

Part C – Decision Under Appeal

Under appeal is the reconsideration decision of the Ministry of Social Development and Poverty Reduction (the ministry) dated March 9, 2022, that denied the appellant designation as a person with disabilities (PWD) under section 2 of the *Employment and Assistance for Persons with Disabilities Act*. The ministry stated that the appellant met the requirements of having reached 18 years of age and of a medical practitioner confirming the impairment is likely to continue for at least 2 years. However, the ministry was not satisfied that:

- the appellant has a severe mental or physical impairment
- the appellant's impairment, in the opinion of a prescribed professional, directly and significantly restricts the ability to perform daily living activities ("DLA") either continuously or periodically for extended periods; and,
- as a result of restrictions caused by the impairment, 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 found that the appellant is not in one of the prescribed classes of persons who may be eligible for PWD designation under section 2.1 of the *Employment and Assistance for Persons with Disabilities Regulation* ("EAPWDR"). As there was no information or argument provided for PWD designation on alternative grounds, the panel considers that matter not to be at issue in this appeal.

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) and Assessor Report (AR), both dated October 13, 2021, and completed by the appellant’s general practitioner (GP) of 1 year who had seen the appellant 2 – 10 times in the preceding twelve months.
 - A Self-report (SR) dated October 13, 2021.
- January 26, 2021, letter from Service Canada respecting the appellant’s application for Canada Pension Plan disability benefits.
- The appellant’s February 21, 2022, Request for Reconsideration.

Information provided on appeal and admissibility

The appellant’s Notice of Appeal dated March 17, 2022, in which the appellant writes that her condition worsens and that she has an upcoming appointment with the GP “to discuss PWD.”

At the hearing, the appellant provided additional information (summarized below) about her medical conditions and functioning.

At the hearing, the ministry reviewed the reconsideration decision. In response to the appellant, the ministry stated that it does not consider episodes 4 days a month to be sufficient to show severe impairment and suggested that the appellant get the GP to confirm the use of assistive devices. The ministry did not provide evidence at the hearing.

The panel admitted the appellant’s information provided on appeal under section 22(4) of the *Employment and Assistance Act* as information reasonably required for full and fair disclosure of the matters at issue. The panel considered the information to be directly related to PWD eligibility.

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

Summary of relevant evidence**Diagnoses**

The GP diagnoses osteoporosis, degenerative lumbar spine, migraines, and osteoarthritis. “Degenerative condition will continue to worsen.”

Physical Impairment

The GP reports:

- Significant periodic mechanical and physical impairment due to osteoarthritis and osteoporosis. When severe, the appellant struggles to mobilize or even prepare food. Pain ok at other times.
- Significant migraine headaches.
- Prostheses or aids are not required.
- Functional skills: the appellant can walk 2 to 4 blocks unaided on a flat surface; climb 5+ steps unaided; lifting is limited to 15 to 35 lbs.; the appellant can remain seated for less than 1 hour.
- Walking indoors and outdoors, climbing stairs, lifting, and carrying and holding require continuous assistance from another person.

In the SR, the appellant reports:

- Osteoporosis
 - causes daily pain, worse in winter, mostly affecting feet, hands, back, and neck
 - progressively becoming more painful to do ordinary tasks
 - prescribed medication provides relief but causes stomachache and overall feeling of discomfort and lack of wellbeing, so she sometimes skips medications for a few days
- Migraines and cluster headaches – she has attacks at least once per month
- Hyperosmia - heightened and hypersensitive sense of smell; happens very often causing nausea, dizziness, agitation, and vertigo
- Allergies – seasonal/occasional asthma; certain foods (anaphylaxes); scents/cleaning products cause rashes and nausea
- Fatigue and pain getting worse with age; she pushes hard to accomplish the most basic things.

