

Part C – Decision Under Appeal

The decision under appeal is the Ministry of Social Development and Poverty Reduction’s (“ministry”) reconsideration decision dated November 2, 2022, where the ministry found the appellant as not eligible for designation as a Person with Disabilities (“PWD”) under section 2 of the *Employment and Assistance for Persons with Disabilities Act* (“EAPWDA”). The ministry found that the appellant met the age (18 years or older) and duration (impairment to continue for at least 2 years) requirements, but was not satisfied that:

- The appellant has a severe mental or physical impairment;
- The appellant’s impairment significantly restricts his ability to perform daily living activities; and
- The appellant requires the significant help or supervision of another person to perform daily living activities restricted by his impairment.

The ministry also found that the appellant was not one of the prescribed classes of persons who may be eligible for PWD designation on the alternative ground set out in section 2.1 of the EAPWDR. As there is 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

Employment and Assistance for Persons with Disabilities Act, SBC 2002, c.41, section 2 (“EAPWDA”).

Employment and Assistance for Persons with Disabilities Regulation, B.C. Reg. 265/2002, section 2 (“EAPWDR”)

The full text of these sections of legislation is set out in the schedule of legislation after this decision.

Part E – Summary of Facts

The hearing took place by teleconference and was originally scheduled for an earlier date. While the parties attended on that date, the appellant indicated that he wished to have a family member present to assist him with his appeal as English was not his first language. The panel granted an adjournment and the hearing reconvened with a family member present to serve as the appellant's advocate. Present at the hearing were the panel, the appellant and their advocate (who was a family member), and a ministry representative.

Evidence Before the Ministry at Reconsideration

The appellant is over 18 years of age and applied for PWD designation on July 19, 2022. In support of his application, the appellant submitted a PWD application, which included a Medical Report, an Assessor Report, and a portion of the application form entitled Applicant Information, which includes a hand-written self-report from the appellant. In addition to the application materials, the Ministry also received the appellant's Request for Reconsideration. Submitted along with the Request for Reconsideration were documents confirming an upcoming appointment for a pulmonary function test, a medical certificate and a doctor's note.

New Evidence Provided on Appeal

Along with his Notice of Appeal form, the appellant submitted confirmation of a further medical appointment with a cardiologist. In addition, at the hearing the appellant's daughter, who acted as both witness and advocate, provided evidence of the appellant's present medical condition and details regarding the amount of assistance she and her family provide to the appellant for his daily living activities. The ministry did not object to the submission of this evidence. The panel finds that much of the oral testimony of the appellant's daughter summarized evidence already before the ministry at reconsideration and is argument in support of the appellant's appeal. However, where the testimony provided further detail the panel finds that the testimony was reasonably required for a full and fair disclosure of all matters related to the decision under appeal. The panel also finds that the additional documentation submitted by the appellant was also reasonably required for a full and fair disclosure of all matters related to the decision under appeal. Accordingly, the panel admits all this new information as evidence pursuant to section 22(4) of the *Employment and Assistance Act*.

Summary of Relevant Evidence**Diagnoses and Health History: Medical Report**

The Medical Report was completed by the appellant's family doctor who has been treating the appellant for the last year and a half and has seen the appellant 11 times or more in the past 12 months. In the Medical Report the doctor diagnoses the appellant with degenerative disease of spinal disc (lumbar) with an onset of June 2019. The doctor reports that this diagnosis is unlikely to improve and will affect the appellant long-term. The doctor states the following about the appellant's health history:

- the appellant has significant back pain the last few years, causing loss of employment;

- the appellant cannot lift things, is unable to walk uphill, and is limited by back pain and shortness of breath (undiagnosed);
- the appellant is constantly breathless (still under investigation); and
- x-ray confirmed moderate disc disease of spine and moderate facet osteopathy.

With respect to functional skills the doctor states that the appellant can walk 2 to 4 blocks unaided, can climb 5+steps unaided, can lift 5 to 15 pounds, and can remain seated for 2 to 3 hours but will have to change position during this time. The doctor reports that the appellant has difficulty with communication, but states that this is due to difficulty with the English language and not a medical diagnosis. The doctor states that the appellant has a significant deficit with cognitive and emotional function in the area of emotional disturbance, circling “depression” on the form.

When asked to comment on the appellant’s daily living activities in the Medical Report, the doctor stated that the appellant’s daily living activities are not restricted but made a note that the appellant does not drive and that the appellant’s daughter helps him with “big grocery shopping.”

Diagnoses and Health History: Assessor Report

The Assessor Report was completed by the same doctor that completed the Medical Report. In the Assessor Report the doctor states that the appellant lives alone and is impacted by severe back pain caused by osteoarthritis/degenerative disc disease that limits his mobility and ability to carry things and work. The doctor also states that the appellant has significant shortness of breath. The doctor states that the appellant has poor ability to communicate and notes that the appellant has poor command of English.

