

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 September 15, 2020, 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 having a medical practitioner confirm 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) completed by the appellant’s general practitioner (GP) of 6 years on February 19, 2020.
 - An Assessor Report (AR) signed by the GP on March 5, 2020.
 - A Self-report (SR) completed by the appellant on February 26, 2020.
- A 4-page handwritten submission by the appellant, including a list of the appellant’s physicians.
- Medical documentation from 1993, 1994, 2000, 2002, 2003, 2004, and 2017.
- The appellant’s August 17, 2020 Request for Reconsideration, to which the appellant attached:
 - A 2-page handwritten submission.
 - An August 25, 2020 note from the GP.

Information provided on appeal and admissibility

The appellant’s Notice of Appeal dated September 22, 2020, which the panel accepted as argument.

At the hearing, the ministry reviewed the reconsideration decision but did not introduce new evidence.

At the hearing, the appellant provided additional information respecting her medical conditions and ability to function. The panel considered this information to be necessary for full and fair disclosure of the matters related to the appeal and therefore admitted this information under section 22(4) of the *Employment and Assistance Act* was not required.

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

Summary of relevant evidence

Note: The medical documentation comprising what may generally be described as Operative Reports, Laboratory Imaging Results and physicians' letters from 1993 through 2017, is not described below. While the information supports the diagnoses in the PWD application, it does not include information respecting the appellant's current physical or mental functioning. The panel notes that some of the documentation relates to degenerative disc disease (DDD) of the lumbar spine which was not addressed by the GP in the PWD application or subsequent letter.

Diagnoses and Health History

The GP diagnoses the appellant with:

- Interstitial cystitis (onset 1994)
- Urinary incontinence (onset 1994)
- COPD (onset 2002) – chronic shortness of breath, limited exercise tolerance, chronic cough
- Depression (onset 2015) – significant depression, mood ↓, social isolation, emotionally labile

Multiple bladder problems over the years – cystitis, bladder spasms ++, recurrent urinary tract infection (UTI), incontinence.

Information provided in the SR includes:

- She has had 22 surgical procedures, several major.
- Bladder procedures are always followed by need to use catheters, which she must always have with her in case she has trouble urinating.
- Lifting over 2 lbs. results in pain and bladder leakage.
- She stays home 80% of the day – going out is not fun.
- She can no longer play soccer or jog.
- She must take medication to prevent infection before swimming, but doesn't swim as much as she used to.
- Her hands drop things (top of fingers go numb).
- Her immune system is low; had COVID-19, is starting to feel better but breathing is still hard. COPD has worsened.
- "The main issue I see is that my doctor needs to stress that I cannot be retrained for any jobs."
- Health is getting worse as the days go by.

Physical Impairment

In the MR the GP reports:

- Able to walk 2-4 blocks unaided on a flat surface.
- Able to climb 2-5 stairs unaided.

- Lifting limited to under 5 lbs.
- No limitations for the time the appellant can remain seated.
- Requires prostheses or aids – uses cane often, urological appliance, toileting aids, and puffers.

In the AR, the GP reports:

- Walking indoors and outdoors, climbing stairs, and standing are managed independently.
- Continuous assistance from another person is required for lifting and carrying and holding.

In the August 25, 2020 note, the GP writes: “This lady is under my care. Due to ongoing serious health issues, she is unfit for work in any capacity.”

At the hearing, the appellant stressed how important it was to her to be honest when providing information to the ministry. The appellant also stated:

- There are some things she can do and some she cannot.
- She doesn't like to take a catheter to other places due to concerns about the cleanliness of those places.
- She can't be retrained for any work.
- She has never been lazy and doesn't want, but needs, disability.
- When providing information, she answered questions based on how she felt on that day, not how she will feel 6 months to a year from now. The appellant explained that a disability advocate completed the AR with the appellant and then it was provided to the GP.
- She walks everywhere she can, especially now with Covid-19, but also uses public transit.
- She can walk a little way if she takes her cane, then rests at a bus stop.
- She has a lousy immune system, foot problems and osteoarthritis, which should have been included by the GP. The GP told the appellant that [diagnostic] codes can't be put down if they don't affect her.

