

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 October 9, 2019, which held that the appellant did not meet 2 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 having a severe mental impairment that, in the opinion of a medical practitioner, is likely to continue for at least 2 years.

However, the ministry was not satisfied that:

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

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

PART D – RELEVANT LEGISLATION

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

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

PART E – SUMMARY OF FACTS*Documents before the ministry at reconsideration*

The appellant's PWD application comprised of:

- A Medical Report (MR) dated July 29, 2019, completed by the appellant's general practitioner (GP) of 23 months, who has seen the appellant 11 or more times in the past 12 months;
- An Assessor Report (AR) dated August 7, 2019, also completed by the appellant's GP; and
- The appellant's self-report (SR) section of the PWD application, dated August 8, 2019.

Request for Reconsideration, dated September 25, 2019, to which the appellant attached the following test results and a number of consult letters from the same specialist:

- September 27, 2017 bilateral Hand X-Ray results identifying mild and moderate osteoarthritis.
- December 5, 2018 X-Ray report respecting the cervical spine, wrists, sacroiliac joints, knees, feet and ankles, and chest identifying mild or mild to moderate degenerative changes of the lower lumbar, thoracic and cervical spine, knees, feet, and ankles.
- April 22, 2019 RAD Hand and Wrist Bilateral report identifying results consistent with mild degenerative changes.
- April 24, 2019 RAD Shoulder Lt report identifying findings consistent with calcific tendinitis in the rotator cuff.
- December 3, 2018 consult letter. Impression: inflammatory arthritis NYD.
- January 7, 2019 consult letter improvement of pain and swelling in hands since last month with medication.
- January 28, 2019 consult letter. Impression: an inflammatory arthritis that is mildly active at the right MC3P joint [hand] which was injected with steroid which will hopefully control the inflammatory. If flares at next visit, will look at another therapy.
- February 19, 2019 consult letter noting possible inflammatory arthritis that is in remission and that current pain is mechanical, reflective of underlying generalized osteoarthritis.
- April 22, 2019 consult letter noting that the appellant was last seen two months ago. Since then, the swelling has resolved and there have been no further flares, though pain in knuckles, shoulders, neck, low back and knees continue, worse with activity. No AM stiffness. Using pain medications with some relief.
- May 27, 2019 consult letter (pages 3 is missing) reporting worsening joint pain and stiffness in hands, knees and ankles since last seen and that AM stiffness lasts hours.
- June 11, 2019 consult letter. Impression: has probable seronegative rheumatoid arthritis (RA) that is still active. A lot of current symptoms are mechanical.

Information provided on appeal and admissibility

In accordance with section 22(4) of the *Employment and Assistance Act* (EAA), the panel may admit oral and written testimony that is in support of the information and records available at the time of reconsideration.

At the hearing, the ministry reviewed the reconsideration decision but did not provide additional evidence. No new evidence was introduced in the appellant's October 16, 2019 NOA or oral testimony at the hearing. Accordingly, an admissibility determination was not required.

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

Summary of Relevant EvidenceDiagnoses and Health History

The GP diagnoses rheumatoid arthritis, osteoarthritis and mood disorders (depression).

Rheumatoid/osteoarthritis affecting multiple joints – including hands. Severely restricts ability to perform fine motor skills. On days when symptoms flare up, mobility is also limited. Depression symptoms including anhedonia and lack of appetite restrict ability to concentrate on tasks or complete tasks.

Physical Impairment

The GP reports the following physical functional skills/abilities:

- Able to walk 4+ blocks unaided on a flat surface; walking indoors and outdoors managed independently, with walking up hills taking 3 to 4 times longer. When joint pain flares up, unable to walk more than 400 yards without stopping.
- Can climb 2 to 5 steps unaided, taking 3 x longer
- Able to lift 15 to 35 lbs.; carrying/holding is managed independently but is restricted due to pain from arthritis in hands.
- Can remain seated less than 1 hour.
- No aids or prostheses are required.

Test results and the consult letters are as summarized above.

