a mess and it takes her about 4 times longer to clean her house and do laundry than most people. At the hearing, the appellant stated that the photographs of her trailer show that she was not capable of keeping the space organized and her sister had to move to her community to help her. In her Request for Reconsideration, the appellant wrote regarding the GP's comments in the AR about her ability to do housekeeping, that she believes the GP only hears what she wants to hear. The appellant wrote that she was moving and she had to start the work or else it would not have gotten done, that people saw how much pain she was in so they finally helped. The appellant wrote that she had calloused and dirty hands because it was winter, which dried her hands due to the cold weather and she does small projects at home to keep busy and so she does not "kill people."

The appellant also wrote that she has a hard time preparing her own meals because she cannot stand long enough to cook anything. She wrote that she can manage her personal finances "if she had more money" and she can "kinda" shop for her personal needs, but she has to go in intervals and has to "take many breaks" if she has a lot to do. The appellant wrote that she needs to use public transportation due to being unable to drive her car, which is a manual transmission so it is hard on her knee. She wrote that she has a hard time moving about indoors and outdoors but she tries to manage and sometimes she gets help when she needs it. The appellant wrote that she does "okay" with performing personal hygiene and she "has to" as there is no one to help. She wrote that she needed help managing her medications and stopped taking pills due to her poor memory, that she forgets if she had already taken them. At the hearing, the appellant argued that her doctor sent in the PWD forms but she did not listen to anything she said and her doctor does not know about her daily life; however, the ministry reasonably considered that, 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 AR and considered that the GP, as the prescribed professional, reported that the appellant is independent with the move about indoors and outdoors DLA, as well as independent with performing all of the tasks of the listed DLA, with the exception of the task of basic housekeeping, which takes the appellant significantly longer than typical. For this assessment for housekeeping, the GP provided a qualifying comment that the appellant "states that housework is difficult due to pain, but she was able to move homes and hands appear dirty and calloused, seems to have done some physical work." The ministry wrote that the GP did not indicate how much longer than typical the appellant takes with housekeeping; however, the appellant indicated in her Request for Reconsideration that it takes her 4 times longer than normal to do cleaning. The GP did not provide an assessment for the task of toileting as part of the personal care DLA and wrote that the task of using public transit is not applicable to the appellant "but could."

In the reconsideration decision, the ministry wrote that the additional medical documents largely describe the appellant's medical history and conditions without speaking to her ability to perform

DLA. In the letter dated February 20, 2017, a physical therapist wrote that the appellant's injuries sustained in the accidents have led to a reported marked degree of limitation in the appellant's activities of daily living, functional abilities and work. The physician wrote that, at initial evaluation, the appellant stated limitations in walking, decreased standing and sitting endurance, and inability in general housekeeping such as laundry. The physician also wrote that "presently" the appellant reports "carrying on with general ADL [activities of daily living]" and "not performing activities such as hiking."

Given the GP's assessment of independence with performing all tasks of DLA with the exception of housework, 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 "others," described as "friend gives her lifts and now husband driving." For help required where none is available, the GP wrote "she has been able to live by herself." 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.

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

S. Walters

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2019-08-01

PRINT NAME

David Kendrick

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019-08-01

PRINT NAME

Chris McEwan

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019-08-01