

Part C – Decision Under Appeal

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the ministry) Reconsideration Decision dated August 15, 2022 which found that the appellant did not meet all of the 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 requirement and that she has an impairment that is likely to continue for at least two years. However, the ministry was not satisfied that the evidence established that:

- the appellant has a severe physical and/or mental impairment;
- the appellant's daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and
- as a result of 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 the time of Reconsideration**

1. The appellant's PWD application comprised of:
 - A Medical Report (MR) [dated May 30, 2022] and an Assessor Report (AR) [dated April 22, 2022], completed by the appellant's neurologist (the neurologist), who had known the appellant for more than 2 years and had seen the appellant 2-10 times in the past 12 months of the PWD application. The MR and AR were completed by an office interview with the appellant.
 - The PWD application also included the appellant's Self-Report (SR) dated February 14, 2022. The SR was left blank.
2. Request for Reconsideration (RFR) dated August 3, 2022. In the RFR, the appellant, in part, stated the following:
 - The SR was not completed because the appellant's challenges with writing, spelling and grammar.
 - She was on disability benefits when she lived in another province.
 - She was diagnosed with epilepsy at age 2 and later with Attention Deficit Disorder (ADD).
 - As a result of her medical conditions, she missed a lot of school and had trouble learning. By the 9th grade she left school.
 - Her seizures went from petit mal to grand mal seizures and her medication was not working at this time.
 - She is not a candidate for surgery.
 - She experiences aura, particularly during menstruation, panic attacks, anxiety or stress, and a lack of sleep.
 - She cannot get up in the morning because she feels she will have a seizure and does not feel well mentally.
 - Seizures are also triggered by over stimulation.
 - She has trouble standing and walking for long distances. She had compartmental syndrome for which she had surgery and half of her calf muscle was removed.

Diagnoses

In the MR, the neurologist diagnosed the appellant with seizure disorder (onset: 1985).

Health History

In the MR, the neurologist stated the following about the appellant:

- She has had different types of seizures since age 2.
- Her generalized Tonic Clonic seizures are reasonably well controlled.
- She also experiences partial seizures with loss of awareness that remains intractable. With medications there is a decrease in frequency but there has not been complete resolution.
- The seizures are unpredictable.
- Her height is 5'5" and weight is 180 lbs.
- She has not been prescribed medication that interfere with the ability to perform DLA.
- She does not require any prostheses or aids for her impairment.

Degree and Course of Impairment

In the MR, the GP indicated that the appellant's impairment is likely to continue for two or more years from the date of the application, with the comment: "Epilepsy is a lifelong disease. The seizures are intractable and will continue despite therapy".

Physical Impairment

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

- She can walk 4+ blocks and climb 5+ steps unaided, lift and remain seated without limitation.

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

- The appellant requires periodic assistance with walking indoors/outdoors, climbing stairs, standing, lifting and carrying/holding, with the comment: “all of the activities are compromised when she is having seizure”.

Mental Impairment

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

- There is no diagnosis of a mental impairment.
- There are no difficulties with communication.
- There are no significant deficits with cognitive and emotional function, with the comment: “all functions are [illegible] during the seizures”.

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

- Speaking, reading, writing and hearing are satisfactory.
- Under cognitive and emotional function, there are major impacts to the area of attention/concentration; moderate impacts to consciousness, executive and memory; all other listed areas have either minimal or no impacts.
- All listed areas of social functioning require periodic assistance and there is good functioning with immediate social networks and marginal functioning with extended social networks, with the comment: “may be compromised with seizures”.
- Comment: “Frequent, unpredictable spells of seizures negatively effect attention interfering with her [DLA]”.

Daily Living Activities

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

- No medications that interfere with the ability to perform DLA have been prescribed.
- There are periodic restrictions with all listed areas of DLA.
- Comments: “[illegible] All functions are impaired during seizures”.