In the Request for Reconsideration, the appellant reports:

- she had only seen the GP in person twice and the time spent on the application was very brief and rushed
- the GP had never filled out a PWD application before
- she had guessed that she could lift 15 lbs., but now realizes that is too heavy
- she can walk, do minimal stairs, and sit for very short periods of time if her medical conditions are not flaring up; during a flare-up, she is unable to do any of these for up to two weeks at a time
- she has worked in very physically demanding jobs and has done a lot of damage to her back
- currently, she is only on call as the employer knows the appellant cannot withstand the workload for any length of time – it takes all day, with a lot of breaks, to do what she used to be able to do in an hour
- she has worked hard and would love to continue but is unable due to her medical conditions

At the hearing, the appellant stated:

- neither she nor the GP is sure of the onset dates of her medical conditions, she has worked “bad back jobs” and had sore muscles for a long time
- degenerative lumbar spine is a disease and x-rays show she has crushed discs
- crushed discs are related to sciatica, because the discs press on the sciatic nerve, which the GP should have explained
- she sometimes has bad days from arthritis and migraines but is managing them; she included them to show a more complete picture of what some days are like
- lumbar spine disease is her main problem – 2 times a week
- at least 4 times a month she has a back episode after which she is sore for days; they are becoming more frequent and painful because the condition is progressive
- she has pain every day but is mobile unless she is having an episode
- she is not sure what triggers the episodes and does not know when they will happen
- she walks to the store and uses a walker to carry her groceries home
- she has used a crutch and a cane, but they do not help because of the pressure their use places on the sciatic nerve; similarly using a chair or back brace or having someone lift her out of bed does not help because of the additional pressure on the sciatic nerve
- sciatica causes the most pain
- she worked some shifts recently but had a bad episode a while ago that left her bed-ridden for 3 weeks; she works when she is able and knows when to stop
- she is proactive and tries to keep her muscles strengthened by maintaining some activity on good days, within her limits; in her past living arrangements and the home she now lives in, everything, like the washroom, is close by so she can manage
- she lives with a great amount of pain a lot of the time; more common than not she is having a painful day but is managing and trying to build a life as best as she can
- she was unable to see the GP as planned because she had a bad flu
- her medical conditions make it hard to make a living

Mental Impairment

The GP reports:

- No significant deficits in any of the 11 listed areas of cognitive and emotional function.
- “Knock on affect” on mental health and wellbeing [from physical medical conditions].
- Manages 2x shifts/week of light work which is positive for mental health.
- Social functioning is not restricted by the appellant’s impairment.
- Ability to communicate (speaking, reading, writing, hearing) is good.

The Cognitive and Emotional Functioning section of the AR was not completed by the GP.

In the reconsideration submission, the appellant describes feeling like she is on a downward spiral and worries about being able to provide for herself. She states that she

lost a job she could manage and her shelter, when the house for which she was a house sitter was sold. She began having passive panic attacks and her social life consists of applying for housing. She has difficulty concentrating and often forgets instructions and words.

At the hearing, the appellant stated that she has a bad short-term memory but thinks it is settling down now that she has a home. She has no mental problems, no depression.

DLA

In the MR, the GP reports:

- The appellant has not been prescribed medication or treatment that interfere with the ability to perform DLA.
- The appellant's impairment directly restricts personal care, meal preparation, basic housework, daily shopping, mobility inside and outside the home, and use of transportation. The restrictions are periodic described as "flares of pain, ok at other times." "Struggles with even basic tasks."
- Management of medications, management of finances and social functioning are not restricted.

In the AR, the GP reports that significant osteoarthritis and osteoporosis affect mobility and the ability to carry out ADLs (activities of daily living). When symptoms flare, the appellant can struggle with independent tasks due to pain and mobility limitations and can require assistance. The GP assesses individual DLA as follows:

- Walking indoors/outdoors, climbing stairs, lifting, and carrying/holding, which relate to the DLA move about indoors and outdoors, require continuous assistance from another person. Standing is managed independently.
- Personal care – dressing, grooming, bathing, toileting, feeding self, and regulating diet are managed independently. Transfers in/out of bed and on/off chair require periodic assistance from another person.
- Basic housekeeping – laundry and basic housekeeping require periodic assistance from another person.
- Shopping – going to and from stores requires periodic assistance from another person. Reading prices and labels, making appropriate choices, paying for purchases, and carrying purchases home are managed independently.
- Meals – meal planning, and safe storage of food are managed independently. Food preparation and cooking require periodic assistance from another person.
- Pay rent and bills – all listed tasks are managed independently.
- Medications – all listed tasks are managed independently.
- Transportation – getting in and out of a vehicle requires periodic assistance from another person. Using public transit and using transit schedules/arranging transportation are managed independently.
- Social functioning – all listed areas of functioning are managed independently.

