

**PART C – DECISION UNDER APPEAL**

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Poverty Reduction (the ministry) dated June 5, 2019, which held that the appellant did not meet 3 of the 5 statutory requirements of section 2 of the *Employment and Assistance for Persons with Disabilities Act* (EAPWDA) for designation as a person with disabilities (PWD). The ministry found that the appellant met the requirements of having reached 18 years of age and of a medical practitioner confirming that the appellant's impairment is likely to continue for at least 2 years.

However, the ministry was not satisfied that:

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

The ministry also determined that 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**Information before the ministry at reconsideration

- The appellant's PWD application, comprised of:
  - A Medical Report (MR) dated March 8, 2019, completed by a general practitioner (GP) who has known the appellant since 2014;
  - An Assessor Report (AR) dated February 21, 2019, completed by a social worker (SW) who has known the appellant for 1 month, seen the appellant 2-10 times and relied on an office interview with the appellant, medical charts and a physician's note to complete the AR; and
  - The self-report (SR) section of the PWD application, dated February 21, 2019, with a 4-page typewritten report attached.
- Lumbar spine Magnetic Resonance Imaging (MRI) report signed by a physician on November 21, 2018.
- Lumbar spine Computed Tomography (CT) report signed by a physician on February 15, 2019.
- The appellant's Request for Reconsideration submission dated May 2, 2018, with the following attachments:
  - May 6, 2019 submission from the SW comprised of case law and argument and referencing changes made to the original AR by the SW described as "a genuine attempt to prove that [the appellant] has severe and continuous physical impairment." The SW also states that section B. 4 of the AR can be disregarded as the appellant has no mental health impairment or brain injury.
  - The amended AR.
  - The appellant's SR to which additional comments have been added by the appellant.

Information provided on appeal and admissibility

- Notice of Appeal (NOA) dated June 19, 2019, to which a 2-page advocate's submission dated June 18, 2019 was attached; and,
- July 23, 2019, email from the ministry indicating that its appeal submission would be the reconsideration summary. The ministry did not take a position as to the admissibility of the appellant's appeal submissions.

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.

The panel determined that the information in the advocate's appeal submission addressing more recent, but ineffective, treatment was admissible as evidence in support of the information and records available at reconsideration. The balance of the advocate's submission and the appellant's NOA were accepted as argument.

The arguments of the ministry and the appellant are set out in Part F of this decision.

Summary of relevant evidenceDiagnoses and Health History

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

- Degenerative lumbar disc disease with facet joint arthropathy – onset September 2009.  
As a result of lumbar backache the appellant is moderately restricted in walking and dressing himself, has decreased range of motion in bending and lifting, stops frequently, and requires help from family and friends to assist in shopping and meal preparation. [The appellant's] backache is a result of multilevel degenerative lumbar disc disease with facet osteoarthropathy demonstrated on attached CT and MRI of lumbar spine."

Physical Impairment

The GP assesses the appellant's functional skills as:

- able to walk 2 to 4 blocks unaided on a flat surface;
- able to climb 2 to 5 steps unaided;
- limited to lifting 5 to 15 lbs.; and
- can remain seated for 1 to 2 hours.

The GP also reports that no prostheses or aids are required for the appellant's impairment.

MRI opinion: "Mild degenerative disc disease with facet osteoarthropathy noted and diffuse disc bulges seen resulting in minimal acquired central canal stenosis and mild bilateral neural foraminal narrowing as described above."

CT opinion: "Multilevel degenerative disc disease noted of the lumbar spine with the most significant findings being at the L4-L5 level, where there is loss of disc height and vacuum disc phenomenon seen. There is a diffuse disc bulge seen at this level with a more focal broad-based right foraminal and extraforaminal disc protrusion seen that together with facet osteoarthropathy and ligamentum flavum hypertrophy is resulting in moderate narrowing of the right neural foramina. Mild acquired central canal stenosis is seen.

The SW provides the following information [changes and additional information provided in the amended AR are in italics].

