

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 January 27, 2022, which held that the appellant did not meet 3 of the 5 statutory requirements of section 2 of the *Employment and Assistance for Persons with Disabilities Act* for designation as a person with disabilities (PWD). The ministry found that the appellant met the age and duration requirements, but was not satisfied that:

- the appellant has a severe mental and/or physical 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.

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

Part D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act (EAPWDA), section 2

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

Part E – Summary of Facts**Evidence at Reconsideration**

1. The appellant's PWD application comprised of a Medical Report (MR) [dated September 27, 2021] and an Assessor Report (AR) [dated September 27, 2021], which were completed by the appellant's general practitioner (the GP) who had known the appellant for 5 years and seen him 2-10 times in the past 12 months. The approaches and sources used to conduct the MR and AR included an office interview with the appellant, file/chart information, other assessments and family/friends/caregivers. The PWD application also included the appellant's Self-Report (SR) dated September 20, 2021.
2. Request for Reconsideration (RFR), signed and dated January 13, 2022. The RFR consisted of a 5-page self-report from the appellant. In this report the appellant indicated that he had lower back pain since age 12, which is now severe. His pain is at a 10/10 in his whole lower body. He has left 5 jobs in the past 8 years due to pain. He has used pain medication and has not had any operations. When he was injured at work in April 2021, he became bed ridden and has not been able to live a normal life since then. He was advised by a doctor to avoid standing, twisting, bending, lifting, looking down, and sitting for more than a few minutes. When he wakes up it takes effort to get out of bed by slowly pulling himself up with a chain by the bed. He uses a cane to walk the 7 steps to the washroom. He has a grab bar to help sit and stand at the toilet and sit on a chair in the shower. His mother helps get his clothes ready by laying them out on a chair. His mother or sister also do the laundry, cooking, cleaning, and help with grocery shopping. He stated that he would not be able to take care of himself without his mother's help.

Diagnoses

In the MR, the GP diagnosed the appellant with chronic back pain (moderate disc bulge L2/L3, L3/L4, L4/L5) with on the onset not described.

Health History

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

- Moderate to severe lower back pain radiating to left leg.
- Unable to walk long distances, especially uphill/downhill.
- Unable to sit long periods.
- Unable to bend or lift.
- He has not been prescribed medication or treatment that would interfere with his ability to perform his DLA.
- He uses a cane to walk 50% of the time.

Duration

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

- The impairment is likely to continue for two or more years.
- "Unknown awaiting to see neurosurgeon for possible surgery".

Physical Impairment

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

- He can walk 1-2 blocks and climb 2-5 steps unaided, lift 5-15lbs, and stand for less than 1 hour.

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

- "Chronic back pain – disc bulge at multiple levels".

- Under 'mobility and physical ability' the GP did not indicate whether the tasks of walking indoor/outdoor, climbing stairs, standing, lifting and carrying/holding are performed independently, periodic assistance is required or continuous assistance is required.
- With walking indoor/outdoor the GP indicated 'takes significantly longer' but did not indicate how much longer and commented "uses cane 50% of the time".
- With climbing stairs, the comment was "5-10 stairs".
- With standing, the comment was "1-1.5 hours".
- With lifting, the comment was "2-5kg".
- With carry/holding, the comment was "2-5kg".

In the SR, the appellant indicated the following:

- "Every step and movement I make has to be slow and pre calculated if I make a move fast my nerves feel like they are being pinched and I have to stop or lay down. My legs have become very weak, and it's become a pain".
- "The chronic pain does not allow me to sleep, sit, stand, bend, or pay attention as all day and night my nerves are being pinned between my bones and the pain and weakness the uncertainty has left me very weak".
- The only time he has relief is when he is on his back or sides. He can only stay in those positions for 10-20 minutes then he has to shift positions because the pain becomes unbearable.

Mental Impairment

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

- There is no diagnosed mental impairment.
- There are no difficulties with communication.
- There are no significant deficits with cognitive and emotional function.

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

- Speaking, reading, writing, and hearing are good.
- There are no impacts with cognitive and emotional functioning.
- He independently performs all tasks under 'pay rent/bills and medications'.
- He independently performs all task under 'social functioning'.
- He has good functioning with immediate and extended social networks.

