

Part C – Decision Under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Poverty Reduction (“ministry”) dated September 23, 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 June 3, 2022.

The appellant is over 18 years of age. In support of her application, she submitted a medical report dated May 16, 2022 and an assessor report dated April 28, 2022, both completed by her family doctor, as well as her self-report. At the reconsideration, the appellant provided additional written statements from herself and from an advocate.

Medical Report:

The doctor states that the appellant has been their patient for 3 years and has seen them between 2 and 10 times in the past 12 months.

The doctor lists diagnoses of degenerative disc disease (onset September 2007), COPD (onset December 2021) and asthma (onset June 1990). The doctor identifies the degenerative disc disease as the “most bothersome diagnosis” and indicates that back pain limits the appellant’s “mobility, ability to work, lifting, carrying, standing over 1 hour, walking further than 150 [metres].” The doctor notes that the appellant has severe pain in her mid and low back and radiating down her legs. COPD has further reduced the appellant’s abilities, and she now experiences shortness of breath after walking 50 metres.

Under “Functional Skills”, the doctor states that the appellant:

- can walk 1 to 2 blocks unaided on a flat surface;
- can climb 2 to 5 steps unaided;
- can lift 7 to 16 kg.;
- can remain seated less than 1 hour;
- has no difficulties with communication or significant deficits in cognitive or emotional functioning.

The doctor also notes that the appellant has been unable to work since 2019 due to reduced mobility and respiratory ability.

Assessor Report:

The doctor states that the appellant lives with her spouse. They summarize the appellant’s impairments as back pain and shortness of breath. They note that the appellant’s ability to communicate is good, and she is independent in standing, and walking indoors and outdoors. However, they note that the appellant takes 2 minutes to climb 10 stairs, which is significantly longer than typical, and is only able to lift, carry or hold 20 pounds.

Under "Daily Living Activities", the doctor indicates that the appellant is independent in all aspects of daily living activities ("DLA") except that the appellant needs periodic assistance from her husband for laundry and basic housekeeping, and to carry purchases home when shopping.

The doctor also indicates that the appellant needs a support bar in the tub or shower to get in and out safely.

Self-Report:

The appellant states:

- she deals with 2 disabilities: COPD, diagnosed in December 2021, and degenerative disc disease, diagnosed in September 2007;
- she uses 3 inhalers a day for the COPD, as well as antibiotics and prednisone;
- she cannot walk very far, or fast, because she loses her breath quickly, and if she does not stop to catch her breath, she panics and has an asthma attack;
- there are many activities and household chores that she cannot do any more because she runs out of breath;
- she was diagnosed with degenerative disc disease after many years of pain in her lower back, radiating down her leg;
- she takes pain medication and anti-inflammatory medication;
- there are many activities she cannot do, or needs assistance to do, such as household chores and outdoor tasks;
- she is not able to sweep and wash floors, or bend to do yard work or gardening;
- bathing is difficult, so she had support bars installed to get in and out of the bath.

Appellant's Statement, September 21, 2022:

The appellant states:

- if she tries to walk 2 city blocks, she must stop 3 times, due to pain and shortness of breath, and she limits herself to walking no more than that, due to increased pain;
- she walks significantly slower than a typical person her age;
- she also feels lightheaded when she gets short of breath, so she prefers to have someone walking with her to help her if that happens;
- inhalers help, if she does not exert herself;
- movement and exercise help her back pain, but she is limited in the amount she can do because of COPD;
- she is taking a medication, Kadian, for severe ongoing pain, and refers to a page on www.webmd.com for additional information about that medication;
- her husband helps her every day:
 - when shopping, he reaches items she cannot handle, and stands in line for her if she cannot keep standing;
 - he always helps with purchases that weigh over 20 pounds;
 - he drives her to medical appointments that are 50 minutes away, because the appellant cannot drive for more than 40 minutes due to back pain;

- he does housework that the appellant cannot do: he sweeps and mops, vacuums and washes the floor, and cleans the bathroom;
- he often washes the dishes, because washing dishes is “a slow and painful process” for the appellant;
- he helps the appellant change the sheets on the bed because she cannot do that alone.

