

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 July 9, 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* for designation as a person with disabilities (PWD). The ministry found that the appellant met the age and duration requirements, but was not satisfied that:

- the appellant has a severe physical and/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, 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 found that the appellant did not demonstrate that she is of the prescribed classes of persons, who may be eligible for the PWD designation on alternative grounds as set out in the EAPWDR section 2.1.

PART D – RELEVANT LEGISLATION

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

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

PART E – SUMMARY OF FACTS

With the consent of both parties, the hearing was conducted as a written hearing, pursuant to section 22(3)(b) of the *Employment and Assistance Act*.

The evidence before the ministry at the time of the Reconsideration Decision included:

- The information before the ministry at the time of reconsideration included the appellant's PWD application comprised of a Medical Report (MR) [dated March 13, 2019], and an Assessor Report (AR) [dated May 1, 2019], both of which were completed by the appellant's general practitioner (the "GP"). The GP has known the appellant for 2 years and saw the appellant 2-10 times in the past 12 months prior to completing the PWD application. The PWD application also included the appellant's Self-Report (SR) dated March 21, 2019.
- Letter signed and dated November 21, 2018 from the appellant's rheumatologist, which in part discusses the dosage of the appellant's medication and stated that in his opinion the appellant "is disabled for any work and this could be considered indefinite".
- Letter signed and dated February, 27, 2019 from the appellant's podiatrist, which in part stated that the appellant has been treated for Morton's neuroma and is advised not to stand "for any more than 30 minutes at a time".
- Request for Reconsideration (RFR), signed and dated June 10, 2019.

Diagnoses

In the MR, the GP diagnosed the appellant with rheumatoid arthritis (onset 2015) and Morton's neuroma (onset 2007).

Physical Impairment

In the MR, the GP indicated the following about the appellant:

- "She has constant and severe bilateral hand/wrist pain along with right shoulder pains. This results in reduced function of her hands; [reduced] power + can easily drop objects, cannot lift anything [over] 5kg [and] difficulty dressing herself, cannot manage small buttons".
- "She has bilateral Morton's neuroma that can cause chronic pain".
- She can walk 4+ blocks unaided, climb 5+ steps unaided, lift 5-15lbs and sit without limitation.

In the AR, the GP indicated the following about the appellant:

- "Rheumatoid arthritis effects multiple joints (illegible) in hands causing chronic pain and loss of function"
- She can walk indoors and outdoors independently, climb stairs independently and stand independently. The appellant requires periodic assistance with lifting and carrying/holding.

In her self report, the appellant indicated the following:

- Her arm cracks and gets very sore with movement.
- She cannot raise her arms upright.
- Her hands and wrists are in chronic pain and she cannot cut her own finger and toe nails because her hands are not strong enough.
- She cannot push or pull more than 15lbs.
- She cannot stay on her feet for more than 30 minutes or feet will begin to throb and tingling is increasing with time. There is chronic pain with her feet and complications with her knees.
- Her neck swells and then she is unable to move it sideways and then she is in severe chronic pain which can take days to settle.
- She wears compression gloves to bed but the pain persists.

Mental Impairment

In the MR, the GP indicated the following about the appellant:

- No difficulties with communication.
- No significant deficits with cognitive and emotional function.

In the AR, the GP indicated the following about the appellant:

- She has good speaking, reading, writing and hearing.
- No impacts with all listed areas of cognitive and emotional functioning.
- She is independent with all listed DLA in the areas of pay rent/bills and medications.

In her self-report, the appellant made no mention of a mental impairment.

Daily Living Activities

In the MR, the GP indicated the following about the appellant:

- Medications that interfere with the ability to perform DLA have not been prescribed.
- She is continuously restricted with personal self care, meal preparation, basic housekeeping, and mobility outside the home.
- She is not restricted with management of medications, daily shopping, mobility inside the home, use of transportation, management of finances and social functioning.
- In response to what assistance is needed with DLA, the GP stated "family help with cleaning and any moderate lifting".

In the AR, the GP indicated the following about the appellant.

- All listed areas of personal care are performed independently except dressing which requires periodic assistance.
- Basic housekeeping (laundry and basic housekeeping) requires periodic assistance and the GP commented in part "fine motor grasping".
- All listed areas of shopping are performed independently except carrying purchases home which requires periodic assistance and the GP commented "needs support for heavy lifting".
- She is independent with meal planning and safe storage of food but requires periodic assistance with food preparation (the GP commented "fine motor skills") and cooking (the GP commented "help [with] meal prep – chopping etc").
- All listed areas of pay rent/bills, medications and transportation are performed independently.
- All listed areas of social functioning are performed independently except able to deal appropriately with unexpected demands (the GP commented "grandson has schizophrenia requires complex support during crisis") and able to secure assistance from others.
- Impact to immediate and extended social networks has been left blank.