- The appellant's mobility and physical ability is greatly impacted by his physical impairment.
- Periodic assistance from another person is required for walking indoors and outdoors (doesn't use assistive devices to walk but needs to hold on (sic) things and take rests) and for carrying and holding. *Walking outdoors takes 5 times longer*
- Continuous assistance from another person is required for climbing stairs ("really hard to climb stairs, so avoids doing it") and lifting (avoids because it twists his back); and,
- Standing is managed independently – "10 minutes before back aches."
- The appellant is going through specialist appointments to see if his back pain can be reduced.

DLA

The GP reports the following.

- The appellant has not been prescribed medications and/or treatments that interfere with the ability to perform DLA.
- Personal self-care, meal preparation, basic housework, daily shopping, mobility outside the home and use of transportation are continuously restricted. Degree of restriction is described as "mild to moderate." Requires daily assistance from family members with whom he lives for these DLA.
- Management of medications, mobility inside the home, management of finances and social functioning are not restricted.

The SW reports the following [changes and additional information provided in the amended AR are in italics].

- Persistent lumbar back ache with minimal response to analgesic makes it really hard to get involved with activities of daily living and depending on assistance to do those activities makes him anxious and worried. As the pain progresses it is hard even to get up from bed and do things during his worst days.
- The ability to perform the DLA "move about indoors and outdoors" is described above under the heading Physical Impairment.
- Respecting the DLA "personal care" dressing, bathing and toileting are managed independently but take longer than usual. Grooming, feeding self and regulate diet require periodic assistance when in pain. Transfers in/out of bed and on/off chair require periodic assistance and are done slowly holding onto handrails or bed. *Dressing takes 3x longer. Takes 15-20 mins. to get up/out of bed or chair.*
- Respecting the DLA "basic housekeeping," both basic housekeeping (help from sister) and laundry (can do with lot of time) require periodic assistance. *Continuous assistance required; 5x longer.*
- For the DLA "shopping" going to and from stores and reading prices and labels (needs glasses) require periodic assistance. Making appropriate choices and paying for purchases are managed independently. Carrying purchases home requires continuous assistance. *Continuous assistance required for going to and from stores.*
- For the DLA "meals" food preparation, cooking, and safe storage require periodic assistance. Meal planning is managed independently. *Continuous assistance required for food preparation and cooking.*
- For the DLA "management of finances" all listed tasks are managed independently, though he needs help going to the bank which takes significantly longer. *Banking requires continuous assistance; pay rent and bills requires periodic assistance.*
- For the DLA "management of medications" periodic assistance is needed to collect medications from the pharmacy but the appellant is able to handle and take medications on time. *Continuous assistance required for filling/refilling prescriptions.*
- For the DLA "use of transportation" getting in and out of a vehicle and using public transit require periodic assistance. The appellant "can't get in and out of all vehicles he try (sic) to avoid that and walks to places he can." Never used public transit and if needed to he would need assistance.
- "[The appellant] needs assistance for activities which need long standing and bending. He requires rides and help in bringing stuff home after shopping." *Always needs help with meal prep and cooking. Always needs someone to give him a ride to go to bank.*

In his SR, the appellant describes the impact on his ability to do DLA due to his severe lower back pain. Bathing and getting out of bed and dressing are difficult and painful, and at times he needs assistance with grooming and dressing. Getting out of bed is very difficult – must stretch, hold onto bed and is done slowly. For meals, he gets help from family at times, otherwise he goes for easy to cook simple meals; moving food from oven and counters

is painful, especially when bending to lower cupboards. He takes medications and goes slowly when doing dishes, with lots of resting phases. He does his own laundry but it takes a long time, with a lot of pain. He does not clean the floor which is very painful and rarely vacuums, dusts or cleans windows. For shopping, a family member helps – picks items for shelves the appellant cannot reach down to and helps get things home. He avoids stairs and ramps, is not able to pick things up off the floor, avoids kneeling, and has a hard time getting up after sitting too long. He can walk from room to room without aids but each step hurts. The appellant's description of his ability to manage medications and transportation and to communicate is substantially the same as the SW's description.

At reconsideration, the appellant added that he can only do up to 5 minutes of washing dishes before resting, that if he has to do his laundry, it takes a long time with a lot of pain and that he gets help from family and friends once a week for all household help.

### Need for Help

The GP describes the assistance required with DLA as daily assistance from family members.