Advocate’s Statement, September 23, 2022:

The advocate provided a statement highlighting aspects of the medical and assessor reports, and the self-report, which the panel receives as argument rather than evidence.

Additional Evidence at the Hearing:

At the hearing, the appellant stated:

- she is very slow to get up and be mobile in the morning;
- she could not possibly go to work, and she does not know how she can afford to pay for her medications, as COPD medications alone cost \$300 per month;
- she takes Kadian, which is morphine, once a day in the morning;
- Kadian is prescribed by a second doctor whom she sees for mental health issues as well;
- her husband always comes shopping with her, in case she needs him to reach something on a top shelf or carry items, or if she gets anxiety in a crowd;
- after sitting or standing for an hour, she has increased low back pain and must move around and stretch.

Admissibility of Additional Evidence:

The ministry did not object to the appellant’s additional oral evidence at the hearing.

The appellant’s oral evidence at the hearing provides additional information about her medical condition, her daily activities, and the assistance she receives from her husband. 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 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 her health continues to get worse. She suffers from severe back pain which, combined with COPD, makes her unable to do many activities. She points out that she cannot sit or stand for long, she moves much more slowly than other people her age, and she cannot clean her house. She relies on help from her husband for the activities she cannot do on her own. She says that the evidence from the doctor is clear, that she cannot work, and has not worked since 2019. She is concerned that the ministry has not understood her situation or the severity of her condition. She did not mention her issues around anxiety when she applied for PWD designation because she did not think it would be relevant, and she is being treated for that condition by a different doctor.

Ministry's Position:

The ministry points out that eligibility for PWD designation is not based on the ability to work. The EAPWDA sets out the five criteria for eligibility, and the ministry was not satisfied that the appellant met three of the five criteria.

The ministry argues that the functional skills described by the doctor do not confirm a severe physical impairment. The ministry points out that the doctor has assessed the appellant as independent in walking indoors and outdoors and standing. According to the doctor, she can walk 1 to 2 blocks, climb 2 to 5 stairs, lift 15 to 35 pounds, and remain seated for less than 1 hour. The doctor reports that the appellant takes longer to lift, carry and hold heavy weights, but the ministry argues that does not confirm a severe impairment. The ministry maintains that the appellant can complete her daily living activities, and only needs help with heavier tasks. While the appellant says she is limited in her ability to walk, due to pain and shortness of breath, the ministry says that the doctor has not confirmed that the appellant needs additional time to walk outdoors. Therefore, while the ministry acknowledged that the appellant's medical conditions affect her mobility, the ministry says that the physical impairment is not severe.

The ministry notes that there was no indication of a mental impairment in the doctor's reports.

With respect to DLA, the ministry acknowledges that the appellant is restricted in performing housework. The appellant is also restricted in carrying purchases home from shopping, but the ministry maintains that does not amount to an overall restriction in shopping activities. At the hearing, the ministry representative stated that the ministry does not consider shower bars to be an assistive device for bathing. The appellant is independent in all other activities, and therefore the ministry says that the appellant is not significantly restricted in DLA. As a result, the ministry says the appellant does not need significant help from another person to perform DLA.

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 of the EAPWDA. In this case, the ministry was not satisfied that:

1. the appellant had a severe mental or physical impairment;
2. in the opinion of a prescribed professional, the impairment directly and significantly restricted the appellant's ability to perform daily living activities and
3. as a result of those restrictions, the appellant required help to perform those activities.

Severe Mental or Physical Impairment:

Under section 2 of the EAPWDR, the minister must be satisfied that, in the opinion of a prescribed professional, the appellant has a severe physical or mental impairment.

In the medical and assessor reports, the appellant's doctor confirms that the appellant suffers from degenerative disc disease and COPD, which limit her functioning. She takes morphine daily, which gives her some relief from severe low back pain that radiates down her legs. She is limited in the length of time she can sit and stand, and the distance she can walk, due to back pain. COPD adds to her symptoms, as her activities are limited when she experiences shortness of breath.