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

- All tasks listed under all areas of DLA are indicated as requiring periodic assistance.
- Comments: “all may be affected with seizures”, “unpredictability of seizures and their intractability make the life of the patient difficult”, and “unpredictable, intractability have a negative effect on the patient’s cognitive functions, decreasing her efficiency with [illegible] activities.”

Help

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

- Requires no prostheses or aids for her impairment.

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

- Help with DLA is provided by family.
- The sections ‘assistance provided through the use of Assistive Devices’ and ‘assistance provided by assistance animals’ were left blank.
- Comment; “[the appellant] has a history of life -long epilepsy. She was able to cope with the [illegible] and other impact of the [illegible] for many years. However, with increasing stress of life and ongoing intractability of seizures, she is no longer able to support herself as previously”.

Evidence on Appeal

Notice of Appeal (NOA), signed and dated August 26, 2022. The NOA was left blank.

Evidence Prior to the Hearing

Prior to the hearing the appellant submitted the following information:

- November 23, 2022 letter from the neurologist. In the letter the neurologist confirms that the appellant has a longstanding history of intractable epilepsy. Due to the intractable and unpredictable nature of her seizures she is unable to sustain employment.
- November 14, 2022 letter from the appellant's nurse practitioner (NP) who provides primary care. In the letter, the NP confirms the appellant's diagnosis of grand mal seizures, anxiety, ADHD, chronic insomnia and compartment syndrome. The NP also indicated that due to her several medical conditions she is unable to work.
- 81-page package containing documents related to the appellant's application and approval of disability benefits in another province. The package included, in part, documents indicating that her disability benefits have been approved, re-application adjudication summary, letters seeking additional information from her medical practitioners, health status report/DLA index, lab reports, EEG results, and consultation reports from various doctors and specialists. These documents are dated from 1995 to 2006.

Evidence at the Hearing

At the hearing, the appellant, in part, stated the following:

- She now has a retinal problem for which she has follow-up appointments to determine how to treat it or manage it.
- The SR in the PWD application was optional so she did not complete it. When she applied for disability benefits in another province, she did not complete the SR and it made no difference to the outcome.
- She was unable to provide more information from her neurologist because the ministry set tight deadlines to have the information in.
- Epilepsy is unpredictable and sporadic so it is difficult to determine how often seizure will occur. However, they are consistent once per month during her menstruation.
- She can also experience seizures when stressed, anxious or has a lack of sleep.
- She can also experience seizures in her sleep and may need to take sleeping pills in an attempt to control this.
- When a seizure occurs, she is unable to function for the rest of the day and will sleep. This is followed by several days of migraines which leaves her unable to function.
- She does not leave the home unless she is accompanied by family or friends.
- When she cannot leave the home, she has goods delivered and does her banking online.
- Her medications are delivered or she picks them up when accompanied by her child.
- Her child is 17 years old and goes to school. The child helps her around the home with cleaning.
- She co-habits with her ex-spouse who helps with co-parenting, billings, cleaning and cooking.
- When she is seizure-free she is able to complete her DLA.
- The home she lives in is equipped with cameras inside, sensors and she has a panic button. These measures have been taken to ensure her safety in the event of a seizure when no one is home.
- She has compartment syndrome which becomes crippling when the weather is cold. She may need cortisol injections.
- The 81-page submission demonstrates that her condition worsened and once epilepsy worsens, it cannot get better. The information indicates that her condition is severe. She progressed from petite seizures to grand mal seizures and there is no way to reverse this.

- In summary, seizures are not controllable or predictable, she is on multiple medications and the ministry can get the information it needs directly from the neurologist as they do in other jurisdictions.

At the hearing, the ministry relied on its reconsideration decision. When asked, the ministry representative stated that the 81-page submission dates from 1995-2006. The information contained within it is from another jurisdiction and does not give an indication of the appellant's current health status.

When asked, the ministry representative stated that the NP's letter clarifies further diagnosis but does not provide information regarding the impact of the diagnosis on the appellant's DLA or need for help. Similarly, the ministry representative stated that the letter from the neurologist does not provide information regarding the impact of the appellant's seizures on her DLA and need for help. As a result, this new information does not help the ministry determine if the appellant has met the legislative criteria.

