

Part C – Decision Under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Poverty Reduction (“ministry”) dated October 18, 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 at the end of the decision.

Part E – Summary of Facts

The appellant attended the videoconference hearing with an advocate.

Evidence Before the Ministry at Reconsideration:

The appellant applied for PWD designation on July 25, 2022.

The appellant is over 18 years of age. In support of her application, she submitted a medical report and an assessor report dated July 18, 2022, completed by her family doctor, and the appellant's self-report.

Medical Report:

The doctor states that the appellant has been their patient since 2016, and they have seen the appellant 11 or more times in the past 12 months.

The doctor gives the diagnoses of visually impaired (onset May 2021), mood disorder (onset ~2000) and degenerative disc disease (onset "years"). The doctor says that the appellant was diagnosed over one year ago with "fast progressing Macular Degeneration" that limits her mobility indoors and outdoors. The appellant "is often tripping over due to her poor vision, needs help with labels/prices/information reading." The appellant suffers from longstanding depression and anxiety, aggravated by the more recent deterioration of her vision. The appellant's lower back pain is also aggravated by falls and accidents due to vision loss.

The doctor states that the appellant needs "correction glasses" and a probe cane for their impairments. The doctor does not indicate if the impairment is likely to continue for 2 years or more but does indicate that visual impairment is progressively deteriorating.

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

- walk unaided 1 to 2 blocks;
- climb 2 to 5 steps unaided;
- lift 7 to 16 kg.;
- remain seated 1 to 2 hours.

The doctor notes difficulty with communication, with the comment that "visual impairment limits her ability to read." They indicate significant deficits in cognitive and emotional functioning in the areas of language (underlining written comprehension or expression), perceptual psychomotor (visual spatial) and emotional disturbance (e.g., depression, anxiety).

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

- basic housework;

- daily shopping;
- mobility inside the home;
- mobility outside the home;
- use of transportation.

The doctor indicates that the appellant is periodically restricted in social functioning. In explaining the impact on social functioning, the doctor states that depression and anxiety due to progressive vision loss cause the appellant to withdraw from social interaction, make her less likely to engage with people she does not know, and have limited trust in strangers.

The doctor did not provide any information in the section of the form that asks what assistance the appellant needs with DLA.

Assessor Report:

The doctor states that the appellant lives with family. Describing the appellant's mental or physical impairments, they state that the appellant has deteriorating vision, "MSK [musculoskeletal] pain – aggravated by tripping/fall accidents", depression and anxiety.

They indicate that the appellant's ability to read and write is poor, noting that she needs a magnifying glass, or other people, to read, and her ability to write is decreased because of reduced vision.

Under "Mobility and Physical Ability", the doctor indicates that the appellant needs periodic assistance from another person to walk indoors and outdoors, and to climb stairs, because of decreased "perception of space" and tripping. They note that the appellant is independent for standing, lifting, carrying, and holding.

Under "Cognitive and Emotional Functioning", the doctor indicates that the mental impairment has a major impact on emotion. The doctor notes moderate impact on motivation, motor activity and "other neuropsychological problems." The doctor notes minimal impact on attention/concentration, executive function, and memory.

Under "DLA", the doctor indicates that the appellant is independent in all aspects of personal care and basic housekeeping. Under the heading "shopping" the doctor indicates that the appellant needs periodic assistance from another person to go to and from the store, and either uses a magnifying glass to read prices and labels or needs another person to read them for her. The doctor indicates the appellant is independent with respect to meals except that she needs a magnifying glass and would only use equipment with which she was familiar. The appellant is stated to be independent to pay rent and bills, deal with medication, and use transportation, except that she would need to use a magnifying glass. The doctor states in the comments at the end of the report that the appellant could not drive due to visual impairment.

Under "Social Functioning", the doctor states that the appellant is independent in the areas listed, except for interacting appropriately with others. The doctor explains that, with her reduced vision, the appellant relies more on familiar social connections and is less engaging in social

connections generally. While the appellant has good functioning with her immediate social network, the doctor indicates marginal functioning with her extended social networks.

Self-Report

The appellant describes her disability as follows:

- she has an eye disease that has caused permanent retina damage;
- she cannot see directly in front of her because of a blind spot in one eye;
- her vision is not expected to improve;
- she has Major Depressive Disorder and has been treated for suicidality;
- she has severe anxiety which makes it hard for her to leave her home, and she avoids interacting with others;
- she has bulged discs, bone spurs, degenerative disc disease with sciatica and bursitis in her left hip.

