

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 24, 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.

In addition, the ministry found that it had not been demonstrated that the appellant is one of the prescribed classes of persons who may be eligible for PWD designation on alternative grounds, which includes: a person who is enrolled in palliative care; a person who has at any time been determined eligible for At Home Program payments through the Ministry of Children and Family Development; a person who has at any time been determined eligible by Community Living BC for community living support; and a person who is considered disabled under section 42(2) of the *Canadian Pension Plan Act*.

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

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

1. The information before the ministry at the time of reconsideration included the appellant's PWD application comprised of a Medical Report (MR) [undated] and an Assessor Report (AR) [undated], which was completed by the appellant's General Practitioner (the 'GP'), who had known the appellant for 2 years and seen him 11 or more times in the past 12 months. The approaches and sources used to conduct the MR and AR was an office interview. The PWD application also included the appellant's Self-Report (SR) dated August 12, 2019.
2. Request for Reconsideration (RFR), signed and dated October 10, 2019, in which the appellant stated, in part, "I daily live with pain and I have to take the painkillers on daily basis for my back".

Diagnoses

In the MR, the GP diagnosed the appellant with mechanical lower back pain and S. radial pain (onset July 2017).

Physical Impairment

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

- "Patient complains of having consistent low back pain, the right leg pain radiating from the buttock, into the posterolateral aspect of the thigh into the shin and into the top of the foot which is associated with paresthesia and numbness is slightly better. His pain is worse with prolonged sitting or standing, bending, lifting and walking.
- He can walk 4+ blocks unaided, climb 2-5 steps unaided, lift under 5 lbs (with the comment "my specialist counselled me not to lift any weight") and remain seated for less than 1 hour.

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

- "Can't stand for more than ½ an hour and can't lift any weight, also can't sit for more than ½ an hour. Can't go upstairs (illegible 5 steps at a time)".
- Walking indoors/outdoors are performed independently
- Standing, lifting and carrying/holding is performed independently, with a comment "was recommended by his specialist not to do these activities".
- Climbing stairs takes significantly longer.

In the SR, the appellant indicated:

- That he has chronic pain in his back.
- Unable to stand longer than ½ an hour or sit longer than ½ an hour.
- Takes painkillers daily.
- Cannot carry any weight more than 5lbs. Cannot lift his ■ year old child.
- Cannot go upstairs (maximum 5 steps at a time).

Mental Impairment

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

- There are no difficulties with communication.
- There are not significant deficits with cognitive and emotional function.
- There are no restrictions to social functioning.

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

- Speaking, reading, writing and hearing are all good, with the comment "difficulty communicating in English".
- Under cognitive and emotional functioning the GP wrote "N/A"

- In the DLA section under social functioning, the GP indicated “N/A”.
- In the DLA section under ‘pay rent/bills’ and ‘medication’, the GP indicated that all listed tasks are performed independently.

In the SR, the appellant made no mention of a mental impairment or that he is impacted mentally in anyway due to his physical 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 been prescribed.
- To the question “does the impairment directly restrict the person’s ability to perform DLA?”, the GP indicated ‘yes’ and then indicated ‘no restriction’ to all listed areas of DLA.

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

- All listed areas and tasks of DLA are indicated as performed independently except ‘carrying purchases home’ which requires periodic assistance (with the comment: “his kids will help with carrying the bags” and “sometimes he needs his wife or kids to carry groceries” and ‘using public transit’ and ‘using transit schedules’ which were left blank (with the comment: “he can but he has his own car”).

In the SR, the appellant did not indicate that he is restricted in performing his DLA.

Help

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

- Requires no prostheses or aids for his impairment.
- In response to ‘What assistance does your patient need with DLA?’, the GP indicated “N/A”.

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

- Help is required by ‘Health Authority Professionals’ without indication of what help is required for or by whom.
- The section ‘assistance provided through the use of Assistive Devices’ is left blank and the section ‘Assistance Animals’ is indicated as “N/A”.
- Help with DLA comes from family with the comment: “carrying stuff”.
- Under ‘assistance provided through the use of assistive devices’ and ‘assistance provided by assistance animals’ the GP commented “N/A” and “none needed”.

Evidence on Appeal

Notice of Appeal (NOA), signed and dated November 19, 2019, which stated “As I’m taking painkillers almost daily to function properly”.

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

Evidence at the Hearing

The appellant elected to be heard via teleconference. The appellant called into the teleconference 18 minutes after the designated time of 9:30am. At 10:35am the appellant exited the teleconference. After consulting with the Tribunal office, the hearing resumed without the appellant at 10:49am and the ministry presented its side. At 10:55am the appellant returned to the teleconference and the hearing

resumed with the ministry presenting its side again.

The panel notes that throughout the PWD application, the handwriting which provides the narrative and describes appellant's conditions differs from the writing which describes the GP's diagnosis and the GP's designation. At the hearing, the appellant confirmed that the PWD application was completed by up to 3 different doctors. The panel concludes that since the GP signed PWD application, he agrees with the analysis provided by up to 2 other doctors and finds that the PWD application carries the weight of up to 3 'doctors'; the GP, the appellant's neurologist and a third doctor from the local hospital.

At the hearing, the appellant reiterated the information found in the RFR and NOA, and stated, in part, the following:

- He lives on medication and cannot go without his medication. His condition is indefinite and the pain is increasing.
- He has stairs at home that lead to his bedroom and he must crawl up them as he cannot walk up the stairs.
- He cannot sit for more than 30 minutes or so and he must stand up from time to time.
- More recently, his bladder leaks without control.
- When driving long distances he must stop and get out of the car to relieve his back pain.