Admissibility of Additional Information

A panel may consider evidence that is not part of the record and what the panel considers is reasonably required for a full and fair disclosure of all matters related to the decision under appeal.

The panel found that the testimony regarding the appellant eye retinal condition, the NP's letter, the neurologist's letter and the 81-page package provide additional detail or disclosed information that provides a full and fair disclosure of all matters related to the decision under appeal. The panel has admitted this new information as being in accordance with s. 22(4) of the *Employment and Assistance Act*. An analysis of each is provided in the panel's decision.

The panel places little weight on the information regarding the appellant's retinal condition because there is no official diagnosis or information on if this condition is connected to her epilepsy or seizures, or how it impacts her ability function, her DLA or need for help.

The panel finds that the letter from the NP provides confirmation of the diagnosis of grand mal seizures, anxiety, ADHD, chronic insomnia and compartment syndrome. Additionally, the letter speaks to the appellant's ability to maintain gainful employment which is not a consideration in PWD designation. The panel places no weight on the reference to employment.

The panel places little weight on the letter from the neurologist because it does not provide the detail the legislation requires, such as the severity of the medical condition, the impact on DLA and the need for help. Additionally, the letter speaks to the appellant's ability to maintain gainful employment which is not a consideration in PWD designation.

The panel finds that the 81-page package submitted by the appellant establishes her longstanding history with epilepsy, and it confirms some of the narrative provided by the neurologist in the PWD application. The panel places little weight on the information contained in the 81-page package because it is not current (dates from 1995-2006), it does not specifically speak to the legislative criteria required in BC and it does not speak to the current severity and impact on current DLA or need for help.

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 does not establish that her 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.

The relevant legislation can be found in Appendix A.

Panel Decision

The appellant argued that due to the epilepsy she is unable to work. 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.

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.

Physical Impairment

The appellant argued that due to medical conditions, specifically her epilepsy, she has a severe physical impairment that impacts her daily functioning.

The ministry argued that based on the information provided in the original PWD application and RFR the appellant does not meet the legislative requirements of severe physical impairment.

In its reconsideration decision, the ministry noted the narrative provided by the neurologist in the MR. The ministry also noted that in the MR, the neurologist indicated that the appellant can walk 4+ blocks and climb 5+ steps unaided, lift and remain seated without limitation. The ministry noted that in the AR, the neurologist indicated that the appellant requires periodic assistance with all listed tasks of mobility and physical ability when having seizures. The ministry noted that the frequency of these seizures is not reported, making it difficult to confirm a severe impairment when they are occurring. The appellant reported the seizures usually occur once every month or two. However, the ministry determined that physical limitations that occur once every month or two does not support a severe degree of physical impairment. Further it was reported that the appellant does not require any aids or assistive devices for her impairment, nor is she prescribed treatment or medication that impacts daily living.

After considering the evidence as noted above, the panel finds that the ministry did not reasonably conclude that the information provided demonstrate that the appellant does not have a severe physical impairment of her physical functioning. The panel notes that in the RFR and at the hearing, the appellant

confirmed that her seizures are brought on during menstruation, when she is overstimulated, stressed, anxious or has a lack of sleep. The appellant indicated that when she experiences a seizure, she is unable to function and must sleep for the rest of the day, and that she experiences migraines for several days to follow. Therefore, one seizure can leave her incapacitated for days. The NP has confirmed that the appellant suffers from insomnia and anxiety. The appellant indicated that she does not sleep well and is anxious. The panel finds that the appellant's medical conditions could cause her to experience more than one seizure per month. Epilepsy is episodic in nature and the appellant has indicated that when she experiences seizures she is incapacitated at length.

