

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 2, 2021, which held that the appellant did not meet 4 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 was satisfied that the appellant met the age requirement but was not satisfied that:

- The appellant's impairment is likely to continue for two years or more;
- 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 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.

PART D – RELEVANT LEGISLATION

EAPWDA, section 2

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

PART E – SUMMARY OF FACTS

On April 20, 2021 the ministry received the appellant's PWD application comprised of a Medical Report (MR) dated April 12, 2021 completed by an orthopedic surgeon (the "Specialist"), an Assessor Report (AR) completed by the appellant's general practitioner (the "Physician") on April 20, 2021, and the appellant's self-report (SR) dated April 14, 2021.

The appellant's request for PWD designation was denied on April 29, 2021. On May 18, 2021 the ministry received the appellant's request for reconsideration form (RFR) dated May 11, 2021, in which the appellant indicates being desperate to receive treatment for "*right hand, lower back, and hips*". With the RFR was a letter from the Physician dated May 18, 2021 (the "Letter") providing further information about the appellant's account of symptoms. The Physician indicates that the appellant had been seen four times since April 20, 2021. Prior to that, the appellant was a patient at the clinic in 2014 but had been out of the country until 2019. The Physician indicates that the appellant had a motor vehicle accident many years ago resulting in chronic low back pain, with the last treatments taking place in 2018-2019.

The Physician indicates that the appellant reports pain with sitting, sleep disruption due to pain, low back stiffness, "*can't do much lifting*", and ongoing right wrist pain. The Physician indicates that the appellant lives alone, does not need assistance from another person, and does not take longer to perform DLA's. The Physician indicates that the appellant's x-rays of hip and back from April 24, 2021 indicate some mild-moderate osteoarthritis and the appellant has an upcoming MRI on July 3, 2021.

The Physician also indicates that the appellant reported sinus allergies and longstanding urinary frequency.

On June 2, 2021 the ministry completed its review. The appellant's Notice of Appeal dated June 21, 2021 indicates that the appellant had attended an MRI on June 14, 2021 and would be submitting the report once received.

Summary of relevant evidence

Diagnoses

In the MR, the Specialist indicates that the appellant was diagnosed with a right distal radius fracture, date of onset February 2021. The Physician indicates that the appellant has been a patient since February 2021 and has been seen 2 to 10 times in the past 12 months.

Degree and Course of Impairment

In the MR, the Specialist indicates that the appellant's impairment is not likely to continue for two years or more.

Physical Impairment

In the MR for Functional Skills, the Specialist indicates that the appellant is able to walk 4+ blocks, can climb 5+ stairs unaided, has no limitations with lifting, and no limitations with remaining seated. In the Health History portion of the MR, the Specialist indicates that the appellant has a right wrist fracture resulting in pain, swelling, and stiffness. The Specialist indicates that the appellant had no use of right hand for six weeks post injury and then gradual return to activity as tolerated.

In the AR, the Physician indicates that the appellant is independent with walking indoors, walking outdoors, climbing stairs, standing, lifting, and carrying and holding. The Physician indicates that the appointment to complete the AR was the first meeting with the appellant. The Physician indicates that the appellant does not have a family doctor but had attended the walk in clinic over the years, but not since 2014.

In the SR, the appellant describes right arm pain, stiffness, and weakness. The SR indicates that a doctor completed the SR for the appellant as the appellant is right handed and was unable to write do to the injury.

The Letter indicates that the Physician had seen the appellant four times since April 20, 2021. The Physician states that "*I don't have much new objective evidence to add, except for patient's account of symptoms*". The Physician indicates that the appellant reported chronic low back pain from a motor vehicle accident many years previously, with chiropractic treatment last attended in 2018 -2019. The Physician indicates that the appellant reported pain with sitting, pain that wakes the appellant from sleep, low back stiffness, right wrist pain (fracture and cast in February 2021) with difficulty pressing/putting weight on it.

The Physician indicates that the appellant's 2014 back x-ray was normal and that back and hip x-rays dated April 24, 2021 indicated some mild to moderate osteoarthritis. The Physician indicates that the appellant had an MRI set for July 3, 2021. The Physician indicates that the appellant also wanted mention of sinus allergies and longstanding urinary frequency.