However, the doctor indicates that, while the appellant takes longer to go up stairs or walk 150 metres, she is still able to complete those activities. The doctor reports that the appellant is independent in all aspects of DLA except that she needs periodic assistance from her husband for laundry and basic housekeeping and carrying purchases home from shopping.

Eligibility for PWD designation is focused on function, rather than the ability to work or financial needs. The panel finds that the ministry was reasonable in determining that, based on her level of functioning as described by the doctor, the appellant's physical impairment, while significant, is not severe.

While the appellant has described anxiety, and consultation with another doctor about mental health issues, that doctor did not provide a report and the doctor who provided the medical and assessor reports does not diagnose a mental impairment. They report no significant deficits in cognitive or emotional functioning. Therefore, the panel finds that the ministry was reasonable in

determining that the appellant does not have a severe mental impairment.

Ability to Perform Daily Living Activities:

Under EAPWDR section 2(2)(b)(i), the ministry must be satisfied that, in the doctor's opinion, a severe physical or mental impairment directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods. EAPWDR Section 2 lists the activities that the ministry can consider in making that determination. Employability is not included in that list.

In the doctor's opinion, the appellant is independent in all aspects of DLA except housework and carrying purchases home when shopping. The ministry has accepted that the appellant is restricted in performing housework. However, the panel finds that the ministry was reasonable in determining that being unable to carry heavy purchases home does not represent a significant restriction in the overall ability to shop for personal needs.

The panel notes that the doctor has indicated the appellant is independent in bathing, without checking the box to indicate that the appellant uses an assistive device. However, the doctor has indicated in the assessor report that the appellant needs to use the grab bar to enter and exit the tub safely. The panel finds that the appellant does use an assistive device when bathing. However, the panel finds that the use of a grab bar alone does not indicate a significant restriction in performing personal hygiene.

The appellant has described other limitations she experiences, such as being unable to drive a vehicle for more than 40 minutes. However, according to the doctor, the appellant is independent in using public and private transportation, and the panel finds that the ministry was reasonable in determining that the appellant was not significantly restricted in using transportation. The appellant also reports that she moves very slowly when she walks outside, and that she must stop frequently because of shortness of breath. However, the doctor has reported that the appellant is independent in walking indoors and outdoors and did not mark the section on the form to indicate that she "takes significantly longer than typical" to do so.

Under section 2(2)(b)(i) of the EAPWDR, the ministry must be satisfied that, in the opinion of a prescribed professional, the appellant's ability to perform DLA is directly and significantly restricted. Not all DLA must be directly and significantly restricted. However, in the BC Supreme Court decision, *Hudson v. British Columbia (Employment and Assistance Appeal Tribunal)*, 2009 BCSC 1461, the court stated that "there must be evidence from a prescribed professional indicating a direct and significant restriction on at least two daily living activities."

The doctor has not identified two or more of the DLA listed in EAPWDR section 2, in which the appellant is significantly restricted. Based on the information provided by the doctor, the panel finds that the ministry was reasonable in its determination that direct and significant restrictions in the ability to perform two or more DLA either continuously or periodically for extended periods were not established.

Help to Perform DLA:

Under EAPWDR section 2(2)(b)(ii), the ministry must be satisfied that, as a result of direct and significant restrictions in the ability to perform DLA, the appellant 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.

As the panel has found that the ministry was reasonable in determining that direct and significant restrictions in the ability to perform two or more DLA had not been established, it follows that the ministry was reasonable in determining that it was not established that the appellant needed significant help to perform those DLA.

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. Therefore, the panel confirms the ministry's reconsideration decision. The appellant is not 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.

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 December 15

Print Name
Janet Ward

Signature of Member

Date (Year/Month/Day)
2022 December 15

Print Name
Katherine Wellburn

Signature of Member

Date (Year/Month/Day)
2022 December 15