In the SR and reconsideration submission, the appellant reports arthritis in every joint, in particular the big toes, ankles, knees, hips, shoulders, wrists, and fingers. It is very painful to walk, use hands or wrists, lifting and even typing. The appellant still tries to walk as much as possible but is scared to go too far in case the pain prevents getting home. Right now, the appellant is getting along, but even walking up the stairs is getting harder. Opening jars hurts the appellant's hands and fingers. Neck pain prevents sitting around for too long and standing hurts the appellant's lower back. Walking aggravates the toes and ankles. Every day is different: sometimes struggling to get out of bed and stand, and some days struggling to climb the stairs to home. Hands and feet and now the knees are the worst, especially when trying to clean the home.

At the hearing, the appellant described having very bad ankles and toes in the morning raising concern about the ability to walk from the bedroom to the kitchen. The appellant also reported being unable to open jars, and having hip and back pain from just standing and peeling potatoes, commenting that you don't realize how bad the pain is until you get it and on how difficult it is to go from having a good job and supporting a family to being unable to work for the last 3 years. The appellant stated that there are a lot of things happening at once – both rheumatoid arthritis and osteoarthritis, water on both ankles, tendonitis in the Achilles tendon – all of which prevent walking too far. Recently, the appellant had to get a sleep apnea machine.

DLA

In the MR, the GP reports:

- The appellant has not been prescribed medication and/or treatments that interfere with the ability to perform DLA.
- Personal self-care, meal preparation, management of medications, basic housework, daily shopping mobility inside the home, management of finances, and social functioning are not restricted by the appellant's impairment.
- Mobility outside the home is periodically restricted - when joint pain flares up – unable to walk more than 400 yards without stopping.
- Unknown if the ability to use transportation is restricted.
- Does not use any assistance.
- All listed aspects of mobility and physical ability (relates to DLA move about indoors and outdoors) are managed independently as are all listed tasks of the DLA personal care, basic housekeeping, shopping, meals, medications, and transportation.

In the AR, the GP reports:

- The ability to communicate is good for speaking, reading and hearing. Writing ability is satisfactory due to arthritis of hands.
- As noted above, climbing stairs takes 3 times as long and walking up hills takes 3 to 4 times longer. Walking indoors is managed independently.
- All listed DLA tasks are managed independently, with the appellant taking significantly longer with transfers in/out of bed and on/off chair (twice as long as normal), basic housekeeping (3 times longer), and getting in and out of a vehicle (twice as long).
- Additional commentary:
 - Drives to stores – can't walk there due to arthritic pains.
 - Carrying purchases home – severe pain in hands.
 - Uses blister packs for taking medications as directed.
 - Joint swelling and pain severely restricts ability for fine motor skills as well as opening jars/boxes when preparing food.
 - Mobility severely limited.
 - Difficulty managing activities of daily living (ADLs) – housekeeping – due to joint pain and swelling secondary to rheumatoid arthritis and osteoarthritis.
- Respecting social functioning, all five listed areas are managed independently - appropriate social decisions, ability to develop and maintain relationships, interact appropriately with others, dealing appropriately with unexpected demands, and ability to secure assistance from others.
- The appellant has marginal functioning with immediate social network – anhedonia secondary to depression restricts ability to maintain relationships. Often cancels plans or doesn't attend gathering. Good functioning with extended social networks.

At the hearing, the appellant reported not wanting to be around people, though sometimes making the effort. The appellant does not bother to do food preparation and cooks only sometimes – mostly has toast for breakfast and dinner. The appellant can't even walk around block, can stand for only 5-10 minutes, and lifting is really restricted due to arthritis. Regarding carrying and holding, the appellant tries not to go to the shops. The appellant can dress and wash and does laundry. The appellant's vehicle has a handle to hold onto to use to pull up when entering. Regarding social functioning, the appellant reports getting quite irate sometimes, not maintaining relationships and not liking unexpected demands from others. The appellant's mind is not clear due to sleeping only 2 hours a night.

The appellant also reported that having always supported a family and having had a good job, it was difficult to ask for help and to share with the GP what happens on the bad days.