Need for Help

The GP reports:

- assistance is provided by family and friends
- the appellant could benefit from a mobility aid such as a cane.

At the hearing, the appellant stated that her sister sometimes helps her and makes some meals. She uses a walker to carry groceries home.

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 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 for PWD designation under section 2 of the EAPWDA****Severe Impairment – Physical or Mental**

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 legislation's requirement for information from a medical or nurse practitioner (and other prescribed professionals) makes it clear that 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.

A diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish severe impairment. While neither "impairment" nor "severe impairment" is defined in the legislation, the PWD Application defines "impairment" as a loss or abnormality of psychological, anatomical, or physiological structure or function, causing a restriction in the ability to function independently, effectively, appropriately, or for a reasonable duration. Although this definition is not binding on the panel, the panel considers the assessment of the severity of impairment based on daily functional abilities to be reasonable.

Physical Impairment

Positions of the Parties

The appellant's position is that her lumbar spine disease is progressive and causes her daily pain and episodes of severe pain that leave her unable to mobilize.

The ministry's position is that the appellant has some limitations with mobility and physical abilities but that a severe physical impairment is not established. The ministry notes that the PWD application is not intended to assess employability or vocational abilities.

The ministry states that the GP reports significant periodic mechanical and physical impairment due to osteoarthritis and osteoporosis but that neither the appellant nor the GP report how often these conditions flare or are severe. Also, the GP reports that the appellant's pain is ok at other times and that prescribed medication and/or treatment does not interfere with the ability to perform DLA. The ministry notes that the GP indicates that a mobility device such as a cane could be helpful, and that the appellant indicates a possible need for an assistive device but finds that the appellant currently manages mobility without these items.

The ministry finds that the being immobile 2-3 days monthly due to migraine headaches, as reported by the appellant, does not confirm severe overall impairment of physical functioning. Respecting the GP's assessment of physical functional skills, the ministry states that the appellant's self-reported inability to lift even 15 lbs. is not confirmed by the GP and that being unable to remain seated for long periods does not, in and of itself, support a severe degree of impairment. The ministry also finds that it is unclear why continuous assistance with mobility, as indicated in the AR, is needed given the physical functional assessment in the MR. Further, most areas of DLA are managed independently or require only periodic assistance for an unspecified duration and frequency.

Panel Analysis

The appellant is diagnosed with several physical medical conditions, with the GP reporting significant periodic mechanical and physical impairment when the appellant's osteoarthritis and osteoporosis symptoms are severe. The appellant reports that her physical functioning is most impacted by degenerative lumbar spine disease, specifically the sciatica caused by pressure placed by crushed discs on the sciatic nerve.

The appellant and the GP report that the greatest impact on the appellant's physical functioning is "periodic" or episodic. The GP describes the appellant's pain level at other times as being ok and the appellant states that she remains mobile, within limits, and is managing despite daily pain. In the MR, the GP indicates physical functional skills (walking, climbing stairs, and lifting) that the ministry has reasonably viewed as not establishing severe physical impairment. The appellant disagrees with the GP's assessment for lifting (up to 15 lbs.) however, it appears that when not experiencing an episode, the appellant is able to lift sufficient weight to manage daily tasks. The panel places little weight on the GP's assessment, in the AR, of the need for

continuous assistance from another person with almost all aspects of physical ability and mobility. As noted by the ministry, the need for continuous assistance is not supported by the GP's assessment that the appellant either independently manages or requires only periodic assistance with DLA. The panel also finds that the appellant's own information about her functioning when not experiencing an episode does not reflect the need for continuous assistance from another person. Based on this analysis, the panel finds that the ministry reasonably determined that the information about the appellant's physical functioning when not experiencing an episodic or periodic flare-up of symptoms does not establish severe physical impairment.

The panel also finds that the ministry was reasonable to conclude that there was insufficient information respecting the frequency and duration of the flare-ups to establish a severe physical impairment. The GP does not indicate how often the appellant experiences flare-ups of severe pain. The appellant's own information is that episodes are unpredictable. Further, the appellant describes what appear to be varying degrees of pain - lumbar pain twice weekly, episodes at least 4 times a month which leave her sore for days and an episode a while ago that left her bedridden for 3 weeks.