In her self-report, the appellant indicated the following:

- She can no longer clean the washrooms, mop the floors, and lift heavy items.
- She cannot lift her dog or bathe him anymore.
- She is too weak to hold a bowl without it slipping from her grip.
- Picking up small items is difficult and she can no longer do up small buttons.
- She cannot open up jars or do up elastics.

Help

In the MR, the GP indicated the following about the appellant:

- Requires prostheses or aids for her impairment – wrist supports and orthotics.

In the AR, the GP indicated the following about the appellant:

- Assistance is provided by family and commented that help is needed “with household chores – dishes, laundry, cleaning + food prep”.
- No assistance is provided by assistance animals
- Assistance provided through the use of assistive devices was left blank.

In her self-report, the appellant indicated the following:

- She can no longer do heavy housework. She receives help from her grandson at times but most of the time she waits until someone is able to help her.

Evidence on Appeal

Notice of Appeal (NOA), signed and dated July 17, 2019, which stated, in part, that the appellant suffers from constant pain due to her progressive rheumatoid arthritis. She cannot perform the tiniest things, she drops dishes as her hands are weak, and her feet are sore too.

The panel found that the information in the NOA consists of the appellant's argument and does not require an admissibility determination.

Evidence Prior to the Hearing

At the hearing the appellant submitted the following additional information:

- Letter from the appellant's GP, signed and dated April 18, 2019, which stated that the appellant “has rheumatoid arthritis which causes multiple joint pains. She should avoid all heavy lifting and repetitive work with her hands.
- Record of employment from Service Canada dated July 17, 2019.

Admissibility of Additional Information

Section 22(4) of the *Employment and Assistance Act* (EAA) provides that panels may admit as evidence (i.e. take into account in making its decision) the information and records that were before the minister when the decision being appealed was made and “oral and written testimony in support of the information and records” before the minister when the decision being appealed was made – i.e. information that substantiates or corroborates the information that was before the minister at reconsideration. These limitations reflect the jurisdiction of the panel established under section 24 of the EAA – to determine whether the ministry's reconsideration decision is reasonably supported by the evidence or a reasonable application of the enactment in the circumstances of an appellant. That is, panels are limited to determining if the ministry's decision is reasonable and are not to assume the role of decision-makers of the first instance. Accordingly, panels cannot admit information that would place them in that role.

The panel found that the 2 documents submitted prior to the hearing (the letter dated April 18, 2019 and the record of employment) provided additional detail or disclosed information that was in support of the information or corroborated the information addressed in the reconsideration. Accordingly, the panel has admitted this new information as being in support of information and records that were before the ministry at the time of reconsideration, in accordance with s. 22(4) of the *Employment and Assistance Act*. However, the panel finds that the information submitted does not speak to the severity of the physical impairment, the impact of the medical conditions on DLA or the need for help and as a result the panel places little weight on this additional information.

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 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. 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, as a result of those restrictions, it could not be determined that the appellant requires the significant help or supervision of another person.

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).

Panel Decision

Severe Impairment

In the reconsideration decision, the ministry was not satisfied that the information provided establishes a severe physical or mental impairment. Determining a severe physical or mental impairment requires weighing the evidence provided against the nature of the impairment and its reported functional skill limitations. A diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment. An "impairment" is a medical condition that results in restrictions to a person's ability to function independently or effectively. To assess the severity of an impairment, the ministry must consider the nature of the impairment and the extent of its impact on daily functioning.

The panel finds that employability is not a consideration for eligibility for PWD designation because employability is not a criterion in section 2(2) of the EAPWDA nor is it listed among the prescribed daily living activities in section 2 of the EAPWDR.

Physical Impairment

The appellant's position is that due to her medical conditions, she is unable to lift, carry and grasp objects (her motor skills have degenerated). She also argued that she cannot raise her arms, stand for more than 30 minutes and that she is in chronic pain.

The ministry argued that based on the information provided in the PWD application, a severe impairment of the appellant's physical functioning has not been established.

The ministry noted the narrative provided by the GP in the MR, and that the GP indicated that the appellant can walk 4+ blocks unaided, can climb 5+ steps unaided, can lift 5-15lbs and can remain seated without limitation.

The ministry noted that in the AR, the GP indicated that the appellant is independent with walking indoors and outdoors, climbing stairs and standing, and that periodic assistance is required with lifting and carrying/holding however the GP did not describe the frequency or duration of the periodic

assistance required with lifting and carrying/holding. The ministry also noted that the inability to remain standing for longer than 30 minutes does not establish a severe degree of impairment.

The panel notes that the appellant and her podiatrist stated that she should not stand more than 30 minutes, yet the GP, who completed the PWD application after the podiatrist's letter was written, indicated in the AR that the appellant has no limitation with standing. The panel finds the appellant's doctors have provided inconsistent information thereby making it difficult to make a determination.