In the SR, the appellant indicated that it "feels as if depression is slowly taking over".

Daily Living Activities

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

- No medications that interfere with the ability to perform DLA have been prescribed.

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

- All listed tasks are performed independently under 'pay rent/bills, medications, and social functioning'.
- All listed task under 'personal care' are performed independently except 'dressing' which requires periodic assistance and a comment next to 'toileting' which stated, "sometimes gets spasm then asks for help".
- Periodic assistance is required for basic housekeeping and laundry but there is no indication of the type, how often and duration of the help needed.
- All tasks under 'shopping' are performed independently except 'going to/from stores and carry purchases home' and commented "accompanying family member".

- Under 'meals' the task of 'meal planning and safe storage food' are performed independently and it takes significantly longer for 'food preparation and cooking'. There was no comment as to how much longer.
- All tasks under 'transportation' are performed independently except 'getting in/out of a vehicle' which takes significantly longer. There was no comment as to how much longer.

In the SR, the appellant stated:

- Using the washroom has become one of his biggest challenges recently. Getting to a sitting position on the toilet is painful as is defecating and he screams in agony in doing so.
- Getting out of bed is challenging and can take several minutes to find the 'sweet spot' where he can get up pain-free.
- Trying to do laundry, cook, clean has become a second challenge as he is barely even able to keep himself standing, bending to clean or using any kind of force to clean or lift an item.

Help

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

- Requires no prostheses are required
- the appellant uses a cane to walk 50% of the time.

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

- The appellant lives with 'family, friends or caregiver'.
- Help with DLA is provided by 'family'.
- Under the section assistance provided through the use of Assistive Devices, a cane was indicated. The GP made no mention of the aids needed to get out of bed, toileting or the chair in the shower as it was mentioned by the appellant.
- No is provided by Assistance Animals.

In the SR, the appellant stated that he requires help with his DLA from his mother and sister.

Evidence on Appeal

Notice of Appeal (NOA), signed and dated March 21, 2022. The appellant stated, "I think I am in the right on this as my capabilities to even just function on basic mobility and movement".

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

Evidence at Prior to the Hearing

Prior to the hearing the appellant submitted two documents that were accepted as evidence.

1. A 2-page submission from the appellant's acupuncturist which outlines the number of treatments he had in 2021 and 2022, provides a diagnosis, and a brief description of treatment and the impact to DLA.
2. A 2-page medical report from a neurosurgeon dated December 1, 2021, which outlines the appellant's history of presenting illness, social history, physical examination, investigations, and assessment and plan.

The panel finds that, since an acupuncturist is not a prescribed professional pursuant to the legislation, it places little weight on the information provided by the acupuncturist. The panel will provide an analysis of the information found in the medical report in the decision below.

Part F – Reasons for Panel Decision

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

Panel Decision**Severe Impairment**

In the reconsideration decision, the ministry was not satisfied that the information provided establishes a severe physical or mental impairment. Determining a severe physical or mental impairment requires weighing the evidence provided against the nature of the impairment and its reported functional skill limitations. A diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment. An "impairment" is a medical condition that results in restrictions to a person's ability to function independently or effectively. To assess the severity of an impairment, the ministry must consider the nature of the impairment and the extent of its impact on daily functioning.

The panel finds that employability is not a consideration for eligibility for PWD designation because employability is not a criterion in section 2(2) of the EAPWDA nor is it listed among the prescribed daily living activities in section 2 of the EAPWDR.

Physical Impairment

The appellant argued that, due to chronic back pain brought on by multiple bulging discs, he is in severe physical pain all day and movements and physical functioning are difficult -- limited and painful. Simple movements like bending, sitting, twisting, standing and lifting are difficult.

The ministry argued that based on the information provided in the PWD application, a severe impairment of the appellant's physical functioning has not been established.

In its reconsideration decision the ministry noted that the GP's narrative and that he indicated that the appellant can walk 1-2 blocks and climb 2-5 steps unaided, lift 2-7kg and remain seated for less than 1 hour. In the AR the GP indicated that the appellant uses a cane 50% of the time to walk indoors/outdoors, can climb 5-10 steps, stand for 1-1.5 hours, can lift, carry and hold 2-5 kg. No assistance is required with these activities. The ministry also noted the appellant's SR which stated difficulty with getting in/out of bed, twisting, bending, lifting, looking down, standing and sitting. The ministry noted that the information in the SR is different from the information provided by the GP who did not indicate that the appellant has a severe physical impairment to mobility and physical functioning. The ministry concluded that a severe physical impairment has not been established.