Mental Impairment

In the MR, significant deficits in 3 of 11 specified areas of cognitive and emotional function are identified – emotional disturbance, motivation, and attention or sustained concentration. Additional commentary includes:

- Chronic depression leading to loss of motivation and concentration difficulty.
- Social functioning periodically restricted when depression flares.
- Socially withdrawn due to depression.

The GP reports that there are no difficulties with communication and that speaking, reading, writing, and hearing abilities are good.

In the AR, where asked to indicate no impact, minimal impact, moderate impact, or major impact on daily functioning for 14 listed areas of cognitive and emotional functioning, the GP reports:

- Major impact for bodily functions.

- Moderate impact for emotion, attention/concentration, and motivation.
- Minimal impact for consciousness, impulse control, insight and judgement, executive, memory, motor activity, language, psychotic symptoms, and other emotional or mental problems.
- No impact for the one remaining aspect of functioning – other neuropsychological problems.

Information from the appellant's SR and reconsideration submission includes:

- History of alcohol drug use related to past abuse and loss of a close family member.
- Many phobias push so many buttons, the hardest being nightmares and memories constantly going through her head.
- The appellant chooses to be positive but is getting depressed more each day.

DLA

In the MR, the GP responds by ticking the "Yes" box to the question "Does the impairment directly restrict the person's ability to perform Daily Living Activities?" and indicates that the appellant has not been prescribed medications or treatments that interfere with ability to perform DLA.

- Personal self-care, meal preparation, management of medications, mobility inside and outside the home, use of transportation, and management of finances are not restricted.
- Unknown if basic housework is restricted.
- Social functioning is periodically restricted – limited when depression flares; socially withdrawn due to depression.
- Help needed is provided by family.

In the AR, the GP reports:

- Depression/daily struggle to stay off booze/drugs impact the ability to manage DLA.
- Except toileting (catheters), all listed tasks of personal care are managed independently.
- All listed aspects of basic housekeeping require continuous assistance from another person.
- All listed aspects of meals require periodic assistance from another person.
- Except for making appropriate choices, all listed tasks of shopping require continuous assistance from another person.
- Friends help when family cannot.
- All listed tasks of pay rent and bills and transportation are managed independently.
- For medications, filling/refilling prescriptions requires continuous assistance from another person: taking as directed and safe handling and storage are managed independently.
- All listed aspects of social functioning are managed independently (appropriate social decisions, develop and maintain relationships, interact appropriately with others, deal appropriately with unexpected demands, and ability to secure assistance from others). Marginal functioning with immediate and extended social networks.

The appellant reports that:

- The adult child who lives with the appellant does food shopping and sometimes the cooking.

- The appellant's other adult child brings food to the appellant.
- If her son didn't live with her, she would need a homemaker and depend on other family members more.
- Her son does a lot for her, including standing outside the shower to ensure safety.
- Safe storage of food is difficult due to mold and other issues with the appellant's home.
- She needs new glasses to read prices and labels.

Need for Help

The GP indicates that help is provided by family, friends and volunteers. A cane is used often and a urological appliance, toileting aids, and puffers are required.

The appellant reports having always worked and never wanting anyone to be her helper, but that she is now unable to get by a day without help from her children.

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:

- 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?

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

Positions of the Parties

The appellant's position is that she is not able to work or be retrained for any work due to her medical conditions. She doesn't leave her home most of the time and relies on a cane. In the NOA the appellant writes that she did not understand the questions, the advocacy organization did not review the PWD application and the GP should have included other [diagnostic] codes.

