

Part C – Decision Under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Poverty Reduction (“ministry”) dated May 24, 2022, in which the ministry denied the appellant designation as a person with disabilities (“PWD”) under the Employment and Assistance for Persons with Disabilities Act (“EAPWDA”). The ministry found that the appellant met the requirements for age (over 18) and duration (impairment to continue for at least 2 years) but was not satisfied that:

1. the appellant had a severe mental or physical impairment;
2. the appellant’s impairment significantly restricted her ability to perform daily living activities; and
3. the appellant required significant help or supervision of another person to perform daily living activities restricted by her impairment.

The ministry also found that the appellant is not in one of the prescribed classes of people who may be eligible for PWD designation on the alternative grounds set out in 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

EAPWDA, section 2
EAPWDR, section 2(1)

Full text of the legislation is provided in the Schedule of Legislation after the reasons.

Part E – Summary of FactsEvidence Before the Ministry at Reconsideration:

The appellant applied for PWD designation on February 15, 2022.

The appellant is over 18 years of age. In support of her application, she submitted: a medical report dated December 2, 2021, completed by her general practitioner; an assessor report dated January 20, 2022, completed by a social worker; and the appellant's self-report.

Medical Report:

The doctor states that the appellant has been their patient for approximately 6 months, and they have seen the appellant between 2 and 10 times.

The doctor gives the diagnosis of Stargardt Disease (macular atrophy), a congenital condition, onset 1988. The doctor says that the appellant's "vision is 20/200 with best correction," and she is "severely visually impaired and has difficulty performing most tasks which require visual acuity." [*emphasis in original*]

The doctor states that the appellant needs corrective lenses, a magnifier, and possibly a cane. Visual impairment is permanent, with no known remedial treatment and, if anything, is likely to worsen.

Under "Functional Skills", the doctor states that the appellant:

- can walk unaided 4+ blocks, but notes, "The act of ambulation is preserved but navigating and avoiding hazards is limited" [*emphasis in original*];
- can climb 5+ steps unaided;
- has no limitations in lifting or remaining seated;
- has difficulty with communication because impaired vision limits reading;
- has significant deficits with cognitive and emotional functioning, in particular emotional disturbance (e.g., depression, anxiety) and motivation (loss of initiative or interest).

Under "Daily Living Activities" ("DLA"), the doctor states that the appellant's impairment directly restricts her ability to perform DLA. The doctor indicates that the appellant is continuously restricted in daily shopping. They state that the appellant is periodically restricted in the following DLA:

- meal preparation;
- management of medications;
- basic housework;
- mobility outside the home;
- use of transportation.

In explaining the periodic restriction, the doctor states, "Vision limited: some meal preparation/medication management/housework/mobility/transport limitations. Needs assistance

at times.” The doctor goes on to comment, “[DLA] are affected every day to varying degrees based on the task at hand.” They stated that the appellant cannot drive and relies on public or other private transport.

In the section of the form that asks what assistance the appellant needs with DLA, the doctor states, “Help shopping: seeing and choosing what is desired; cannot drive, relies on public or other private transport; needs help with cleaning tasks requiring precision or focal acuity.”

Assessor Report

The social worker states that the appellant lives with her 3 children. Describing the appellant’s impairments, they state that the appellant has assistive technology and devices to assist with schoolwork. They report that the appellant burns herself cooking, cannot drive, but “can move around her own home okay.”

They indicate that the appellant’s ability to speak and hear is good, and her ability to read and write is satisfactory, though the appellant requires a magnifying glass to read, and writes in a large script. The social worker adds the comment that the appellant does not read at all unless she must, and then uses a magnifying glass.

Under “Mobility and Physical Ability”, the social worker indicates that the appellant is independent walking indoors, climbing stairs, standing, lifting, carrying & holding, and notes that the appellant is “nearly independent moving about in her home environment”, although she needs help from her children to locate items. They indicate that the appellant needs periodic assistance from another person when walking outdoors, because the appellant often trips.