The panel finds the ministry's analysis of the evidence and its conclusion regarding the evidence as stated here was reasonable. The panel also considered the GP's narrative in which he stated that the appellant was unable to lift but then indicated that the appellant can lift 2kg-7kg. The GP indicated that the appellant is unable to walk long distances or sit for long periods. This is consistent with being able to walk 1-2 blocks and climb 2-5 steps unaided as indicated in the MR and AR.

The panel considered the medical report from the neurosurgeon and finds that the information contained in it lacks the necessary detail to meet the legislative requirements. That is, the panel found that the neurosurgeon does not explicitly indicate the severity of the impairment and does not provide enough information regarding the impacts to mobility and physical functioning or DLA. It was indicated that the appellant can walk but it causes pain, most movement aggravates the lower back pain and that his range of motion is quite limited. The panel finds that this information is consistent with the GP's assessment as presented in the MR and AR. The panel also notes that medical report was completed after the SR and PWD application, it was not based on a comprehensive in-person examination, there is a pain management plan in place and no update on its success has been provided, that the appellant is to avoid specific lumbar spine movements and no update on its success has been provided, the appellant has been instructed to do core strengthening exercise and no update on its success has been provided, the appellant is not a candidate for surgery, a follow-up with the neurosurgeon is not required and the pain is managed by over-the-counter medication. The panel finds that the information provided by the neurosurgeon does not provide information that allows for a clear determination of a severe physical impairment.

The panel also considered the SR provided by the appellant which includes extensive information about his physical pain and the impacts they have on his daily life. The panel empathizes with the appellant, however, it finds that, though this information is important to understand the full picture of the appellant's condition, it is not enough to satisfy the legislative requirements as it has not been supported by his prescribed professionals.

Given the overall assessments of the appellant's functional ability, and mobility and physical ability in the PWD application, the panel finds that the ministry was reasonable in its determination that the evidence does not support a finding that the appellant suffers from a severe physical impairment and that the legislative criteria outlined in Section 2(2) of the EAPWDA have not been met.

Mental Impairment

The appellant argued that he feels depression is slowly setting in and that his social relationships are impaired.

The ministry's position is that based on the assessments provided in the PWD application, a severe impairment of mental functioning has not been established.

In its reconsideration decision, the ministry noted that the GP did not confirm a diagnosis of a mental impairment, and reported no deficits to the appellant's cognitive and emotional functioning and no impacts to his daily cognitive and emotional functioning pursuant to the MR and AR. The ministry also noted that there are no difficulties with communication and the ability read, write, hear and speak are good. The ministry determined that there is insufficient evidence to conclude that the appellant presents with a severe mental impairment.

The panel finds that the ministry reasonably concluded that the information provided by GP regarding the appellant's mental functioning does not support a finding of a severe mental impairment. That is, the GP did not provide a diagnosis a mental impairment, there is no indication of deficits with cognitive and emotional functioning or communication. The medical report from the neurosurgeon provided no information regarding mental functioning. The panel also notes that all DLA that are typically difficult for those with a mental impairment are performed independently by the appellant. The appellant is able to make decisions about personal activities, care or finances; and can relate to, communicate or interact with others effectively as indicated in the AR.

The panel also considered the SR provided by the appellant which includes some information about his depression and social ability. The panel empathizes with the appellant, however, it finds that, though this information is important to understand the full picture of the appellant's condition, it alone cannot satisfy the legislative requirements as it has not been supported by a prescribed professional.

Given the overall assessments of the appellant's mental, cognitive, and emotional ability and functioning in the PWD application and the lack of any additional information provided at appeal from a prescribed professional, the panel finds that the ministry was reasonable in its determination that the evidence does not support a finding that the appellant suffers from a severe mental impairment and that the legislative criteria outlined in Section 2(2) of the EAPWDA have not been met.