Mental Impairment

In the MR, the Specialist indicates that it is unknown whether the appellant has any significant deficits with cognitive and emotional function. The Specialist indicates that the appellant does not have any difficulties with communication.

In the AR, the Physician indicates that section B, item 4 for cognitive and emotional functioning is not applicable.

DLA

In the MR, the Specialist states that the appellant does not have significant impairment in ability to perform DLA's. The Specialist states: "*I do not think this application is relevant though patient suggests this is appropriate for financial assistance for physiotherapy sessions*".

In the AR, the Physician indicates that the appellant's physical impairment is a right wrist fracture in February 2021 for which the appellant was followed by the Specialist. The Physician

indicates that the appellant is no longer in a cast but still has impairment compared to baseline; and has to use left hand to do DLA's.

The Physician indicates that the appellant is independent with all aspects of DLA. With respect to personal care, basic housekeeping, shopping, and meals, the Physician indicates that the appellant needs to use left hand to carry out these DLA's. The Physician indicates that the appellant needs physiotherapy.

The Physician indicates that DLA of social functioning is not applicable.

In the Letter, the Physician indicates that the appellant reports being unable to do much lifting. The Physician indicates that the appellant does not need assistance from another person, but that the appellant feels that DLA's take longer.

Need for Help

In the MR, the Specialist recommends that the appellant attend 6-12 physiotherapy sessions.

In the AR, the Physician did not provide any information to indicate that the appellant receives assistance for DLA from anyone else. The Physician indicates that physiotherapy would be of assistance. The Physician does not indicate that the appellant uses any assistive devices and does not have an Assistance Animal.

In the Letter, the Physician indicates that the appellant lives alone and does not need assistance from another person nor assistive devices.

Additional information provided

Prior to the appeal the appellant provided the MRI lumbar spine report from a hospital dated June 14, 2021 (the "MRI Report") indicating that the appellant had lumbar spondylosis with a degenerative grade 1 anterolisthesis of L4 on L5. The MRI findings indicate mild to moderate facet arthropathy.

At the hearing, the appellant stated that the information provided by the Specialist and the Physician did not adequately describe her conditions. The appellant stated that the Specialist only indicated the information about the appellant's broken wrist and did not reflect that during the fall in February 2021 the appellant also suffered injury to hips. The appellant reports that the Physician completed the AR in three minutes and did not take the time to go through the questions sufficiently. The appellant reports inability to sit more than 30 minutes or stand more than 45 minutes and experiencing tingling in leg and an "electric shock" from hips to feet. The appellant reports difficulty with bending and lifting and needing help to move any heavy items. The appellant reports difficulty cooking and makes only simple meals or fast food. The appellant states that taking showers and dressing takes longer and that the appellant is unable to mop.

The appellant stated that when attending the hospital after the fall, the main concern was the fractured right wrist so the appellant did not say anything about hip pain at that time.

The appellant is waiting to see a medical specialist in relation to ongoing sinus issues. The appellant also reports prior thyroid issues from 2014 to 2016.

The appellant reports experiencing financial difficulty due to inability to work and that the income assistance is barely enough to pay for rent and medications, with little left for groceries. The appellant seeks PWD designation for additional funding and physiotherapy treatment.

Admissibility of New Information

The ministry did not object to the admission of the MRI Report into evidence.

The panel has admitted the information in the MRI Report and the appellant's oral testimony as the information is required for a full and fair disclosure of all matters related to the decision under appeal, in accordance with section 22(4) of the *Employment and Assistance Act*. In particular, the new information relates to the appellant's impairment, DLA, and help needed.

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. In particular, was the ministry reasonable when concluding it was not satisfied that

- The appellant's impairment is likely to continue for more than two years;
- a severe physical or mental impairment was established;
- 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 help, as it is defined in the legislation, 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

Duration of Impairment

The ministry's position is that as the Specialist in the MR indicated that the appellant's impairment is not likely to continue for two years or more from today, the appellant did not meet the legislated criteria.

The appellant did not argue that the right wrist injury would last more than two years. The appellant did not make any submissions with respect to duration.

The panel finds that as there is no information from the Specialist or Physician indicating that the appellant has an impairment that is likely to continue for two years or more, the ministry was reasonable in concluding that section 2(2)(a) of the EAPWDA had not been met.