With respect to mobility and physical ability the doctor reports:

- the appellant is independent with standing and lifting;
- the appellant is independent with walking indoors and outdoors and climbing stairs but is 3 times slower than an average person with these tasks and needs frequent breaks; and
- the appellant requires periodic assistance from another person for carrying and holding and notes that with heavy groceries he needs help from his daughter.

With respect to cognitive and emotional functioning, the doctor reports a moderate impact on the appellant’s bodily functions, emotion, and language, but does not note what sort of impact the appellant’s medical diagnoses has on other areas of cognitive and emotional functioning.

With respect to daily living activities, the doctor reports:

- the appellant is independent with toileting, feeding self, paying for purchases, meal planning and preparation, paying rent and bills, medication, and transportation;
- takes 3 times longer than an average person with dressing, grooming, and bathing, requiring frequent breaks due to back pain; and

- takes 3 times longer than an average pension with laundry, basic housekeeping, going to and from stores, and reading prices and labels.

When asked about any mental impairment, the doctor states that the appellant is independent in all areas, but notes that the appellant has poor English and communication skills. The doctor reports that the appellant has marginal functioning with his immediate and extended social networks.

The doctor noted that the appellant requires help from family, friends, and neighbours to complete his daily living activities and does not indicate a need for any assistive device or assistance animals.

Diagnoses and Health History: Self-Report

In the PWD application the appellant stated that he suffers severe back pain and respiratory issues and is undergoing lots of medical appointments, ultrasounds, and blood tests. He states that he has problems putting on shoes and socks and when kneeling has trouble getting back to a standing position. The appellant reports that the pain makes it so he cannot do anything, and he struggles walking, lifting, and any kind of bending. He reports being slower with his general mobility as well as being constantly out of breath and coughing up foam. He states that he cannot leave his house as much as he used to.

Documentary Evidence Provided with Request for Reconsideration

The appellant provided documentary evidence showing:

- confirmation of an appointment for a pulmonary function test for January 30, 2023;
- medical certificate confirming the appellant should be excused from work/school from May 22/19 to June 7/19; and
- doctor's note dated June 17, 2019, stating that the appellant should be off work due to a back injury until feeling fit to work.

New Evidence

In addition to the evidence before the ministry at reconsideration, the appellant provided a document showing that he has a cardiology appointment on Monday, October 23, 2023.

The appellant's daughter who acted as both witness and advocate at the hearing provided evidence of the appellant's medical condition. She stated that the appellant is very ill. She described him having blood in his urine and stool, coughing up blood and having difficulty breathing. In addition, she stated that the appellant has heart problems and is not able to walk or climb stairs easily due to breathing problems. She states that the appellant spends about 75% of his time sleeping and is in and out of hospital regularly and that the doctor knows that he is this sick but has not updated the medical information in the application for PWD designation.

In answer to questions from the panel, the appellant's advocate provided personal evidence as to the extent of help she and her family provide the appellant. In this regard, the advocate stated that she cooks, cleans, regularly checks in on the appellant and sends him food through Skip the Dishes when she is unable to prepare food for him. She stated that her children and husband also help the appellant, visiting every other day and that they help with meal preparation and do the appellant's laundry. She says that together, they ensure that the appellant gets to his appointments and to the hospital for various medical appointments. The appellant's advocate also stated that the appellant has a colonoscopy booked in early 2023 as they are concerned about the possibility of prostate cancer given the appellant's symptoms.

Part F – Reasons for Panel Decision**Issue on Appeal**

The issue on appeal is whether the ministry's decision that the appellant was ineligible for PWD designation was reasonably supported by the evidence or was a reasonable application of the legislation in the circumstances of the appellant. That is, was the ministry reasonable when determining that the requirements of section 2(2) of the EAPWDA were not met because:

- a severe mental or physical impairment was not established;
- the appellant's daily living activities were not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and
- as a result of those restrictions, in the opinion of a prescribed professional, the appellant did not require an assistive device, the significant help or supervision of another person, or the services of an assistance animal to perform daily living activities.

Panel DecisionPhysical Impairment

The appellant's position is that he has significant chronic back pain, shortness of breath, and other medical symptoms that make it impossible for him to work and difficult for him to complete many day-to-day activities. The appellant submits that he is clearly very sick, needs the help of his family to complete daily living activities, spends much of his life sleeping, must attend numerous medical appointments and is regularly in and out of hospital. The appellant submits that the evidence should satisfy the ministry that he meets the criteria for PWD designation.

The ministry's position is that while the appellant has back pain that the evidence does not show that he has a severe impairment. The ministry states that although the doctor reports that the appellant "cannot lift things" in one area of the application he also reports that the appellant can lift 5 to 15 pounds in another area of the application and that the requirement for help only with heavy lifting does not support a severe degree of impairment. The ministry states that while the doctor notes that the appellant takes 3 times longer to perform some daily living activities that they do not consider this to show a severe impairment and that the appellant, although taking longer to complete some activities, maintains his physical independence being reported to be independent with most activities. Further, the ministry notes that the appellant is not reported to require any aids or assistive devices.