In the PWD application (specifically the AR), the neurologist indicated that the appellant's mobility and physical ability is compromised to the point she needs assistance when she experiences seizures. The neurologist stated that previously the appellant could cope with her epilepsy. However with increasing stress of life and the ongoing intractability of the seizures, she is no longer able to cope. Not only does this confirm that stress brings on seizures but also that the appellant is not coping. In the MR, the neurologist also indicated that there is a decrease in the frequency of the seizures however, as indicated in the AR, the seizures are still frequent and will continue despite therapy.

Given the overall assessments provided by the appellant and her medical practitioners, the panel finds that the ministry was not 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 her anxiety is severe.

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

In the reconsideration decision, the ministry noted that in the MR, the neurologist indicated that there are no significant deficits to the appellant's cognitive and emotional function but all are impacted during seizures. In the AR, the neurologist indicated that there is a major impact to attention/concentration and all other listed areas of cognitive and emotional functioning have either minimal or no impact. The ministry concluded that when considering these deficits and impacts in conjunction with DLA, a severe degree of impairment was not established, as the appellant is restricted in DLA only during seizure activity, which occurs once every month or two.

The panel finds that the ministry analysis of the evidence was reasonable, and it reasonably concluded that the information provided by the prescribed professional regarding the appellant's mental, cognitive and emotional functioning does not support a finding of a severe mental impairment. Despite the fact that now there is a diagnosis of anxiety and ADD, the information provided from the medical practitioners and appellant does not support a finding of a severe mental impairment. When considering the neurologist's narrative and evidence as a whole, it does not demonstrate that anxiety, ADD or attention/concentration deficits impact the appellant's mental functioning at a severe level. The panel also notes that the neurologist did not explain why in the MR it was indicated that there are no significant deficits to cognitive and emotional function but in the AR, it was indicated that there is a major impact to attention/concentration.

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.

The appellant argued that since her seizures leave her incapacitated for days, she is unable perform her DLA independently.

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

In its reconsideration decision, the ministry noted the neurologist narrative indicating that the appellant has frequent unpredictable spells of seizures negatively affecting attention interfering with DLA. The ministry noted that in the MR, the neurologist indicated that the appellant is restricted periodically in all activities, as seizures are periodic, and all functions are impaired during seizures. The ministry concluded that the appellant estimated seizures occur once every month or two, which does not support significant restrictions periodically for extended periods. The ministry noted that in the AR, the neurologist indicated that periodic assistance is required with all listed tasks of DLA. The ministry concluded that as it is reported that seizures occur once every month or two, it is not clear that the appellant is restricted periodically for extended periods. The appellant can also maintain marginal functioning with immediate and extended social network.

The panel finds the ministry's analysis of the evidence and its conclusion to be reasonable based upon the evidence before it. The panel finds that the evidence does not provide enough information, such as the frequency of the assistance required, to support a determination that DLA are periodically restricted for extended periods pursuant to the legislation. Additionally, the panel notes that insufficient additional or supporting information was provided from a prescribed professional at appeal to support the appellant's position.

Though the appellant provided further details about the restrictions to her DLA in the RFR and at the hearing, the legislation requires that a prescribed professional confirm that a severe impairment significantly and directly restricts the ability to perform DLA. The appellant's evidence is not supported or confirmed by her prescribed professional as required.

As such, the panel finds that the evidence provided by the prescribed professional did not describe or indicate that a severe impairment restricts the appellant's ability to perform her 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 she requires help with DLA from her family. She stated that she is unable to leave the home unaccompanied and when she experiences a seizure she needs help to perform her DLA.

The ministry argued that as it has not been established that daily living activities are significantly restricted (criterion 4), it cannot be determined that significant help is required from other persons or a device.

In the reconsideration decision, the ministry noted that the neurologist indicated that the appellant's family provides help. However, 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.

Appendix A

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.

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*

2022-0203

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: 2022/11/29

Print Name

Jennifer Armstrong

Signature of Member

Date: 2022/12/12

Print Name

Glenn Prior

Signature of Member

Date: 2022/12/13