

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the ministry) reconsideration decision dated March 18, 2020 which found that the appellant did not meet three of the five statutory requirements of Section 2 of the *Employment and Assistance for Persons with Disabilities Act* for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that the appellant's impairment is likely to continue for at least two years. However, the ministry was not satisfied the evidence establishes 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 these restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

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

The original hearing date was April 27, 2020 and the appellant requested an adjournment to obtain further information from the appellant's general practitioner (GP). The adjournment was granted and a new hearing date was scheduled for May 19, 2020. At the reconvened hearing, the appellant did not attend. After confirming that the appellant was notified and waiting 20 minutes, the hearing proceeded under Section 86(b) of the Employment and Assistance Regulation.

The evidence before the ministry at the time of the reconsideration decision included the Persons With Disabilities (PWD) Application comprised of the appellant's information and self-report dated December 4, 2019, a medical report (MR) and an assessor report (AR) both dated December 2, 2019 and completed by a GP who has known the appellant since July 2019 and has met with the appellant 3 times in that period.

The evidence also included the following documents:

- 1) Final Report dated June 10, 2015 for a CT scan of Head and Cervical Spine;
- 2) Preliminary Report dated June 10, 2015 for Emergency Discharge;
- 3) Consult Report dated February 8, 2019 from a specialist eye physician and surgeon;
- 4) GP's Observations Report dated October 28, 2019; and,
- 5) Request for Reconsideration dated January 31, 2020.

Diagnoses

In the MR, the GP diagnosed the appellant with chronic neck and lower back pain, with an onset of June 2015. There was no diagnosis of a condition within the mental disorder category of the diagnostic codes. Asked to describe the appellant's mental or physical impairments that impact the appellant's ability to manage daily living activities (DLA), the GP wrote in the AR: "chronic neck/ back pain and spasms."

Physical Impairment

In the MR and the AR, the GP reported:

- In terms of the appellant's health history, the GP wrote that the appellant "claims that chronic neck and back pain happens on daily basis, it limits [the appellant's] ability for physical work up to 30 minutes and before MVA (motor vehicle accident) [the appellant] used to work 8 hours as [physically intense job] without difficulty."
- The appellant requires aids for the impairment, specifically: "back belt, vibrating pads."
- In terms of functional skills, the GP reported that the appellant can walk 4 or more blocks unaided on a flat surface, climb 5 or more steps unaided, has no limitations with lifting in relation to the specified range of up to 16 kg. or 35 lbs. and can remain seated 1 to 2 hours.
- In the AR, the appellant is assessed as being independent with walking indoors, with walking outdoors, with climbing stairs, and with standing. The appellant requires periodic assistance from another person with lifting and for carrying and holding, with comments by the GP that the appellant has difficulty with lifting more than 50 lbs. and 20 lbs. is the maximum for carrying.
- In the section of the AR relating to assistance provided, the GP indicated that help is provided by the appellant's spouse. The appellant also uses a scooter (electric bike) as

“therapy for back issues.”

In the Final Report dated June 10, 2015 for a CT scan of Head and Cervical Spine, the impression was that there was “no evidence of trauma.”

In the Preliminary Report dated June 10, 2015 for Emergency Discharge, with a conclusion of “no significant pathology as a result of this accident” and the expectation that the appellant will “do quite well and have no significant injury.”

In the Consult Report dated February 8, 2019, the specialist eye physician and surgeon wrote:

- There is an impression of “history of ruptured globe OD [right eye].”
- The summary is that the appellant “has done very well after [the appellant’s] ruptured globe repair” and has “great vision despite the severity of [the appellant’s] injury.”