Under “Daily Living Activities”, the social worker indicates that the appellant is independent in all aspects of personal care and basic housekeeping, though with laundry, they note that the appellant is independent because she can differentiate between colours. They indicate that the appellant is independent getting to and from stores (walking in her community or getting a ride from friends) and carrying purchases home but needs periodic assistance from another person to read prices and labels, make appropriate choices and pay for purchases. In explanation, they state that the appellant’s children or a friend help her to identify items and find prices, and she uses a debit or credit card to make purchases. The appellant has bought wrong items by mistake, and often needs help from whomever is shopping with her, to know items and prices. They also report that the appellant often trips when she is outside.

The appellant is stated to be independent in meal planning and preparation, but she often suffers burns, cuts, and spills when cooking. She uses assistive technology for paying rent and bills, can call the pharmacy to manage her medications, and can get in and out of a vehicle independently. The social worker notes that there is no public transport in the appellant’s community.

For assistive devices, the social worker indicates that the appellant uses a magnifier to read and write and has enlarged text on her phone. The appellant enlarges the screen on her computer and uses a projection device in the classroom. She has indicated that there are many devices in the CNIB catalogue that would be helpful.

Self Report

The appellant states:

- she needed to use a magnifier to complete the application;
- she has difficulty seeing stairs, curbs, and cracks in the sidewalk, and falls often;
- she cannot drive;
- it is hard to shop alone so she relies heavily on her children;
- she often cuts and burns herself in the kitchen;
- she cannot work because of her eyesight;
- she struggles with menus so only orders what she knows;
- cleaning is difficult because she cannot see small debris, crumbs, and spills.

Additional Evidence:*StudentAid BC form:*

The appellant provided a StudentAid BC form that includes a section “Verification of Permanent Disability” completed by an optometrist. The optometrist indicates “Best vision 20/200 R&L, bilateral macular atrophy/Stargardt Disease”, onset 1987, prognosis “stable”. The appellant had been in the care of the optometrist since 2016. The optometrist also specifies:

- a visual acuity of 6/21 (20/70) or less in the better eye after correction;
- an uncorrectable vision problem or reduced visual stamina such that the applicant functions throughout the day as if his/her visual acuity is limited to 6/21 or less.

Under “Disability Impacts on Daily Functioning (as it relates to educational setting)” the optometrist indicates physical impacts on keyboarding and handwriting, and states that the appellant is “past visually impaired requires full educational support.”

The form is also signed by a disability coordinator at a post-secondary institution, indicating that the appellant is classified as permanently disabled and requires large print material, a reader, a computer/laptop, and a digital recorder.

Evidence at the Hearing:

At the hearing, the appellant stated:

- she is classified as permanently disabled and attends school with the assistive devices listed in the StudentAid BC form;
- she is registered with the Canadian Institute for the Blind (“CNIB”) and will get a “low vision” cane within the next month;
- she is not completely blind, but her vision is 20/200 which is beyond the definition of legally blind;
- her vision cannot be corrected with glasses;
- she frequently burns herself when trying to cook;
- she has no depth perception.

In answer to questions from the panel, the appellant stated:

- She can walk in her small home community because the roads are straight, and she knows the terrain and landmarks. However, if she was in another community, she would get lost because she cannot read street signs; she would also be likely to trip and fall because she would not be able to see if there was a dip in the sidewalk.
- When she is outside someone walks with her, usually one of her children.
- She does not consider that she has a mental impairment.
- Her 2 older children do the cooking so that she does not burn herself.
- She often falls on the stairs – not always falling down, but often falling up the stairs because she has no depth perception.
- She has given herself a black eye with the broom handle because she cannot see where it is when she is using it.
- Where the doctor has said that she needs help periodically, that is because she does the activity periodically, not because she can sometimes manage to do the activity without help.
- She pays a friend a monthly amount for to drive her if she needs to go anywhere that is beyond safe walking distance from her home.
- She always has someone with her to help when she is shopping, usually one or more of her children, who can read prices and ingredients; when the appellant looks at a shelf of items in the store, she can only see colours.

Admissibility of Additional Evidence:

The ministry did not object to the additional evidence in the appellant's written submission or her oral evidence at the hearing.

The StudentAid BC form gives additional medical evidence about the appellant's visual impairment and the assistive devices she uses. The appellant's oral evidence at the hearing provides additional information about her ability to see, and the help she receives with DLA. The panel finds that the additional evidence is reasonably necessary for the full and fair disclosure of all matters relating to the decision under appeal, and therefore it is admissible under Section 22(4) of the Employment and Assistance Act.