The panel finds that the ministry reasonably concluded that the information provided by the GP regarding the appellant's physical functioning does not support a finding of a severe physical impairment. That is, the ability to walk 4+ blocks unaided, climb 5+ steps, lift 5-15lbs, remain seated without limits does not speak to severely impaired physical functioning. The panel notes that the evidence provided by the GP in regards to the appellant's need for periodic assistance with lifting and carrying/holding is insufficient to conclude that the appellant suffers from a severe physical impairment because the frequency or duration of the assistance required has not been explained and therefore makes it difficult to determine if the appellant's limitations meet the requirements of a severe impairment as indicated above and in the legislation.

Given the assessments of the appellant's functional ability, and mobility and physical ability in the PWD application and the lack of explanation or detail in the additional information provided at appeal, the panel finds that the ministry was reasonable in its determination that the evidence does not support a finding that the appellant suffers from a severe physical impairment and that the legislative criteria outlined in Section 2(2) of the EAPWDA have not been met.

Mental Impairment

The appellant did not argue that she suffers from a mental impairment and the PWD application gives no indication of a mental impairment. Therefore the panel will not provide an analysis.

Restrictions in the ability to perform DLA

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

DLA are defined in section 2(1) of the EAPWDR and are listed in both the MR and the AR sections of the PWD application with the opportunity for the prescribed professional to check marked boxes and provide additional narrative.

The appellant argued that due to her medical conditions she is directly and significantly restricted in her ability to perform her DLA independently. She argued that she cannot dress herself, cook, complete

laundry or basic housework and that she needs assistance with these activities.

The ministry argued that it is not satisfied that the information provided establishes that the impairment directly and significantly restricts DLA continuously or periodically for extended periods.

The ministry noted the GP's narrative as indicated above (including the fact that no medication or treatment has been prescribed interferes with the appellant's ability to perform DLA) concluded that since the GP indicated that she independently perform all listed tasks of DLA except dressing, food preparation, cooking, laundry, basic housekeeping and carrying purchases home, it is unable to confirm that the appellant experiences significant restrictions to DLA. Furthermore, the ministry noted that the GP failed to provide information on the duration and frequency of the periodic assistance required with dressing, food preparation, cooking, laundry, basic housekeeping and carrying purchases home.

In terms of social functioning the ministry noted that only 2 aspects of social functioning require periodic assistance and that no additional information was provided to explain the type or the degree of the assistance required or to explain the frequency in which the appellant needs assistance. The ministry noted that the help required in social functioning appears to be limited to her grandson's mental health condition.

The panel finds that the ministry reasonably concluded that there is not enough evidence to confirm that the appellant has a severe impairment that significantly restricts her ability to perform her DLA continuously or periodic for extended periods. The panel notes that the information provided established that the appellant is able to perform the most of her DLA independently. Of those DLA that the appellant requires periodic assistance with, the GP did not indicate the frequency and duration of the assistance required and therefore it is difficult to determine if the assistance that is required is significant and that it is required periodically for *extended* periods as prescribed by the legislation. The panel finds that to simply indicate that periodic assistance is required, without providing the details of the assistance required, is insufficient to meet the legislative requirements.

The panel considered the assessment by the GP in the PWD application of independence with almost all of the DLA, the lack of information regarding the frequency and duration of the periodic assistance required with 8 of the 30 plus tasks listed in the PWD application and that insufficient additional or supporting information was provided from a prescribed professional at appeal to support the appellant's position. The panel finds that the evidence provided by the GP does not describe or indicate that a severe impairment restricts the appellant's ability to perform his DLA either continuously or periodically for extended periods. Given the evidence as a whole, the panel finds that the ministry reasonably concluded that the evidence does not establish that an impairment significantly restricts DLA continuously or periodically for extended periods, pursuant to Section 2(2)(b)(i) of the EAPWDA.

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 appellant indicated that she requires assistance with her DLA which comes from her grandson and others.

The ministry argued that because it has not been established that DLA are significantly restricted, it cannot be determined that help is required.

The panel notes that, in the AR, the GP did indicate that assistance is required from family and that the appellant uses wrist splints and orthotics. However, in the PWD application, the GP did not indicate how often or how long assistance is required.

Given that confirmation of direct and significant restrictions with DLA is a precondition of the need for help criterion and because the panel found that the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established, the panel also finds that the ministry reasonably concluded that it cannot be determined that the appellant requires help to perform DLA as required by section 2(2)(b)(ii) of the EAPWDA.

Conclusion

The panel finds that the ministry's reconsideration decision, which determined that the appellant was not eligible for PWD designation, was reasonably supported by the evidence and is a reasonable application of the applicable enactment, 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

Neena Keram

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2019/08/28

PRINT NAME

Angie Blake

DATE (YEAR/MONTH/DAY)

2019/08/28

PRINT NAME

Bob Fenske

DATE (YEAR/MONTH/DAY)

2019/08/28