In the Observations Report dated October 28, 2019, the GP who completed the MR and the AR wrote:

- The appellant is complaining of chronic neck and back pain and back spasms since MVA June 10, 2015. The pains and aches and back spasms occur daily and the appellant takes pain medication.
- There was C6-C7 tenderness on palpation, neck “restricted extension due to pain,” thoracic spine tenderness T10-T12 with trigger points around both shoulder blades, mostly on the left side. Limited extension of lumbar spine due to pain but full flexion, rotation and “power 5/5 in all major muscle groups.”
- The appellant has hypertension, GERD [gastroesophageal reflux disease], chronic back pain/spasms- “no neuropathic signs, likely myofascial,” and PUD [peptic ulcer disease].

In the self-report, the appellant indicated:

- The appellant was involved in a motor vehicle accident June 2015 that required the “jaws of life” to get the appellant out of the vehicle.
- The appellant had lacerations on the eyeball which, after 2 years of surgery, has healed.
- The appellant’s neck and back are “messed up.” The appellant did physiotherapy for a year that “helped a bit.”
- The appellant feels as though aging 25 years occurred “all at once.” The combination of issues has made “life hard to manage.”
- Sitting or standing any length of time eventually leads to pain increase.

Mental Impairment

In the MR and the AR, the GP reported:

- The appellant has no difficulties with communication.
- The appellant has no significant deficits with cognitive and emotional functioning.
- In the AR, the GP indicated that the appellant has a good ability to communicate in all areas, specifically: speaking, reading, writing and hearing.
- With respect to the section of the AR relating to daily impacts to the appellant’s cognitive and emotional functioning, the GP assessed no major impacts. There are moderate impacts assessed in the areas of bodily functions, emotion, impulse control,

attention/concentration, motivation, and motor activity. There is a minimal impact to language and no impacts to the remaining 7 listed areas of functioning.

- The GP added comments that the appellant has "insomnia due to chronic pain; anxiety with driving long distances as result of MVA; impulse control problems; poor focusing/concentration; low motivation; pressured speech; severe back spasms."
- For social functioning, the appellant is independent with making appropriate social decisions, with developing and maintaining relationships, interacting appropriately with others, and securing assistance from others. The appellant requires periodic support/supervision with dealing appropriately with unexpected demands. The GP did not provide further explanation or description.
- The appellant has good functioning in both immediate and extended social networks. The GP did not provide further comments to explain.
- Asked to describe the support/supervision required to maintain the appellant in the community, the GP left this section blank.

In the Observations Report dated October 28, 2019, the GP who completed the MR and the AR wrote that the appellant has polysubstance use disorder and is aware of local addiction services.

In the self-report, the appellant wrote that the combination of medical issues has made "life hard to manage" and "it's also mentally frustrating on top of everything to boot."

In the Request for Reconsideration, the appellant indicated:

- The appellant has a lifetime battle with addiction and the appellant's child was taken by the ministry [Ministry of Children & Family Development]. The appellant has been "living in a daze" and "depression is an under statement."
- The appellant's father passed away at a young age and not knowing where the appellant's child is or how the child is doing is making the appellant's "greatest fear come true, not being able to be there for [the child]."

Daily Living Activities (DLA)

In the MR and the AR, the GP reported:

- The appellant has not been prescribed medication that interferes with the ability to perform DLA.
- For the move about indoors and outdoors DLA, the appellant is independent with walking indoors and walking outdoors.
- The appellant is independent in performing all of the tasks of the personal care DLA (dressing, grooming, bathing, feeding self, regulating diet, transfers in/out of bed and on/off chair) as well as the task of laundry and tasks of the shopping DLA (going to and from stores, reading prices and labels, making appropriate choices, and paying for purchases). The appellant requires periodic assistance from another person with the task of basic housekeeping (with the GP's note that "vacuuming, sweeping, general cleaning- needs help") and carrying purchases home (with the GP's note that "if heavy bags (greater than 20 lbs.)").
- The appellant is also independent in performing all of the tasks of the meals DLA (meal planning, food preparation, cooking, and safe storage of food), the medications DLA

(filling/refilling prescriptions, taking as directed, safe handling and storage) and the transportation DLA (getting in and out of a vehicle, using public transit, and using transit schedules and arranging transportation). The appellant is independent with the tasks of banking and paying rent and bills and requires periodic assistance from another person with the task of budgeting. The GP did not provide further explanation or description.