The SW reports that required help is provided by family and friends and that the appellant stated that he feels he needs a cane while walking outside especially in bad weather. He needs help getting to his appointments (rides) and requires assistance in doing things which "need lots of physical strain like standing long, bending and impact on his lower back." The appellant reports that he gets help from community agencies, family and friends.

**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 was not in the prescribed class of persons described in section 2.1 and that the requirements of section 2(2) of the EAPWDA were not met because:

- a severe physical or mental impairment was not established;
- the appellant's DLA are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and
- as a result of those restrictions, in the opinion of a prescribed professional, the appellant does not require an assistive device, the significant help or supervision of another person, or the services of an assistance animal to perform DLA?

**Relevant Legislation****EAPWDA**

2 (1) In this section:

"**assistive device**" means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform;

"**daily living activity**" has the prescribed meaning;

"**prescribed professional**" has the prescribed meaning.

(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person has a severe mental or physical impairment that

(a) in the opinion of a medical practitioner or nurse practitioner is likely to continue for at least 2 years, and

(b) in the opinion of a prescribed professional

(i) directly and significantly restricts the person's ability to perform daily living activities either

(A) continuously, or

(B) periodically for extended periods, and

(ii) as a result of those restrictions, the person requires help to perform those activities.

(3) For the purposes of subsection (2),

(a) a person who has a severe mental impairment includes a person with a mental disorder, and

- (b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires
- (i) an assistive device,
  - (ii) the significant help or supervision of another person, or
  - (iii) the services of an assistance animal.

(4) The minister may rescind a designation under subsection (2).

## EAPWDR

### Definitions for Act

**2** (1) For the purposes of the Act and this regulation, "**daily living activities**",

(a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:

- (i) prepare own meals;
- (ii) manage personal finances;
- (iii) shop for personal needs;
- (iv) use public or personal transportation facilities;
- (v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
- (vi) move about indoors and outdoors;
- (vii) perform personal hygiene and self-care;
- (viii) manage personal medication, and

(b) in relation to a person who has a severe mental impairment, includes the following activities:

- (i) make decisions about personal activities, care or finances;
- (ii) relate to, communicate or interact with others effectively.

(2) For the purposes of the Act, "**prescribed professional**" means a person who is

(a) authorized under an enactment to practise the profession of

- (i) medical practitioner,
- (ii) registered psychologist,
- (iii) registered nurse or registered psychiatric nurse,
- (iv) occupational therapist,
- (v) physical therapist,
- (vi) social worker,
- (vii) chiropractor, or

(viii) nurse practitioner, or

(b) acting in the course of the person's employment as a school psychologist by

(i) an authority, as that term is defined in section 1 (1) of the Independent School Act, or

(ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the School Act,

if qualifications in psychology are a condition of such employment.

(3) The definition of "parent" in section 1 (1) applies for the purposes of the definition of "dependent child" in section 1 (1) of the Act.

#### **Alternative grounds for designation under section 2 of Act**

2.1 The following classes of persons are prescribed for the purposes of section 2 (2) [*persons with disabilities*] of the Act:

(a) a person who is enrolled in Plan P (Palliative Care) under the Drug Plans Regulation, B.C. Reg. 73/2015;

(b) a person who has at any time been determined to be eligible to be the subject of payments made through the Ministry of Children and Family Development's At Home Program;

(c) a person who has at any time been determined by Community Living British Columbia to be eligible to receive community living support under the Community Living Authority Act;

(d) a person whose family has at any time been determined by Community Living British Columbia to be eligible to receive community living support under the Community Living Authority Act to assist that family in caring for the person;

(e) a person who is considered to be disabled under section 42 (2) of the Canada Pension Plan (Canada).

#### **Panel Decision**

##### **Eligibility under section 2.1 of the EAPWDR**

In the absence of any evidence or argument respecting eligibility for PWD designation under section 2.1 of the EAPWDR, the panel finds that the ministry reasonably determined that it has not been established that the appellant falls within the prescribed classes of persons under that section. The panel's discussion below is limited to eligibility for PWD designation under section 2 of the EAPWDA and section 2 of the EAPWDR.