In the absence of further information confirming the frequency and duration of severe pain flare-ups experienced by the appellant, the panel finds that the ministry was reasonable to conclude that the information does not establish a severe physical impairment.

Mental Impairment

Positions of the Parties

In the reconsideration submission, the appellant describes worrying about providing for herself and having passive panic episodes, difficulty concentrating, and often forgetting instructions and words. At the hearing, the appellant's position was that she believes her short-term memory problems are getting better and that she does not have any mental problems.

The ministry's position is that the information does not establish a severe mental impairment. The ministry notes that the GP reports that the appellant's physical health conditions affect her mental health and wellbeing. However, the GP does not diagnose a medical condition that explicitly results in a mental impairment or indicate significant deficits to cognitive and emotional functioning or impacts on daily cognitive and emotional functioning. Also, the GP reports that the appellant independently manages DLA tasks related to decision making about personal activities, care, and finances, as well as social functioning.

Panel Analysis

The appellant is not diagnosed with a mental health condition. The GP does indicate that the appellant's physical medical conditions affect her mental health and wellbeing, but the GP's assessment of mental functioning does not reflect severe impairment. Specifically, the GP reports there are no significant deficits with cognitive and emotional functioning, that the appellant has good communication abilities, and independently manages all listed areas of

social functioning and all decision-making DLA tasks. Additionally, the appellant's own information does not indicate a severe mental impairment.

Therefore, the panel finds that the ministry was reasonable to conclude that the information does not establish a severe mental impairment.

Restrictions in the ability to perform DLA

Positions of the Parties

The appellant's position is that she is unable to mobilize or do things when having a flare-up of her back pain.

The ministry's position is that it is not satisfied that the appellant has a severe impairment that directly and significantly restricts the appellant's ability to perform DLA. The ministry states that it relies on the medical opinion and expertise of the GP, a prescribed professional, to determine if an impairment directly and significantly restricts DLA. The ministry states that the GP reports periodic restrictions with many activities but does not describe the frequency and duration of the restrictions, only noting "flares of pain, ok at other times." The ministry also finds that the appellant is reported as independent with most activities, though significant osteoarthritis and osteoporosis result in the need for periodic assistance with some activities. However, the nature, frequency and duration of the assistance is not described to establish a significant restriction, periodically for extended periods. The ministry notes that the appellant reports being unable to do things for up to two weeks during a flare-up but that it is not clear how often these flare-ups occur. Finally, the ministry notes that social functioning is not restricted.

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.

In this case, the GP is the only prescribed professional who provided information respecting the appellant's ability to perform DLA.

The GP indicates that the appellant independently manages the two DLA that are specific to mental impairment: make decisions about personal activities, care, or finances; and relate to, communicate, or interact with others effectively.

Regarding the appellant's physical functioning, the GP indicates that when pain from appellant's osteoarthritis and osteoporosis is severe, the appellant struggles to mobilize or even prepare food. The GP reports that at other times the appellant's pain is ok. Consistent with this information, the GP assesses the need for periodic assistance with almost all physical DLA tasks. As previously discussed under *Physical Impairment*, the panel found that the assessment in the AR of the need for continuous assistance from another person with all walking, climbing stairs and lifting/carrying/holding was not supported by the other information provided by the GP or the appellant's statements which consistently indicate the need for periodic assistance.

The panel finds that the information establishes that the appellant's ability to manage physical DLA tasks is directly and significantly restricted when experiencing flare-ups or episodes of severe back pain. However, as the ministry notes, the legislation requires that the direct and significant restrictions must either be continuous or periodic for extended periods as confirmed by a prescribed professional. The panel finds that the GP has not indicated the frequency or duration of severe pain flare-ups to determine whether they are for extended periods. Additionally, the panel notes that the appellant's information indicates varying degrees of symptom flare-ups and unpredictable frequency and duration.

Based on the above analysis, 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.

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 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.

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).

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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)

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

Part H – Signatures

Print Name

Jane Nielsen

Signature of Chair

Date (Year/Month/Day)

2022/04/12

Print Name

Angie Blake

Signature of Member

Date (Year/Month/Day)

2022/04/12

Print Name

Charles Schellinck

Signature of Member

Date (Year

2022/04/12