Part F – Reasons for Panel Decision

The issue on appeal is whether the ministry's reconsideration decision, in which the ministry found the appellant to be ineligible for PWD designation under the EAPWDA, was reasonably supported by the evidence or was a reasonable application of the legislation in the appellant's circumstances. The ministry found that the appellant met the requirements for age (over 18) and duration (impairment to continue at least 2 years) but was not satisfied that:

- the appellant has a severe mental or physical disability;
- the appellant's impairment, in the opinion of a prescribed professional, directly and significantly restricts her ability to perform daily living activities 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 daily living activities.

Appellant's Position:

The appellant maintains that she meets the legislated requirements for PWD designation. She says that her visual impairment is severe, and directly and significantly restricts her DLA. She injures herself often because she cannot see when cooking and cleaning, and she trips when she is walking outdoors, or indoors on staircases. She needs the assistance of another person when she is walking outside, or in an environment with which she is not familiar. She cannot shop without the help of another person, and she rarely uses the stove because of the risk of burning herself. She uses assistive devices at school and will have a "low vision" cane in about a month.

The appellant confirmed that she is not asking for PWD designation based on severe mental impairment.

Ministry Position:

The ministry relied on its reconsideration decision at the hearing. The ministry maintains that the appellant does not have a severe physical impairment because the doctor indicates that the appellant has no limitations in walking, climbing stairs, standing, lifting, carrying, and holding, and the social worker indicates that appellant is independent in those areas of functioning. The ministry says that the difficulties noted in navigating outside the home, and a need for periodic assistance to do so, do not indicate a severe impairment of physical functioning.

Regarding DLA, the ministry says that, while the doctor indicates some limitations in meal preparation, medication management, housekeeping, mobility, and transportation, they do not confirm that the appellant is restricted significantly, either continuously or periodically for extended periods of time. The ministry points out that the assessor report states that the appellant is independent with personal care, housekeeping, cleaning, medication and getting in and out of vehicles. While the appellant needs periodic assistance for some aspects of shopping, the ministry argues that it is not clear that this assistance confirms a significant

restriction periodically for extended periods. Further, the ministry maintains that the use of adaptive technology does not confirm a significant restriction. While the appellant may cut and burn herself while cooking, or may trip and have accidents, the ministry says those incidents “are not reported to impact [the appellant’s] ability to complete [her DLA]”.

As the ministry has not determined that DLA are significantly restricted, it takes the position that it cannot determine that the appellant needs an assistive device or significant help from another person.

Panel Decision:

To find a person eligible for PWD designation under the EAPWDA, the ministry must be satisfied of all the requirements in section 2. In this case, the ministry was not satisfied:

1. that the appellant has a severe mental or physical impairment;
2. that, in the opinion of a prescribed professional, the impairment directly and significantly restricts the appellant’s ability to perform daily living activities; and,
3. as a result of those restrictions, the appellant requires help to perform those activities.

Severe mental or physical impairment:

The panel notes that the term “severe mental or physical impairment” is not defined in the legislation, and that “the Tribunal should interpret the [EAPWDA] with a benevolent purpose in mind” (*Hudson v. British Columbia (Employment and Assistance Appeal Tribunal)*, 2009 BCSC 1461, “Hudson”). The ministry relied on a definition of “impairment” that the ministry has incorporated into its PWD application form: “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.” At the hearing, the ministry representative stated, incorrectly, that this definition is found in the legislation. While the panel may consider the ministry’s definition, it is not binding on the panel, which is governed by the legislation.

The appellant is legally blind, with vision assessed at 20/200, due to Stargardt disease, or macular atrophy. The ministry does not take issue with the degree of visual impairment but maintains that it assesses function based on physical ability, for example, to walk, climb stairs, lift, and carry.