When asked to describe how her disability affects her life and her ability to take care of herself, the appellant states:

- about half the time, she cannot get up and walk;
- she is at continuous risk of falling when climbing stairs, so she avoids stairs completely;
- lifting more than 10 pounds irritates her back and increases her pain;
- she can only sit at a desk or table for 10-15 minutes before her pain and stiffness increases;
- she needs others to read to her; if she must read herself, she gets headaches;
- her short term memory is very poor;
- her depth perception is “terrible” and makes it dangerous for her to climb stairs;
- she suffers from vertigo;
- she struggles with fatigue and cannot sleep soundly because of pain, depression, and anxiety;
- she does not “have enough energy to commit to any purpose” and is not interested in activities she once enjoyed;
- she cannot control her worry, and ruminates after events have passed;
- her focus and attention are impaired by worry;
- she struggles with transferring in and out of bed and uses a chair, rather than an assistive device, to manage transfers, which she says puts her at risk of injury;
- she needs a handrail in the shower;
- she lacks motivation to make meals, so she either relies on instant and prepackaged food, or she does not eat;
- a friend picks up her prescriptions for her, because the appellant cannot drive to the pharmacy, and “I would struggle with going in once there”;
- she does not have the motivation to do housework, and it leaves her exhausted and sore;
- she cannot shop for herself because of depression and anxiety, and relies on family members to shop for her;
- her mobility is continuously restricted;

- she cannot drive a vehicle, and she cannot use public transportation because of her depression and anxiety;
- she needs help from others to be reminded of appointments;
- her ability to initiate communication with others is affected by depression and anxiety, so she often fails to get help;
- she avoids community interactions, and as a result she regularly goes without necessary items like food;
- she needs more help than she is receiving.

Additional Evidence - Appellant:

Letter from Family Doctor, dated October 17, 2022:

The family doctor provided a further letter that repeated information from the medical and assessor reports, and included the following additional information:

- the appellant uses objects in her environment instead of formal assistive devices because she does not yet have access to or training necessary to use the assistive device she needs, i.e., a probe cane;
- the appellant needs more assistance than she is receiving to be able to complete DLA “consistently and in a timely fashion”;
- if the appellant “pushes her limitations” in reading and writing, “she triggers migraines that further restrict her capacity”;
- the doctor agrees with the appellant’s statement that anxiety and depression severely impair her functioning;
- the appellant’s ability to shop is continuously restricted and family members “complete shopping tasks on her behalf”;
- the appellant’s mobility is restricted by chronic back pain and diabetic neuropathy, as well as her visual impairment;
- the appellant cannot walk because of pain “about half the time”;
- at best, the appellant can walk a little more than a block, though she is at continuous risk of falling;
- the appellant lives in a rural area with limited public transport; because she cannot drive due to visual impairment, she depends on family and friends to drive her to medical appointments;
- the description of the appellant’s social functioning with extended social networks as “marginal” does not reflect her actual level of avoidance due to anxiety, depression, and vision loss;
 - the appellant relies on others to do her shopping in part to avoid the necessary social interactions;
 - she needs assistance with social interactions periodically, but she continuously struggles to engage socially because of the cumulative effect of her disabilities.

Letter from Optometrist, dated November 1, 2022:

The appellant's optometrist confirms that the appellant has "a chronic eye condition causing foveal atrophy secondary to choroidal neovascularization" which "significantly reduces her best corrected visual acuity. On September 26, 2022, the appellant's "best corrected visual acuity was 20/100 in the right eye and 20/150 in the left eye".

Letter from Family Doctor, dated November 7, 2022:

The family doctor states that the appellant was diagnosed with macular degeneration and macular telangiectasia earlier this year. The condition continues to deteriorate, despite treatment, and is expected to last more than two years. The appellant's condition has worsened since the doctor completed the forms for the PWD application. The doctor reports "significant decline" in independent functioning and states that "the degree of support required with [DLA] has tremendously increased", although the doctor does not provide further details.

Fax cover sheet:

The appellant's written submission included a fax cover sheet showing a 7 page fax transmission from the advocacy organization to the ministry on October 17, 2022, the day before the deadline for submitting additional information to the ministry for the reconsideration. The fax transmission included the written submission from the advocate and the October 17, 2022 letter from the family doctor.

Evidence at the Hearing:

At the hearing, the appellant stated:

- every 6 months her eyes bleed and she needs injections in her eye;
- she has had 80% loss of vision, and could be blind in 5 years;
- she falls down the stairs every day because she cannot see;
- she cannot put a spoon in a pot to stir it because she cannot judge distance;
- her vision is worse since the letter from the optometrist was written: her right eye is now 20/120.