In the self-report, the appellant indicated the appellant can no longer work in any sort of work the appellant is familiar with.

Need for Help

The GP reported in the AR that the appellant receives help from family, specifically the appellant's spouse. The GP indicated that the appellant uses a back belt and vibrating pads as aids to help compensate for the impairment. The GP indicated that equipment used by the appellant includes a "scooter (electric bike) as therapy for back issues."

Additional information

In the Notice of Appeal dated April 3, 2020, the appellant expressed disagreement with the ministry's reconsideration decision and wrote that the appellant feels the amount of time given after the initial decision to both find an advocate and to have the GP reassess the appellant mentally along with the physical already done [was insufficient].

The ministry relied on the reconsideration decision as summarized at the hearing.

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

PART F – REASONS FOR PANEL DECISION

The issue on appeal is whether the ministry's reconsideration decision, which found that the appellant is not eligible for PWD designation, was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. The ministry found that the evidence does not establish that the appellant has a severe mental or physical impairment and that DLA are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods. Also, it could not be determined that, as a result of those restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

The criteria for being designated as a PWD are set out in Section 2 of the EAPWDA as follows:

Persons with disabilities

2 (1) In this section:

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

"daily living activity" has the prescribed meaning;

"prescribed professional" has the prescribed meaning.

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

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

(b) in the opinion of a prescribed professional

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

(A) continuously, or

(B) periodically for extended periods, and

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

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

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

(b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires

(i) an assistive device,

(ii) the significant help or supervision of another person, or

(iii) the services of an assistance animal.

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

The EAPWDR provides as follows:

Definitions for Act

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

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

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

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

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

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

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

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

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

- (i) an authority, as that term is defined in section 1 (1) of the Independent School Act, or
- (ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the School Act,

if qualifications in psychology are a condition of such employment.

Part 1.1 — Persons with Disabilities**Alternative grounds for designation under section 2 of Act**

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

- (a) a person who is enrolled in Plan P (Palliative Care) under the Drug Plans Regulation, B.C. Reg. 73/2015;
- (b) a person who has at any time been determined to be eligible to be the subject of payments made through the Ministry of Children and Family Development's At Home Program;
- (c) a person who has at any time been determined by Community Living British Columbia to be eligible to receive community living support under the Community Living Authority Act;
- (d) a person whose family has at any time been determined by Community Living British Columbia to be eligible to receive community living support under the Community Living Authority Act to assist that family in caring for the person;
- (e) a person who is considered to be disabled under section 42 (2) of the Canada Pension Plan (Canada).

Eligibility under section 2.1 of the EAPWDR

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

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

In the reconsideration decision, the ministry was not satisfied that the information provided establishes a severe physical impairment. The ministry acknowledged that the appellant was diagnosed by the GP with chronic neck and lower back pain, with an onset of June 2015. In the Observations Report dated October 28, 2019, the GP who completed the MR and the AR wrote that the appellant's pains and aches and back spasms occur daily and the appellant takes pain medication and the GP noted that there was C6-C7 tenderness on palpation, neck "restricted extension due to pain," thoracic spine tenderness T10-T12 with trigger points around both shoulder blades, mostly on the left side" and "limited extension of lumbar spine due to pain but full flexion, rotation and "power 5/5 in all major muscle groups." The ministry also considered the Consult Report dated February 8, 2019 in which the specialist eye physician and surgeon wrote that the appellant "has done very well after [the appellant's] ruptured globe repair" and has "great vision despite the severity of [the appellant's] injury."

A diagnosis of a serious medical condition or conditions does not in itself determine PWD eligibility or establish a severe impairment. Section 2(2) of the EAPWDA requires that the ministry must be satisfied that the impairment is severe before the ministry may designate an

applicant as a PWD. An “impairment” involves a loss or abnormality of psychological, anatomical, or physiological structure or functioning causing a restriction in the ability to function independently, effectively, appropriately, or for a reasonable duration. To assess the severity of the impairment, the ministry must consider the nature of the impairment and the extent of its impact on daily functioning.