The ministry's position is that the information provided by the GP and the appellant speaks to a moderate rather than severe physical impairment. The ministry reviewed the additional medical documentation provided but found that it did not speak to limitations/restrictions in the appellant's ability to perform DLA or the help required. The ministry notes that employability or ability to work is not taken into consideration for the purposes of determining eligibility for PWD designation.

The ministry acknowledges that the GP reports the use of a cane often but finds that the GP also reports that walking indoors and outdoors, climbing stairs and standing are managed independently. The ministry also recognizes that continuous assistance is required for lifting, carrying and holding but finds that this, in itself, does not demonstrate severe physical impairment. The ministry considered the appellant's statements regarding arthritis and finger numbness but found this information was not confirmed by the GP. The ministry notes that, while the appellant reports staying home 80% of her days, it is difficult to establish that the appellant is unable to leave home given the GP's assessment of independent walking, indoors and outdoors, and the ability to take transportation. The ministry concludes that the GP's assessment suggests that the appellant is largely independent with mobility and physical ability and managing the majority of physical functional skills.

Panel Analysis

The panel finds that the information provided in the MR and AR is that the appellant suffers from a number of serious medical conditions but is, for the most part, able to function independently. In the MR, the assessment of the appellant's functional skills indicates that the appellant can walk 2-4 blocks unaided, climb 2-5 steps unaided and remain seated without limitation. In the AR, the assessment of physical ability and mobility, which the appellant explains reflects information she provided to an advocate, indicates independence with walking indoors and outdoors, climbing stairs, and standing. Both the MR and the AR identify a significant limitation in the ability to lift – less than 5 pounds, which the appellant and the AR clarify as being a 2 pound limit. Information respecting the use of a cane is unclear and therefore, in the panel's view, does not establish a severe limitation in the ability to walk: both the functional skills assessment in the MR and the mobility assessment in the AR identify the ability to walk unaided however, the GP also notes that a cane is used often, as does the appellant. While the appellant says there were deficiencies on the part of the GP and advocate, assessment of PWD eligibility must be made on the available information. In reaching its conclusion, the panel notes that the appellant describes her main issue as the inability to be retrained for any work. However, while employability is the focus of the ministry's Persons with Multiple Barriers to Employment (PPMB) qualification it is not a consideration for eligibility for PWD designation because employability is neither a criterion nor a DLA under the PWD legislation. Based on the above analysis, the panel finds the ministry reasonable when concluding that a severe physical impairment has not been established.

Mental Impairment

Positions of the Parties

The appellant's position is that despite trying to stay positive, her depression is getting worse daily.

The ministry's position is that while the depression diagnosis is notable, a serious medical condition does not in itself establish a severe impairment. The ministry considers impairment to be a medical condition resulting in restrictions in the ability to function independently or effectively. The ministry finds that inconsistent information in the PWD application makes it difficult to establish a severe mental impairment: considering the deficits and impacts on functioning in conjunction with the assessment of DLA, a severe degree of impairment is not established. Also, while reported to be socially withdrawn when depression flares, the frequency of flares is not indicated, the appellant is independent in all aspects of social functioning, with marginal rather than very disrupted social functioning, and there is no description of any support/supervision required to maintain the appellant in the community. Additionally, there are no difficulties with communication and decision-making tasks about personal activities, care and finances are managed independently.

Panel Analysis

The assessments in the PWD application do not identify communication difficulties, safety concerns or the need for support or supervision to maintain the appellant in her community. Additionally, only one major impact on daily functioning is reported (bodily functions) which, based on the commentary throughout the MR and AR, the panel finds likely relates to the physical issues the appellant experiences with toileting. In the MR, social functioning is assessed as being periodically restricted "when depression flares" but the GP does not indicate how often flares occur, or how long they last. In the AR, the appellant is reported to independently manage all listed areas of social functioning, with marginal functioning with all social networks, rather than very disrupted functioning. Also, as the ministry notes, decisions about personal activities, care and finances are managed independently, with the appellant explaining that problems respecting reading prices/labels and safe storage of food are not related to mental impairment. As discussed above, employability is not the basis upon which severity of impairment is established. Based on the information provided, the panel considers the ministry's conclusion that a severe mental impairment has not been established to be reasonable.