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

- when she shops, she cannot see other shopping carts in front of her, and cannot read price tags and labels;
- she must hold on to a cart to be able to walk around in the store;
- she relies on her adult child to shop with her and go through the checkout; if she cannot use the 'tap' function at the checkout, she needs them to enter the PIN to use a payment card;
- walking outside, she can see only 2 to 3 feet ahead of her, and so she must have someone always walking with her;

- she cannot cut food on her own, and has cut her fingers in the past, because she cannot see where the food ends and her hand begins;
- working with the CNIB, she has made adaptations in her home, putting bright tape on the edges of the walls so she does not walk into the corners, because she cannot see the edge of the wall, or judge how far away it is;
- sitting during the hearing has made her back hurt;
- when her back pain flares up, it affects her legs, and it hurts to walk; when that happens, she must lay flat on her back and wait for anti-inflammatory medication to take effect and spasms to pass. She is on bed rest three or four days a week because of the pain, especially if she does not have access to medication, which is expensive;
- her adult child does the laundry, because the appellant cannot lift the laundry basket or bend to put clothes into the dryer.

The advocate stated that she observed that the appellant needed her adult child's assistance to come to the hearing that day.

Additional Evidence – Ministry:

At the hearing, the ministry representative stated that the ministry did not receive the fax transmission of October 17, 2022, though they could not say why it was not received. The ministry did not have the October 17, 2022 letter of the family doctor until it received the copy from the Tribunal on November 3, 2022.

Admissibility of Additional Evidence:

Neither party objected to the additional evidence. The panel finds that the further reports from the family doctor and the optometrist, and the appellant's oral evidence at the hearing, give additional information about the appellant's mental and physical impairments and the effect of those impairments on her ability to perform DLA. The fax transmission report and the ministry's evidence about receipt of the transmission give additional facts about the information the ministry did or did not have when it made the reconsideration decision. Therefore, the panel finds that all 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 two 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 criteria for eligibility for PWD designation. She says that her impaired vision, degenerative disc disease and mood disorder are severe impairments. She argues that the medical and assessor reports, and the additional reports of the family doctor, establish that those impairments directly, significantly, and continuously restrict her ability to perform DLA. Further, she maintains that she requires assistive devices, in the form of a high-power lens and a probe cane, as well as continuous assistance from other people, to perform DLA involving walking, climbing stairs and written communication.

The advocate argues that the reconsideration decision is not reasonable because it does not consider the additional evidence that the advocate faxed to the ministry on October 17, 2022. The advocate points out that the fax transmission report confirms that the fax was received, and she is not aware of any other way to confirm that the ministry has received documents.

The advocate also maintains that the PWD application forms are confusing to anyone who has not been trained in how to complete the form, and the family doctor was confused about what was being asked. In the October 17, 2022 letter the family doctor has clarified the deterioration in the appellant's condition, and the optometrist has explained the severity of the appellant's impaired vision.

Ministry's Position:

At the hearing, the ministry conceded that, based on the additional reports from the doctors and the appellant's oral evidence at the hearing, the ministry is satisfied that the appellant meets all the criteria to be eligible for PWD designation.

Severe Physical Impairment:

The ministry maintains that the information about functional skill limitations in the original application indicated that the appellant had a moderate, rather than a severe impairment. However, the ministry notes that the additional reports of the optometrist and the family doctor show that there has been further significant decline in the appellant's vision since the appellant first applied for PWD designation. Further, the additional evidence establishes that the appellant always needs a probe cane or the assistance of others for mobility. Therefore, the ministry is satisfied that the appellant has a severe physical impairment.

In its reconsideration decision, the ministry acknowledged that the appellant experienced deficits in cognitive and emotional functioning but maintained that the information provided by the doctor showed "moderate to minimal" impact on daily functioning resulting from those deficits. Therefore, at the reconsideration, the ministry was not satisfied that the information provided established a severe mental impairment. In answer to a question from the panel, the ministry advised that, as the criteria in section 2(2) of the EAPWDR required only one of either severe physical or mental impairment for eligibility, and the ministry was satisfied that the appellant had a severe physical impairment, it was not necessary for the ministry to decide if, considering the additional evidence, the appellant had a severe mental impairment.

Restrictions in DLA:

The ministry says that, in the medical and assessor reports submitted with the original application, the family doctor did not provide sufficient information about the degree of restriction in DLA. However, in the additional evidence the doctor clarifies that the appellant needs a high-power lens to read and uses objects in her environment for stability because she does not yet have the probe cane she needs. The additional evidence also establishes that the appellant needs more assistance than she is receiving.