Need for Help

The GP indicates that help required for DLA is provided by family: Child does shopping once a month; would benefit from assistance with housekeeping.

At the hearing, the appellant reports that the appellant's children, who do not reside with the appellant, help when they can.

PART F – REASONS FOR PANEL DECISION**Issue on Appeal**

The issue on appeal is whether the ministry's decision to deny the appellant designation as a PWD was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. That is, was the ministry reasonable when determining that the appellant is not a person described in section 2.1 of the EAPWDR and that the requirements of section 2(2) of the EAPWDA were not met because:

- 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*,

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

PANEL DECISION

Severe Impairment

Section 2(2) of the EAPWDA requires that the ministry is satisfied that an applicant has a severe mental or physical impairment; an applicant need not have both a severe physical and severe mental impairment, though the ministry will consider whether the evidence establishes both a severe physical and mental impairment.

Physical Impairment

Positions of the Parties

The appellant's position is that the information from the GP establishes a severe physical impairment, in particular the GP's identification of severe restrictions and the need for assistance. The appellant's physical (and mental) condition continues to deteriorate, with further tests required, and the appellant has not been able to work for 3 years. The appellant is frustrated that the GP thinks one thing and ministry thinks another – leaving the appellant in the middle.

The ministry's position is that the diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish severe impairment. Severity is assessed on the basis of the impairment and the extent of its impact on daily functioning as evidenced by limitations/restrictions in mobility, physical ability and functional skills; employability or vocational ability is not taken into consideration. The ministry acknowledges that the appellant's medical conditions result in pain and some limitations, but finds that the degree of independent functioning described by the GP, including remaining independent with carrying and holding despite being "restricted due to pain from arthritis in hands" is more in keeping with a moderate degree of physical impairment. The ministry also notes that no prostheses or aids are required to manage the impairment and that while the GP reports that there are days when symptoms flare-up and mobility is limited, the frequency, duration and impact of the limitation is not described.

Panel Analysis

While the panel acknowledges the appellant's frustration, the panel finds that the information provided by the GP was reasonably viewed by the ministry as not establishing a severe impairment. While the GP reports severe restrictions with fine motor skills, the GP also reports that activities requiring fine motor skills are managed independently including grooming and meal preparation. Additionally, despite noting restrictions due to hand pain from arthritis, the GP reports that carrying and holding is managed independently and that the appellant can lift between 15 and 35 lbs. Respecting mobility, the GP comments "mobility severely limited" but also describes restrictions in the ability to mobilize outside the home as being periodic – when joint pain flares up – without describing how often the flare-ups occur and how long they last. Furthermore, the GP reports that even during a flare-up the appellant can walk 400 yards. Additional information from the GP is that the appellant can walk 4+ blocks unaided on a flat surface, presumably when not experiencing a flare-up, and that walking up hills takes 3-4 times longer. No limitations with walking indoors are identified by the GP. The appellant's own description of difficulties walking within the home upon waking up and being unable to walk around the block is not confirmed by the GP – perhaps in part given the appellant's reluctance to fully disclose the extent of functional limitations to the GP.

The additional medical information, the lab reports and consult letters, confirm that the appellant's rheumatoid arthritis has been both inactive and active within the past year, with flare-ups occurring. The most recent information indicates current activity and pain. However, while one of the more recent consult letters notes that morning stiffness lasts for hours, the information does not describe how the stiffness or pain impacts the appellant's activities.

Given the level of independent physical functioning assessed by the GP, and noting that employability is not a consideration when determining PWD eligibility, the panel considers the ministry to be reasonable when concluding that the functional limitations are more in keeping with a moderate impairment and therefore, a severe physical impairment is not established.

Mental Impairment

As the ministry was satisfied that the appellant has a severe mental impairment, this legislative requirement has been met.

Restrictions in the ability to perform DLA

Positions of the Parties

The appellant's position is that the GP has confirmed that the appellant is severely restricted and requires assistance with DLA.