Restrictions in the ability to perform DLA

Positions of the Parties

The appellant's position is that she is dependent upon her children on a daily basis and would require a homemaker and the assistance of other family members if she no longer shared a home with her son.

Noting that it relies on the medical opinion and expertise of the GP when assessing DLA restrictions, the ministry concludes that there is not enough evidence to confirm that the appellant's impairment significantly restricts the ability to perform DLA continuously or periodically. In the MR, the appellant's ability to manage DLA is indicated to be unrestricted except for a restriction with shopping that is not identified as periodic or continuous, with the GP also indicating that it is unknown if basic housekeeping is restricted. However, in the AR the need for continuous assistance is identified for basic housekeeping, as well as for most tasks of shopping and filling/refilling prescriptions, with periodic assistance required for all meal tasks. The ministry acknowledges that the inability to do heavy lifting has been identified by the GP, but finds that it has not been established why the appellant cannot go to and from stores, read prices and labels or pay for purchases given the ability to independently walk indoors and outdoors, budget, and interact appropriately with others. Further, in the MR, the GP indicated that it was unknown if basic housekeeping abilities were restricted, making it difficult to establish the appellant's ability to maintain her home in an acceptable sanitary condition. Respecting meals, the frequency and duration of the need for assistance is not described in order to determine the significance of the restriction, with a restriction arising only once a month less likely to be significant than one arising several times a week, and furthermore, in the MR the GP indicates that there are no restrictions with meals.

Panel Analysis

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 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.

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.

Respecting the assessments of the appellant's ability to manage DLA, the panel finds numerous unexplained discrepancies between the information provided in the MR and AR. For example, in the MR, social functioning is reported to be periodically restricted, with the GP commenting that the appellant is socially withdrawn due to depression and social functioning is limited when depression flares (though no description of the frequency or duration of the flares is provided). In the AR, all aspects of social functioning are reported to be independently managed, with no support/supervision required. For meals, in the MR, the GP indicates that there are no restrictions whereas in the AR, all aspects are reported to require periodic assistance from another person. No clarifying commentary is provided to account for the difference or to describe the need for periodic assistance, though at the hearing, the appellant clarified that safe storage of food is a problem due to the condition of her home, not as a result of impairment. For basic housekeeping, there is no explanation for identifying restrictions as

unknown in the MR while in the AR indicating the need for continuous assistance from another person. While restrictions are identified for shopping in both the MR (frequency not specified) and AR (continuous assistance required), the panel considers it reasonable for the ministry to question why the appellant is unable to go shopping given the assessment in the DLA sections of both the MR and AR of the ability to walk indoors and outdoors unaided, as well as the appellant's ability to interact with others and budget. That the appellant requires assistance with carrying purchases home is, as the ministry notes, established based on the consistent information respecting the appellant's ability to lift weights of under 5 pounds, further clarified as a limit of 2 pounds. That the appellant also requires a catheter when experiencing difficulty urinating is also well established, though it is unclear how often that occurs.

In conclusion, while the GP's information establishes that the appellant's medical conditions result in some restrictions in the ability to perform DLA, based on the above analysis, the panel finds the ministry reasonable when concluding that the information was insufficient to establish that in the opinion of a prescribed professional the appellant's 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.

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

Conclusion

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

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

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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).

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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

PRINTNAME

Jane Nielsen

SIGNATURE OF CHAIR

DATE(YEAR/MONTH/DAY)

2020/10/14

PRINTNAME

Inge Morrissey

SIGNATURE OF MEMBER

DATE(YEAR/MONTH/DAY)

2020/10/14

PRINTNAME

Kenneth Smith

SIGNATURE OF MEMBER

DATE(YEAR/MONTH/DAY)

2020/10/14