The ministry notes that the appellant is continuously restricted in the DLA of transportation and shopping, and she is at continuous risk of tripping and falling. Therefore, the ministry is satisfied that the appellant is directly, significantly, and continuously restricted in her ability to perform DLA.

Help with DLA:

At the reconsideration, the ministry was not satisfied that DLA were restricted, and therefore the ministry was not satisfied that the appellant needed significant help with DLA. However, the ministry is now satisfied that the appellant is directly and significantly restricted in her ability to perform DLA, and the ministry is also satisfied that the appellant needs significant help to perform DLA. Therefore, the ministry has now considered whether the appellant needs help of a significant nature, and the ministry is satisfied that the appellant does need that help.

Panel Decision:

The panel agrees with the position taken by the ministry at the hearing and finds that the appellant meets the criteria for eligibility for PWD designation under the EAPWDA.

The panel finds that:

1. the appellant has a severe physical impairment that, in the opinion of a medical practitioner is likely to continue for at least two years;
2. in the opinion of a prescribed professional, that impairment directly and significantly restricts the appellant's ability to perform daily living activities continuously or periodically for extended periods; and
3. as a result of those restrictions, the appellant requires help to perform those activities.

Severe mental or physical impairment:

1. *Physical impairment:* The appellant has visual impairment due to macular degeneration and macular telangiectasia, and her vision continues to deteriorate because of these progressive conditions. She also has degenerative disc disease. Due to her impaired vision and lack of depth perception, the appellant is at constant risk of tripping and falling and needs either a probe cane (which she does not have yet) or the assistance of other people to walk safely. Without those supports, the appellant uses the support of objects in her environment, with increased risk of injury. The doctor confirms that, because of musculoskeletal pain, the appellant is unable to walk "half the time." The appellant confirms that she is bedridden 3 or 4 days a week.

Considering the whole of the evidence, the panel finds that the ministry's decision that the appellant did not have a severe physical impairment is not reasonably supported by the evidence. The panel finds that the appellant does have a severe physical impairment.

2. *Mental impairment:* The appellant suffers from depression and anxiety, exacerbated by her physical disabilities. The family doctor notes impact to social functioning because of depression and anxiety, which the doctor describes as severe, resulting in avoidance of contact with people outside her immediate social network. The doctor states that the appellant "is reliant on others to do things like her daily shopping, in part to avoid the social interactions required."

The panel notes that the family doctor does not indicate that the appellant requires any treatment for depression or anxiety. Further, while the doctor states that they "agree with [the appellant's] characterization of this as severely impacting her functioning", the doctor does not give sufficient details of the impact of the mental health conditions on the appellant's functioning, to support their description of the impairment as severe.

The panel acknowledges that depression and anxiety are serious and significant medical conditions for the appellant, and that those conditions affect her daily life. The panel also notes that the appellant's mental health and physical impairment are interrelated. However, the panel finds that the ministry was reasonable in its determination that the evidence does not establish a severe mental impairment.

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 v. British Columbia (Employment and Assistance Appeal Tribunal)*, 2009 BCSC 1461).

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.

The family doctor has confirmed that the appellant has continuous restrictions in the DLA of shopping for personal needs, using public or personal transportation and moving about indoors and outdoors. Therefore, the panel finds that the evidence establishes that, in the opinion of a prescribed professional, the appellant's ability to perform two or more DLA is directly, significantly, and continuously restricted by a severe physical impairment.

Help with DLA:

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, either continuously or periodically for extended periods. The appellant requires assistive devices, in the form of a high-power lens for any activities requiring reading or writing, and a probe cane to move about indoors and outdoors. She also requires the significant assistance of others to go shopping with her, provide transportation, accompany her when walking, and help with reading and writing. The panel also notes that the appellant needs more help than she is receiving.

Evidence Before the Ministry at Reconsideration:

Given that the appellant is successful on the merits of the appeal, the panel finds it is not necessary to address the impact of the failure to receive and consider the additional evidence in the fax transmission of October 17, 2022.

Conclusion:

The panel finds that, considering the additional evidence, the ministry's reconsideration decision, which determined that the appellant was not eligible for PWD designation, is 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

(a) 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)
2022/11/25

Print Name
Charles Schellinck

Signature of Member

Date (Year/Month/Day)
2022/11/25

Print Name
Perihan Sucu

Signature of Member

Date (Year/Month/Day)
2022/11/25