The ministry considered the impacts of the appellant’s diagnosed medical conditions on daily functioning, reviewing the assessments provided in the MR and the AR. The ministry wrote that the GP reported in the MR that the appellant can walk 4 or more blocks unaided on a flat surface, climb 5 or more steps unaided, remain seated for 1 to 2 hours, and has no limitation with lifting. The ministry also considered that the GP assessed the appellant in the AR as being independent with walking indoors, walking outdoors, climbing stairs, and standing. In the self-report, the appellant wrote that the appellant’s neck and back are “messed up,” the appellant feels as though aging 25 years occurred “all at once,” and sitting or standing any length of time “eventually leads to pain increase.” The ministry reasonably considered that although the GP indicated that appellant requires periodic assistance from another person with lifting, the GP also noted that assistance is required for more than 50 lbs., and for carrying and holding the assistance is required for more than 20 lbs. and that this higher range of physical functioning does not show a severe degree of physical impairment.

The ministry also considered that the GP reported the appellant requires an aid for the impairment, specifically: “back belt, vibrating pads” and the appellant uses a “scooter (electric bike) as therapy for back issues,” and reasonably determined that devices used for therapy are not specifically designed to enable a person to perform a DLA, such as mobility, according to the definition of “assistive device” in Section 2 of the EAPWDA.

Given the GP’s assessment of independent physical functioning in the higher range of functional skills limitations, the panel finds that the ministry reasonably determined that the evidence is not sufficient to establish that the appellant has a severe physical impairment under Section 2(2) of the EAPWDA.

Severe Mental Impairment

In the reconsideration decision, the ministry was not satisfied that the information provided was sufficient evidence of a severe mental impairment. The ministry noted that the GP did not provide a diagnosis of a medical condition that explicitly gives rise to a mental impairment and, while the GP referred to polysubstance use disorder in the Observations Report dated October 28, 2019, the GP reported in the MR that the appellant has no significant deficits in cognitive and emotional functioning. The appellant wrote in the self-report that the combination of medical issues has made “life hard to manage” and “it’s also mentally frustrating on top of everything to boot.” In the Request for Reconsideration, the appellant indicated that the appellant has had a lifetime battle with addiction and the appellant has been “living in a daze”

and that “depression is an under statement” as the appellant’s child was taken by the Ministry of Children & Family Development.

The ministry also considered that the GP reported in the MR that the appellant has no major impacts to cognitive and emotional functioning and moderate impacts in six areas, specifically: bodily functions (the GP noting: “insomnia due to chronic pain”), emotion (the GP noting: “anxiety with driving long distances as result of MVA”), impulse control, attention/concentration (the GP noting: “poor focusing/ concentration”), motivation (the GP noting: “low motivation”), and motor activity (the GP noting: “severe back spasms”). The ministry wrote that although the GP indicated a minimal impact to language and noted the appellant has “pressured speech,” the GP also assessed the appellant as having no difficulties with communication and with good abilities in all areas, specifically: speaking, reading, writing and hearing.

The ministry reasonably considered that the GP reported that the appellant is independent in all areas of social functioning, with the exception of dealing appropriately with unexpected demands, and the GP did not provide narrative as a description or explanation of the periodic support/supervision that is required by the appellant. The GP also reported that the appellant has good functioning in both immediate and extended social networks and does not describe any support/ supervision required to maintain the appellant in the community.

Given the absence of a definitive diagnosis of a mental disorder and the GP’s assessment of moderate impacts to the appellant’s cognitive and emotional functioning, as well as the lack of evidence of significant impacts to the appellant’s social functioning, the panel finds that the ministry reasonably determined that a severe mental impairment was not established under Section 2(2) of the EAPWDA.