Severe Physical Impairment

The ministry's position is that the functional skills reported by the Specialist in the MR and the assessment of mobility and physical ability in the AR are not indicative of a severe physical impairment. The ministry notes that in the Letter, the Physician reports that the appellant had a previous motor vehicle accident resulting in chronic low back pain, pain with sitting, pain that wakes the appellant from sleep, right wrist pain, and inability to do much lifting. The ministry also notes that the Physician indicates that prior x-rays of hips and back indicated some mild to

moderate osteoarthritis. The ministry's position is that the additional information in the Letter demonstrates that the appellant experiences limitations to physical functioning due to low back pain and wrist pain but that the assessments provided do not establish that the appellant has a severe physical impairment.

The appellant's position is that the MR and AR did not adequately reflect the appellant's physical impairment which includes ongoing right wrist pain and weakness, inability to use right hand, chronic low back pain, hip pain, radiation of pain into legs impacting the appellant's ability to perform DLA. The appellant's position is that the additional information provided, along with the appellant's information regarding impairment and functional limitations is sufficient to establish that the criteria for severe physical impairment is met.

Section 2 of the EAPWDA requires that the minister "is satisfied" that a person has a severe physical or mental impairment, giving the minister discretion when making the determination. When exercising this discretion, the fundamental basis for assessing PWD eligibility is information from one or more prescribed professionals. The panel also notes that the legislation does not identify employability or financial constraints as considerations when determining PWD eligibility.

The panel finds that the MR and the AR only refer to the appellant's right distal radius fracture and do not identify any resulting impacts on the appellant's physical functioning. While the additional information provided in the Letter references a number of physical medical conditions reported by the appellant including chronic low back pain, sinus issues, and urinary frequency, with some pain and impact to sitting, lifting, and sleep disruption, the panel finds that the ministry reasonably concluded that the noted impacts were not sufficient to determine that a severe physical impairment was established.

While the appellant argues that the MRI Report indicates severe degeneration, the panel notes that it only indicates mild to moderate facet arthropathy, and there is no additional information from a prescribed professional identifying any further impacts on the appellant's physical functioning as a result of the MRI findings.

The panel acknowledges that the appellant has some pain and limitations but finds the ministry's conclusion reasonable given the minimal description of physical limitations by the Physician. While the appellant argued that the information provided by the Specialist and the Physician did not adequately describe the appellant's impairments, the fundamental basis for assessing PWD eligibility, as noted above, is information from one or more prescribed professionals. The panel appreciates that the appellant does not feel that the Specialist or the Physician took the necessary time to go through the questions on the MR or the AR but the panel finds the reconsideration decision reasonably determined that the information from the prescribed professionals was not sufficient to establish a severe physical impairment as required by section 2(2) of the EAPWDA.

Severe Mental Impairment

The ministry's position is that the information provided does not demonstrate a severe impairment of the appellant's mental functioning. The reconsideration decision notes that the

MR indicates that it is unknown if the appellant experiences any significant deficits to cognitive and emotional functioning. The AR indicates that the appellant's cognitive and emotional functioning is not impacted as a result of an identified mental impairment or brain injury. The ministry also notes that neither the MR nor the AR indicate any restrictions to the appellant's social functioning.

The appellant's position is that the chronic pain and disrupted sleep affect the appellant's mental health, resulting in decreased focus, concentration, and inability to return to work.

The panel finds that neither the Specialist nor the Physician made a diagnosis of any mental impairment and did not identify any resulting impacts on the appellant's mental functioning. In the AR, the Physician indicates in section B, question 4, cognitive and emotional functioning is not applicable. The Letter does not provide any further information regarding any impact to mental impairment. While the panel appreciates that it may be difficult for the appellant to be unable to return to work, employability is not a criterion for designation as PWD.

The panel finds that the ministry reasonably determined that the information provided does not demonstrate a severe mental impairment as required by section 2(2) of the EAPWDA.

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. Inherently, any analysis of periodicity must also include 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 evidence of the duration and frequency of the restriction in order to be "satisfied" that this legislative criterion is met.

DLA are defined in section 2(1) of the EAPWDR and are listed in both the MR and the AR sections of the PWD application with the opportunity for the prescribed professional to check marked boxes and provide additional narrative. DLA, as defined in the legislation, do not include the ability to work.