Restrictions in the ability to perform DLA

Section 2(2)(b)(i) of the EAPWDA requires that the minister be satisfied that in the opinion of a prescribed professional, a severe mental or physical impairment directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods. While other evidence may be considered for clarification or support, the ministry's determination as to whether or not it is satisfied that the legislative criteria are met, is dependent upon the evidence from prescribed professionals. The term "directly" means that there must be a causal link between the severe impairment and the restriction. The direct restriction must also be significant. Finally, there is a component related to time or duration – the direct and significant restriction may be either continuous or periodic. If periodic, it must be for extended periods. Any analysis of periodicity must also include 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 argued that due to the inability to sit, stand, lift, twist, look down or bend and the fact that he has chronic physical pain he is unable to perform his DLA independently.

The ministry argued that it is not satisfied that the information provided establishes that the impairment directly and significantly restrict DLA continuously or periodically for extended periods.

The ministry noted that the GP indicated that the appellant is not prescribed medications and/or treatments that interfere with his ability to manage DLA. The ministry noted that the GP indicated that the appellant is independent with most of the listed DLA. Of the DLA tasks that require periodic assistance or continuous assistance, the ministry noted that the GP did not explain the type or amount of assistance that is required. The ministry also noted that for those tasks that take significantly longer to complete, the GP did not indicate how much longer it takes to complete them. The ministry noted that, without such information, it is difficult to make a determination if a significant restriction to DLA exists either continuously or periodic for extended periods.

The panel finds the ministry's analysis of the evidence and its conclusion regarding the evidence as stated here was reasonable. The panel finds that being independent with the majority of listed DLA and lacking information regarding frequency and duration of the periodic assistance that is required does not

satisfy the legislative requirements as the GP did not demonstrate that periodic assistance is required for extended periods. Similarly, the panel finds that without information regarding how much longer specific tasks take to complete it would be difficult to determine if DLA are directly and significantly restricted by a severe impairment. As stated previously, the medical report from the neurosurgeon provided no assessment of the appellant's ability to perform his DLA.

The panel also considered the SRs provided by the appellant which includes extensive information about his physical mobilities, functional abilities, and how his medical conditions impact his DLA. The panel empathizes with the appellant, however, it finds that, though this information is important to understand the full picture of the appellant's condition, it is not enough satisfy the legislative requirements as it has not been confirmed by a prescribed professional.

The panel considered the assessment by the GP in the PWD application of independence with almost all of the DLA, the lack of sufficient information indicating whether there is a restriction to perform some DLA either continuously or periodically for extended periods, and that insufficient additional or supporting information was provided from a prescribed professional at appeal to support the appellant's position. The panel finds that the evidence provided by the GP does not describe or indicate that a severe impairment restricts the appellant's ability to perform his DLA either continuously or periodically for extended periods. Given the evidence as a whole, the panel finds that the ministry reasonably concluded that the evidence does not establish that an impairment significantly restricts DLA continuously or periodically for extended periods, pursuant to Section 2(2)(b)(i) of the EAPWDA.

Help to perform DLA

Section 2(2)(b)(ii) of the EAPWDA requires that, *as a result of direct and significant restrictions in the ability to perform DLA*, a person requires help to perform those activities. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform DLA.

The appellant indicated that he receives help from his mother and sister to perform his DLA.

The ministry acknowledged that the appellant uses a cane and stated that he receives help from his mother. However, it argued that because it has not been established that DLA are significantly restricted, it cannot be determined that help is required.

The panel notes that, AR, the GP indicated that assistance is required from the appellant's family. However, it was not indicated what assistance is provided, how often or for how long. The panel finds that without such information it is difficult to determine if the criteria of help has been met. The panel also notes that the GP was very specific that a cane is only used 50% of the time which does not translate to needed significant assistance from this assistive device. The panel also notes that the appellant stated that his mother and sister do all of his cooking, cleaning, laundry and shopping. However, the information was not supported by the evidence.

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

Conclusion

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

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.

2022-0054

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

Neena Keram

Signature of Chair

Date (Year/Month/Day)

2022/04/21

Print Name

Sameer Kajani

Signature of Member

Date (Year/Month/Day)

2022/04/27

Print Name

Carla Tibbo

Signature of Member

Date (Year/Month/Day)

2022/04/21