The doctor clearly stated that the appellant has the physical ability to “ambulate,” that is, to put one foot in front of another, but her ability to walk is limited by her inability to see where she is going. To the extent that the ministry maintains that its definition of “impairment” would mean that being blind is not a severe impairment if the person is physically able to walk (even if they cannot see to avoid hazards), the panel finds that the ministry’s definition is not reasonable. To put the panels’ finding another way: the ability to see is part of physical function; if a person is legally blind, their physical function, namely their eyesight, is impaired. The ministry may not have included eyesight in its list of physical functions, but it is not reasonable for the ministry to exclude the ability to see, from the physical functions it considers when determining impairment.

By any reasonable definition, being unable to see is an impairment, and being legally blind is a severe physical impairment.

The panel finds that the ministry was not reasonable in its determination that the appellant does not have a severe physical impairment.

Severe Mental Impairment:

Although the doctor indicated that the appellant has deficits in 2 aspects of cognitive and emotional function, the appellant confirmed at the hearing that she is not asking for PWD designation based on severe mental impairment. There is no other evidence of mental impairment, beyond the doctor's bare statement of deficits in emotional disturbance and motivation. The panel finds that the ministry's determination that the appellant does not have a severe mental impairment is reasonably supported by the evidence.

Restrictions to DLA:

Under EAPDWA section 2(2), if it is established that a person has a severe mental or physical impairment, the ministry may designate them as a PWD if, in the opinion of a prescribed professional, that severe impairment directly and significantly restricts the person's ability to perform at least 2 DLA either continuously, or periodically for extended periods (*Hudson*).

Under EAPWDR section 2(1)(b), for a person who has a severe physical impairment, "daily living activities" means:

- prepare own meals;
- manage personal finances;
- shop for personal needs;
- use public or personal transportation facilities;
- perform housework to maintain the person's place of residence in acceptable sanitary condition;
- move about indoors and outdoors;
- perform personal hygiene and self-care;
- manage personal medication.

Education and employment are not included in the list of DLA.

The doctor indicates that the appellant is periodically or continually restricted in all but 3 of the 10 DLA listed in the medical report, which do not match exactly the DLA in section 2 of the EAPWDR. However, the panel finds that the doctor has confirmed that the appellant is restricted in activities that correspond with the following DLA set out in the EAPWDR, whenever focal visual acuity is needed:

- preparing own meals;
- shopping for personal needs;
- using public or personal transportation facilities;

- performing housework to maintain the person's place of residence in acceptable sanitary condition;
- moving about indoors and outdoors (the doctor identifies restrictions moving about outdoors, but not indoors);
- managing personal medication.

The doctor confirms that DLA are restricted "every day to varying degrees based on the task at hand."

The social worker identifies restrictions in categories that correspond with these DLA set out in the EAPWDR:

- preparing own meals;
- shopping for personal needs;
- moving about indoors and outdoors;
- managing personal finances.

They note that the appellant:

- often trips when she walks outdoors;
- cuts and burns herself when cooking;
- has difficulty locating items in her home;
- needs help from another person when shopping, to read prices and labels, choose appropriate items and pay for her purchases;
- cannot read without the use of a magnifier;
- must use phone assistive technology to pay rent and bills.

The appellant has provided more detail of her daily restrictions:

- she cannot distinguish items on shelves or see prices when shopping;
- she cannot see to navigate safely when walking outside her home, especially in an unfamiliar environment, or if she comes across an unexpected hazard like a curb or stairs, a tree root, a crack in the sidewalk or a dip in terrain;
- she often cuts and burns herself when cooking;
- she has hit herself in the eye when trying to use a broom;
- she cannot see to clean spills, crumbs, and small debris;
- she falls up and down stairs because she lacks depth perception;
- she cannot drive and pays a monthly amount to a friend to take her where she needs to go, if she must be somewhere that is not within walking distance in her home community.

The panel finds that the ministry failed to give sufficient weight to the impact of the appellant's visual impairment on her DLA. The ministry states that the doctor "does not confirm that [the appellant] is restricted...periodically for extended periods of time". The doctor checked the box on the medical report form that indicated restrictions on DLA are "periodic" rather than "continuous". However, the appellant's impaired vision is continuous and permanent, and the panel finds that the doctor has confirmed that the appellant's ability to perform DLA is restricted continuously, whenever the appellant is engaged in a DLA that requires visual acuity. For example, she may not need assistance with mobility outside the home if she is in a familiar area where she knows the terrain, but she would need continuous assistance to move about in an unfamiliar environment. The panel finds that the doctor has not indicated restrictions in DLA that

are periodic in the sense that the restriction comes and goes – the restriction is only “periodic” in the sense that the appellant is not continuously engaged in the DLA that is restricted.