In response to questions, the appellant stated the following:

- His condition is worsening.
- His medications were prescribed by the GP who signed the PWD application.
- He does not know how the condition of the bladder leaking is related to the diagnosed conditions of mechanical lower back pain and S. radial pain.
- The narrative in the PWD application was written by doctors other than his GP who signed the application. A doctor from the local hospital and/or the appellant's neurologist completed the application.
- He has had pain for 4-5 years and last year he participated in physical therapy which included time spent in pools. However the therapy did not include stretches or muscle strengthening and he received only short term pain relief.
- He attends school 4 days per week but misses days due to back pain.
- He can prepare meals (get them out of the refrigerator and eat them) and take his medication independently.
- He has █ kids, which is expensive, and PWD designation will help him pay for treatment.
- He was told that surgery is an option but he is fearful of surgery and the success rate is unknown.

At the hearing, the ministry relied on its reconsideration decision.

Admissibility of Additional Information

At the hearing the appellant made reference to the following information which was not before the ministry at the time of reconsideration:

- The appellant must crawl up stairs as he cannot walk up the stairs.
- His bladder leaks uncontrollably.
- He cannot drive long distances without standing to relieve his back pain.
- He participated in physical therapy last year.
- A doctor has offered back surgery as a solution to the pain but the appellant is fearful of surgery and the success rate is unknown.

A panel may consider evidence that is not part of the record as the panel considers is reasonably

required for a full and fair disclosure of all matters related to the decision under appeal.

In this case, the panel determined that the information referenced at the hearing (and is referenced above) is admissible and keeping within the legal test stated above.

The panel finds that the information referenced at the hearing did not confirm a physical medical condition that results in restrictions to the appellant's ability to function independently or effectively, or confirms a causal link between the severe physical or mental impairment and significant restrictions in daily functioning. The panel also finds that the information referenced at the hearing was primarily a self-report and not confirmed by the GP. For these reasons, the panel places little weight on this 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 his 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.

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*

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 argued that he has lower back pain for which he takes medication on a daily basis in order to function.

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.

In its reconsideration decision, the ministry noted that the GP indicated that the appellant did not require any prostheses or aids for his impairment; he can walk 4+ blocks unaided on flat surfaces, climb 2-5 steps unaided, can lift under 5lbs and can remain seated for less than 1 hour. The ministry also noted that the GP indicated that the appellant takes significantly longer to climb stairs and that he is independent with walking indoors/outdoors, standing, lifting and carrying/holding. However it was not indicated how much longer it takes to climb stairs which makes it difficult to determine the overall level of functioning in this area. The ministry noted that the GP indicated that the appellant is independent in performing tasks that would typically be difficult for a person with a severe physical impairment. The ministry concluded that the information provided in the PWD application and SR indicated a moderate level of impairment and does not establish the presence of a severe physical impairment.

The panel concurs with the ministry's conclusions and notes that the GP indicated that the appellant's

physical functioning and mobility is restricted in the area of lifting and limited in the areas of climbing stairs unaided and remaining seated. However, the GP clearly indicated that this restriction and limitation does not translate to the appellant's ability to function with his DLA. The panel considered the SR in which the appellant stated that he can climb 5 steps and his testimony at the hearing that he must crawl up the stairs against the PWD application which indicated that the appellant can climb up to 5 steps and that it takes significantly longer than typical. There is no indication as to how much longer the appellant takes to climb stairs. With this inconsistency in the information it is difficult to determine the nature of the appellant's impairment regarding the ability to climb stairs or the severity of his restriction. Similarly, in the MR the GP indicated that the appellant can lift under 5 lbs. and wrote that pain is worse with prolonged lifting. In section B of the AR, the narrative from the GP indicated that the appellant cannot lift any weight. Yet in the AR it was indicated that lifting was performed independently, without a weight restriction indicated, and that it has only been recommended that the appellant not engage in this activity. No additional information was provided to bring clarity to the issue of lifting.

Given the overall assessments of the appellant's functional ability, and mobility and physical ability in the PWD application and the lack of any 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 he suffers from 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, but shall not be limited to, the 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, as a part of the overall evidence, verification 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 his medical condition he is restricted in performing his DLA.

The ministry concluded that the information provided does not establish that an impairment directly and significantly restricts DLA continuously or periodically for extended periods.

In the reconsideration decision, the ministry noted the GP's narrative and that he indicated that the

appellant independently performs all of the listed DLA except lifting which requires periodic assistance. The narrative provided by the GP stated “his kids will help with carrying the bags” and “sometimes he needs his wife or kids to carry groceries”. The ministry also noted that in the MR the GP indicated that the appellant is not restricted with any of the listed DLA. The ministry determined that needing occasional help to lift heavy groceries is not indicative of a significant restriction to the appellant’s ability to carry purchases home. The ministry concluded that not enough evidence is provided to establish that the appellant’s ability to manage his DLA is significantly restricted either continuously or periodically for extended periods.

The panel finds that the ministry reasonably concluded that the evidence does not confirm that the appellant has a severe impairment that significantly restricts his ability to perform his DLA continuously or periodically for extended periods. The panel notes that the information provided established that the appellant is able to perform most of his DLA independently. Of that DLA that requires periodic assistance, the GP did not indicate the duration and frequency 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 notes that the GP indicated that assistance from the appellant’s wife and kids is required “sometimes”, which would not be indicative of ‘requiring assistance periodically for extended periods’. The panel finds that it was reasonable for the ministry to determine 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 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 he requires assistance with his DLA which comes from his family.

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 with carrying stuff. However, 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

APPEAL NUMBER

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)

2020/01/10

PRINT NAME

Shirley Heafey

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2020/01/10

PRINT NAME

Roy Wares

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2020/01/10