Restrictions in the ability to perform DLA

Section 2(2) of the EAPWDA requires that a severe impairment directly and significantly restricts the appellant’s ability to perform the DLA either continuously or periodically for extended periods, as confirmed by the opinion of a prescribed professional. The direct and significant restriction may be either continuous or periodic. If the restriction is periodic, it must be for an extended time. DLA are defined in Section 2(1) of the EAPWDR and are also listed in the MR and, with additional details, in the AR. Therefore, a prescribed professional completing these forms has the opportunity to indicate which, if any, DLA are significantly restricted by the appellant’s impairment continuously or periodically for extended periods. In this case, the GP is the prescribed professional.

In the reconsideration decision, the ministry was not satisfied that the appellant has a severe physical or mental impairment that, in the opinion of the prescribed professional, directly and significantly restricts DLA either continuously or periodically for extended periods of time. The ministry considered that the GP indicated in the AR that the appellant is independent with all of the tasks of the listed DLA with the exception of the tasks of basic housekeeping, carrying

purchases home when shopping, and budgeting, for which the appellant requires periodic assistance from another person. The ministry reasonably considered that the GP's notation of "vacuuming, sweeping, general cleaning-needs help" is not clear in terms of how much or how often help is required and, when considered in conjunction with the appellant's high level of physical functioning, does not establish a significant restriction through a need for periodic assistance for extended periods of time. For the task of carrying purchases home, the ministry reasonably considered that the GP's note that help is required by the appellant to carry bags over 20 lbs. in weight does not establish a significant restriction in this task. The GP did not provide a description or explanation to the assessment of a need for periodic assistance with budgeting and the ministry reasonably considered that the lack of information regarding the nature, degree and frequency of assistance required makes it difficult to confirm that the periodic assistance is required for extended periods of time.

The appellant wrote in the self-report that the appellant can no longer work in any sort of work with which the appellant is familiar, and the panel finds the ministry reasonably considered that 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.

Given the GP's assessment of independence with most tasks of DLA, with the need for periodic assistance with some tasks and insufficient information from the GP regarding the extent of the periodic assistance required, the panel finds that the ministry reasonably concluded that the evidence is insufficient to show that the appellant's overall ability to perform DLA is significantly restricted either continuously or periodically for extended periods, pursuant to Section 2(2)(b)(i) of the EAPWDA.

Help to perform DLA

In the reconsideration decision, the ministry held that, as it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required. Section 2(2)(b)(ii) of the EAPWDA requires that, as a result of being directly and significantly restricted in the ability to perform DLA either continuously or periodically for extended periods, a person must also require help to perform those activities. That is, the establishment of direct and significant restrictions under section 2(2)(b)(i) is a precondition of meeting the need for help criterion. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal to perform a DLA.

The GP reported in the AR that the appellant receives help from the appellant's spouse. The GP also indicated that the appellant uses a back belt and vibrating pads as aids to help compensate for the impairment. The GP indicated that equipment used by the appellant includes a "scooter (electric bike) as therapy for back issues" and the ministry reasonably considered devices used for therapy are not specifically designed to enable performance of a

DLA, as previously discussed. As the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established, the panel finds that the ministry also reasonably concluded that, under section 2(2)(b)(ii) of the EAPWDA, it cannot be determined that the appellant requires help to perform DLA.

Conclusion

The panel finds that the ministry's reconsideration decision, which determined that the appellant was not eligible for PWD designation pursuant to Section 2(2) of the EAPWDA, was reasonably supported by the evidence. The panel confirms the ministry's decision. The appellant's appeal, therefore, is not successful.

APPEAL NUMBER
2020-00107

PART G – ORDER

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

THE PANEL CONFIRMS THE MINISTRY DECISION RESCINDS THE MINISTRY DECISION

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

LEGISLATIVE AUTHORITY FOR THE DECISION:

Employment and Assistance Act

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

and

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

PART H – SIGNATURES

PRINT NAME
S. Walters

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)
2020-05-19

PRINT NAME
David Handelman

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)
2020-05-19

PRINT NAME
Dawn Martin

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)
2020-05-19