The ministry goes on to state that the fact that the appellant trips when she walks, and cuts and burns herself when she cooks “is not reported to impact [her] ability to complete [her DLA]”. Under section 2(2) of the EAPWDR, the criterion is whether the appellant can perform the DLA without restrictions – not whether she can complete the DLA by continuing to walk after she trips and falls or make the meal after she cuts and burns herself.

The ministry lists the appellant’s challenges with shopping – that she needs to have another person with her to read prices and labels, choose which items to buy and pay for purchases – and then says that “it is not clear” that these restrictions are “a significant overall restriction in [the appellant’s] ability to shop”. The panel finds that reading prices and labels, choosing what to buy and paying for it is a fairly complete description of what is involved in shopping, and the appellant cannot do any of those tasks herself, without assistance. The panel cannot imagine what other restrictions might be required for a determination that there is “a significant overall restriction” in the appellant’s ability to shop.

With respect to the ability to use public or private transportation facilities, the panel notes that the appellant pays a friend a monthly amount to provide transportation, not for convenience, or because she does not have her own vehicle, but because she cannot drive due to visual impairment. Therefore, panel finds that the appellant’s ability to use private transportation facilities is directly and significantly affected by her impairment.

The panel finds that the ministry was not reasonable in its assessment of the restrictions in the appellant’s ability to perform DLA. The appellant’s ability to prepare her own meals, manage personal finances, shop for personal needs, use transportation, perform housework, and move about indoors and outdoors is directly, significantly, and continuously restricted by her impaired vision. Therefore, the panel finds that the evidence establishes that the appellant’s ability to perform 2 or more DLA is directly, significantly, and continuously restricted by a severe physical impairment.

Help with DLA:

Under EAPDWA section 2(2), if a person has direct and significant restrictions to DLA, the ministry must then determine whether, because of those restrictions, a person requires help to perform those activities. In its reconsideration decision, the ministry stated that it could not be determined that the appellant needed significant help to perform DLA because it had not been established that the appellant’s DLA were significantly restricted.

The panel has found that the appellant’s DLA are significantly restricted by a severe physical impairment, and therefore goes on to consider whether, in the opinion of the prescribed professionals (the doctor and the social worker), the appellant requires help to perform those activities as a result.

Under EAPWDR section 2(3)(b), a person needs help to perform DLA if they require an assistive device, the significant help of another person, or an assistance animal.

The appellant and the social worker confirmed that the appellant requires the following help to perform DLA that are directly and significantly restricted by her impairment:

- she always needs another person to go shopping with her, to read prices and labels, see the final amount at the cash desk and help her pay for purchases;
- she needs a magnifier to read anything;
- her children do most of the cooking, because of the risk of cutting or burning herself;
- she needs a “low vision” cane to assist when walking outdoors, and she is in the process of getting this assistive device;
- she needs phone assistive technology to do her banking and pay bills.

Having found that the appellant is directly and significantly restricted in her ability to perform DLA, the panel also finds that the appellant requires help to perform those activities. She requires assistive devices, in the form of a “low vision” cane, a magnifier and phone assistive technology; she requires the significant help of another person to go shopping with her, provide transportation, accompany her when walking in an unfamiliar environment and cook meals.

Conclusion:

The panel finds that the ministry’s reconsideration decision was not reasonably supported by the evidence. The panel rescinds the ministry’s decision. The appellant is successful in the appeal.

Schedule of Legislation

Employment and Assistance for Persons with Disabilities Act

Persons with disabilities

Section 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).

Employment and Assistance for Persons with Disabilities Regulation

Definitions for Act

Section 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.

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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
Susan Ferguson

Signature of Chair

Date (Year/Month/Day)
2022/09/23

Print Name
Bob Fenske

Signature of Member

Date (Year/Month/Day)
2022/09/23

Print Name
Wesley Nelson

Signature of Member

Date (Year/Month/Day)
2022-09-23