**Eligibility under section 2 of the EAPWDA***Physical Impairment*

On appeal, the appellant's advocate argues that the ministry has ignored the information confirming that the appellant has had minimal response to analgesics and that he has been referred to a specialist. Additionally, the ministry has unreasonably concluded that an impairment is not severe because an assistive device is not used, as not all severe impairments can be remedied with an assistive device and furthermore, the appellant has indicated that he would be helped by a shower rail and cane and that he had to move because he couldn't handle the stairs which is a sign of a severe impairment. Respecting the ministry's reliance on the GP's statement that "the impairment is mild to moderate" [the panel notes that the GP was responding to a request to describe the degree of restriction in the ability to perform DLA], the advocate argues that because "severe" is a relative term and is not defined, the substantive evidence should be looked at – specifically that the GP reports the need for daily assistance and "lists continuous assistance being required in 6 out of 10 daily living activities listed."

The ministry argues that the legislation clearly provides that the determination of severity of impairment is at the discretion of the minister, taking into account all of the information provided and that for the following reasons the ministry is not satisfied that the information provided is evidence of a severe impairment. Acknowledging that the legislation does not require an applicant to have a long-standing history with the professionals who complete the PWD application, the ministry again notes that the legislation requires that the minister be satisfied that a severe impairment exists. Noting that the SW had only known the appellant for one month when completing the application and that the GP has known the appellant for over 4 years, the ministry has given less weight to the SW's information. The ministry notes that the GP describes that the appellant is "moderately" restricted with walking and dressing, despite also noting that the appellant stops frequently. The degree of assistance with shopping and meal preparation is not described. The ministry is not convinced that not currently using any aids and benefiting from only a basic aid such as a cane suggests severe impairment – the ministry notes that the GP says no aids are required and that when asked what aids are routinely used the SW did not respond and subsequently noted the appellant's belief that he needs a cane. The ministry also points to the CT and MRI results finding that "much of the information describes 'mild' or 'moderate' issues" and that the GP does not mention referrals to specialists which the ministry argues would be of benefit if the appellant's condition was considered severe. The ministry also notes that the GP does not mention what medication is taken, if any, and to what degree it helps or if more extreme pain management measures would be of benefit. The ministry concludes that the functional skills assessment describes only a moderate degree of restriction and that, while the GP identifies the need for continuous assistance with most areas of DLA, given the description of "mild to moderate" restrictions the appellant is continuously mild to moderately restricted in several areas of DLA. The ministry also concludes that the information respecting the extensive help from family members does not necessarily establish that such help is required, finding that the evidence suggests it is in the nature of the duty of family members/friends to help when needed, again noting the ability to independently walk 2-4 blocks and lift 5-15 lbs. and no requirement for assistive devices.

*Panel Analysis*

The legislation, section 2 of the EAPWDA, requires that the minister "is satisfied" that a person has a severe physical or mental impairment which gives the ministry discretion when making the determination. In exercising its decision-making discretion the ministry must consider all of the evidence and assess the relative weight to be placed on evidence where there is conflicting information.

The panel concludes that the ministry's decision that a severe physical impairment is not established is reasonable. In reaching this conclusion, the panel considers the ministry's greater reliance on the GP's information over that of the SW to be reasonable: in addition to having known the appellant much longer, the GP has clearly factored in the CT and MRI results when providing his medical assessment and no substantive explanation is provided by the SW as to why the appellant, who was originally assessed by the SW as either independently managing the vast majority of DLA tasks independently or with periodic assistance, is now reported to require a much greater level of continuous assistance. The panel also notes that the SW's original assessment was consistent with the appellant's original description of being able to make simple meals and requiring assistance "at times" with meals and aspects of personal care and that the appellant has not explained this markedly reduced level of functioning.

In assessing the GP's information, the ministry was reasonable to consider the GP's statement that the appellant requires daily assistance from family together with the GP's assessment of the appellant's ability to independently walk 2 to 4 blocks, climb 2 to 5+ steps, lift 5 to 15 lbs. and remain seated for 1 to 2 hours and the GP's description of the degree of restrictions in the ability to manage DLA is "mild to moderate." Accordingly, the ministry was reasonable in concluding that the GP's information establishes a "mild to moderate" continuous restriction and that in these circumstances, the daily assistance provided by family is not sufficient to establish a severe physical impairment.

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

#### Mental Impairment

The appellant is not diagnosed with a mental impairment or brain injury and does not argue that he has a severe mental impairment.