The appellant's position is that the information provided establishes that the combination of right wrist pain and limitations, chronic low back pain, hip pain, sleep disruption, lack of focus and concentration and sinus allergies, directly and significantly restricts the appellant's DLA continuously or periodically for extended periods. The appellant reports difficulty with bending and lifting and needing help to move any heavy items. The appellant reports difficulty cooking

and makes only simple meals or fast food. The appellant states that taking showers and dressing takes longer, and that the appellant is unable to mop floors.

The ministry's position is that the information provided is not sufficient to confirm that the appellant has a severe impairment that significantly restricts ability to perform DLA continuously or periodically for extended periods, so the legislative criteria has not been met. The ministry notes that the MR and the AR indicate that the appellant is not restricted in ability to perform DLA. The AR indicates that the appellant is able to manage all aspects of DLA but is required to complete them using the appellant's left hand. The ministry also notes that the Letter indicates that while the appellant lives alone and does not need assistance from another person or assistive devices, the appellant feels that DLA take longer.

The ministry acknowledges that the appellant has certain limitations resulting from lower back pain and right wrist pain so it takes the appellant longer to complete DLA, but as there is no information indicating how much longer than typical it takes to manage DLA, the ministry is unable to determine if the limitations represent a significant restriction to the appellant's overall level of functioning.

The panel finds that the ministry reasonably determined that the information provided does not indicate that the appellant's impairment significantly restricts ability to perform DLA continuously or periodically for extended periods. In particular, the Specialist in the MR indicates that the appellant does not have significant impairment in ability to perform DLA. In the AR, the Physician indicates that the appellant is independent with all aspects of all DLA, only noting that the appellant has to use left hand for DLA of personal care, basic housekeeping, shopping, and meals.

The panel notes that the appellant did not feel that the MR or the AR adequately described the appellant's restrictions. The panel also notes that the appellant sought further information from the Physician to clarify the impairments and impact to DLA. However, while the Letter indicates that the appellant reports taking longer with DLA's, the Physician has not provided any information describing which tasks of DLA take longer or how much longer than typical is needed. In addition, the Letter indicates that the appellant does not require assistance from another person for DLA.

Based on the information from the Specialist and the Physician, the panel finds that the ministry was reasonable in concluding that direct and significant restrictions in the ability to manage DLA either continuously or periodically for extended periods were not established.

The information provided demonstrates that the appellant experiences some limitations resulting in some aspects of DLA taking longer than typical, but the information provided is insufficient to determine if they represent a significant restriction to the appellant's overall level of functioning. The panel finds that the ministry has reasonably determined that the information provided does not confirm that the appellant has a severe impairment that significantly restricts ability to perform DLA continuously or periodically for extended periods.

The panel finds that the ministry reasonably determined that based on the information provided, the appellant did not meet the legislative criteria of section 2(2)(b) 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's position is that help is required with DLA because of a severe physical impairment. In particular, the appellant seeks funding for physiotherapy treatment for right wrist and arm.

The ministry's position is that because it has not been established that DLA are significantly restricted, it cannot be determined that help is required.

In the MR, the Specialist indicates that the appellant does not require prosthesis or aids for the appellant's impairment. The Specialist recommends 6 to 12 physiotherapy treatments.

In the AR, the Physician does not indicate that the appellant uses any assistive devices and does not have an Assistance Animal. The Physician indicate that the appellant would benefit from physiotherapy.

The information provided indicates that the appellant does not receive or need assistance with DLA but would benefit from physiotherapy treatment. However, confirmation of 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 reasonable in determining that the appellant did not meet the duration criteria, does not have a severe physical or mental impairment, and that the appellant's DLA are not directly and significantly restricted either continuously or periodically for extended periods in which case it cannot be determined that the appellant requires significant help with DLA. As the reconsideration decision is reasonably supported by the evidence and is a reasonable application of the applicable enactment, the panel therefore confirms the decision. The appellant is not successful on appeal.

APPEAL NUMBER
2021-0131

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

Helene Walford

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2021/07/21

PRINT NAME

Cherri Fitzsimmons

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2021/07/21

PRINT NAME

Daniel Chow

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2021/07/21