The ministry's position is that it relies on the information from prescribed professionals, in this case the GP, who reports that the majority of DLA are independently managed or required little help from others, which does not establish significant restrictions. In particular, the ministry notes that in the MR, with the exception of mobility outside the home, which is periodically restricted "when joint pain flares up" and walking is limited to 400 yards without stopping, no other restrictions are identified and the appellant "does not use any assistance." In the AR, the ministry notes that while the GP reports that transfers to and from chairs and bed and getting in and out of a vehicle take twice as long as normal, that basic housekeeping takes 3 times longer, that the appellant must drive to the store, being unable to walk due to arthritic pain, and that the appellant has severe hand pain when carrying purchases home, the appellant remains independent with these activities. Regarding social functioning, the ministry notes that the appellant is again assessed as independent.

Panel Analysis

Section 2(2)(b)(i) of the EAPWDA requires 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 it is satisfied, is dependent upon the evidence from prescribed professionals. The term "directly" means that there must be a causal link between the severe impairment and the restriction. The direct restriction must also be significant. Finally, there is a component related to time or duration – the direct and significant restriction must be either continuous or periodic. If periodic, it must be for extended periods. Inherently, any analysis of periodicity must also include consideration of the frequency. All other things being equal, a restriction that only arises once a year is less likely to be significant than one that occurs several times a week. Accordingly, in circumstances where the evidence indicates that a restriction arises periodically, it is appropriate for the ministry to require evidence of the duration and frequency of the restriction in order to be "satisfied" that this legislative criterion is met.

DLA are defined in section 2(1) of the EAPWDR and are listed in both the MR and the AR sections of the PWD application with the opportunity for the prescribed professional to check marked boxes and provide additional narrative. DLA, as defined in the legislation, do not include the ability to work. As noted above, the restriction is to be in the opinion of a prescribed professional, which in this case is the GP as the additional medical information does not describe the appellant's ability to manage DLA.

In the appellant's case, the GP reports that the majority of listed DLA tasks are managed independently, without

assistance and without taking significantly longer to perform. Where restrictions are identified, they are either fairly minimal, such as requiring twice as long with all transfers (chairs, bed and vehicle), or the GP does not provide sufficient information to establish that the restrictions are significant. In particular, while mobility outdoors is periodically restricted when joint pain flares-up, the GP does not describe the frequency or duration of this restriction and while basic housekeeping takes 3 times longer to perform, the GP only states that assistance would be beneficial, as opposed to required, with no further explanation of the frequency or nature of that assistance. Similarly, while the GP reports that the appellant's child does shopping once a month, the GP reports that shopping is managed independently by the appellant. Additionally, despite reporting that joint pain and swelling severely restricts the appellant's fine motor skills, with the exception of using blister packs to take medications, the GP reports that the appellant independently manages all other listed tasks that involve fine motor skills including carrying/holding and meal preparation. The appellant has described a greater degree of restrictions with DLA including mobility, both outdoors and indoors, and meal preparation but the legislation requires that the ministry base its decision on the opinion of a prescribed professional.

Respecting the two DLA specific to mental impairment - make decisions about personal activities, care or finances and relate to, communicate or interact with others effectively – both are managed independently, and although the GP writes that depression symptoms restrict the ability to concentrate on tasks or complete tasks, the GP does not identify any impacts related to mental impairment on the ability to perform any of the listed DLA tasks.

Based on the above analysis, the panel concludes that the ministry reasonably determined that the GP's information indicates that the appellant independently manages the majority of DLA with little help from others which does not establish direct and significant restrictions in the ability to perform DLA, either continuously or periodically for extended periods. In reaching this conclusion, the panel again notes that the legislation requires that the ministry be satisfied based on the opinion of a prescribed professional and that the ability to work is not a legislated DLA.

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." Having found that the ministry was reasonable to conclude that this precondition was not met, 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 had not met all requirements set out under section 2(2) of the EAPWDA for designation as a PWD, was reasonably supported by the evidence. The ministry's decision is confirmed and 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)

2019/11/05

PRINT NAME

Simon Clews

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/11/05

PRINT NAME

Wendy Marten

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/11/05