#### Restrictions in the ability to perform DLA

On appeal, the appellant's advocate argues that the GP, the SW and the appellant are all very clear that assistance is required and received from family, with the GP specifically stating "requires daily assistance," and that the legislation does not state that family is excluded from providing the assistance.

Noting that the legislation requires that restrictions in the ability to perform DLA be both significant and either continuous or periodic for extended periods, the ministry argues that *significant* [emphasis included] restrictions are not established by the physical functional abilities assessed by the GP for walking and lifting, the GP's indication that no assistive devices are required and the "mild to moderate" degree of restriction in the ability to perform DLA. Again the ministry argues that while it is evident that the appellant benefits from extensive help from family members, the information does not necessarily establish that such help is required as a result of the impairment. Therefore, the ministry concludes that while the appellant has certain limitations as a result of his medical conditions, the information provided does not establish that an impairment significantly restricts DLA continuously or periodically for extended periods.

*Panel Analysis*

Section 2(2)(b)(i) of the EAPWDA requires that the minister be satisfied that, in the opinion of a prescribed professional [emphasis added], a severe mental or physical impairment directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods. While other evidence may be considered for clarification or support, the ministry's determination as to whether or not it is satisfied, is dependent upon the evidence from prescribed professionals.

DLA are defined in section 2(1) of the EAPWDR and are listed in both the MR and the AR sections of the PWD application with the opportunity for the prescribed professional to check marked boxes and provide additional narrative. DLA, as defined in the legislation, does not include the ability to work. While there is likely some crossover between restrictions impacting the ability to work and those impacting the ability to perform DLA, the demands of employment are routinely more demanding in terms of frequency and duration than managing DLA, and more importantly, only restrictions on the ability to perform the DLA set out in the legislation are considered under section 2(b)(i) of the EAPWDA.

In this case, both the GP and the SW are prescribed professionals. For the reasons stated previously, the panel considers the ministry reasonable to have placed greater weight on the information from the GP. While it is clear on the evidence that the appellant experiences limitations in his ability to manage DLA, given that the GP has assessed physical functional abilities in the mid-range of functioning and has repeatedly described any restrictions with DLA as moderate (walking and dressing) or "mild to moderate" (personal self-care, meal preparation, basic housework, mobility outside the home, and use of transportation) the ministry's conclusion is reasonable. As the appellant's advocate notes, the GP also notes the requirement of daily assistance; however, that alone does not establish severe impairment and it is not unreasonable for the ministry to view the assistance provided as being as a result of mild to moderate restrictions.

For these reasons, and noting that the restriction with DLA must be the result of a severe impairment, a requirement not met in this case, the panel concludes that the ministry was reasonable to determine that the information provided does not establish that a severe impairment significantly restricts the ability to perform DLA either continuously or periodically for extended periods.

*Help to perform DLA*

Section 2(2)(b)(ii) of the EAPWDA requires that, *as a result of direct and significant restrictions in the ability to perform DLA*, a person requires help to perform "those activities." Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform DLA.

The establishment of direct and significant restrictions with daily living "activities" is a precondition of requiring "help to perform those activities." In this case, the panel found the ministry was reasonable in concluding that direct and significant restrictions with DLA were not established. Accordingly, the panel also finds that the ministry reasonably concluded that it cannot be determined that the appellant requires help to perform "those activities" as a result of direct and significant restrictions with daily living "activities" as required by section 2(2)(b)(ii) of the EAPWDA.

Conclusion

The panel finds that the ministry's reconsideration decision, which determined that the appellant was not eligible for PWD designation, was reasonably supported by the evidence, and therefore confirms the decision. The appellant is not successful on appeal.

APPEAL NUMBER

**PART G -- ORDER**

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

THE PANEL       CONFIRMS THE MINISTRY DECISION       RESCINDS THE MINISTRY DECISION

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

**LEGISLATIVE AUTHORITY FOR THE DECISION:**

*Employment and Assistance Act*

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

and

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

**PART H -- SIGNATURES**

PRINT NAME

Jane Nielsen

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2019/08/13

PRINT NAME

Shirley Heafey

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/08/13

PRINT NAME

Katherine Wellburn

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/08/13