Section 2 of the EAPWDA requires that the minister is "satisfied" that a person has a severe physical or mental impairment, giving the minister discretion when making the determination. When exercising this discretion, the legislation's requirement for information from a medical or nurse practitioner (and other prescribed professionals) makes it clear that the fundamental basis for assessing PWD eligibility is information from one or more prescribed professionals.

The panel reviewed all the evidence submitted by the appellant. It is clear the appellant regularly experiences chronic back pain and shortness of breath. Further, the oral testimony provided by the appellant's advocate indicates that the appellant's physical condition appears significantly worse than that set out by the doctor in the PWD application. The advocate reports that the appellant is in and out of hospital, has blood in his urine and stool and is barely able to get out of bed due to constant fatigue. The advocate also reports that the appellant is unable to perform meal preparation, shopping, and housekeeping at all and requires constant assistance from her and her family in these areas. However, this description of the appellant's physical impairment does not match that provided by the doctor in the Medical Report and Assessor Report. In both the Medical Report and Assessor Report the doctor indicates that while the appellant takes somewhat longer to perform some activities and experiences some pain with certain activities that he remains largely unrestricted in his physical ability.

As stated above, the fundamental basis in the legislation for assessing whether an individual has a severe impairment is the information provided by prescribed medical professionals and the evidence from the doctor does not show a physical impairment as severe as that reported by the appellant or his advocate. Accordingly, the panel finds that the ministry reasonably determined that the available evidence did not show that the appellant had a severe physical impairment.

Mental Impairment

The appellant's position is that his physical impairment affects his mental health, and he is no longer able to leave the house as often as he used to and spends most of his days sleeping.

The ministry's position is that the appellant does not have a severe mental impairment. The ministry acknowledges that the appellant experiences limitations to cognitive and emotional functioning due to emotional disturbance caused by pain, resulting in a moderate impact in the areas of sleep and emotion, but notes that there are no major impacts identified and a diagnosis of a mental impairment has not been provided.

Section 2 of the EAPWDA requires that the minister is "satisfied" that a person has a severe physical or mental impairment, giving the minister discretion when making the determination. When exercising this discretion, the legislation's requirement for information from a medical or nurse practitioner (and other prescribed professionals) makes it clear that the fundamental basis for assessing PWD eligibility is information from one or more prescribed professionals.

The panel reviewed all the evidence submitted by the appellant. While the doctor indicated that the appellant had moderate impact in the areas of sleep and emotion, the doctor did not note any major impacts to the appellant's mental functioning and did not provide a diagnosis of a mental impairment. The panel finds that the evidence before the tribunal does not support a finding that the appellant has a severe mental health impairment. Accordingly, the panel finds that the ministry reasonably determined that the available evidence did not show that the appellant had a severe mental impairment.

Restrictions in ability to perform daily living activities

The appellant's position is that he is no longer able to work or perform many day-to-day activities such as meal preparation, housekeeping, and shopping due to significant back pain and shortness of breath. The appellant states that he needs significant help from his family to complete these daily living activities.

The ministry's position is that the appellant is not significantly restricted in daily living activities. The ministry submits that while the doctor reports that the appellant takes 3 times longer for a few activities this does not confirm a significant restriction. Further, the ministry notes that while the appellant requires assistance with lifting heavier items that he maintains the ability to lift 5 to 15 pounds.

Section 2(2)(b)(i) of the EAPWDA requires that the ministry 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 it is satisfied, is dependent upon the evidence from prescribed professionals. The term "directly" means that there must be a causal link between the severe impairment and restriction. The direct restriction must also be significant.

The panel reviewed all the evidence and notes that there is a significant difference between the evidence provided by the appellant and his advocate and the doctor's report in the Medical Report and Assessor Report. While the appellant and his advocate describe the appellant being unable to perform housekeeping, food preparation, and shopping activities, the doctor reports the appellant largely independent in these areas. The doctor notes only that some activities take the appellant longer than the average person to complete and that the appellant needs assistance of another person only in the area of grocery shopping. The legislation requires the opinion that an individual's ability to perform daily living activities is restricted to come from a prescribed professional. The evidence from the doctor does not support such a finding. Accordingly, the panel finds that the ministry reasonably determined that the appellant did not have direct and significant restrictions in performing daily living activities.

Help to perform daily living activities

The appellant's position is that he requires help to perform a number of daily living activities.

The ministry acknowledges that the appellant receives help from his family, friends, and neighbour. However, the ministry submits that as it has not been established that daily living activities are significantly restricted, it cannot be determined that help is required from other persons or a device.

A review of the evidence submitted clearly indicates that the appellant receives help from his family members to perform some daily living activities. However, subsection 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. To put it another way, the legislation

requires confirmation of direct and significant restrictions to performing daily living activities in order to say that help is needed performing such daily living activities. Since the panel agreed that the ministry reasonably determined that the appellant did not have direct and significant restrictions in performing daily living activities it follows that the panel also finds the ministry reasonably determined that help was not required.

Panel Comment

The appellant is awaiting multiple medical appointments, which the appellant hopes will provide further medical diagnoses. The panel notes that, in answer to a question from the panel, the ministry indicated that the appellant could reapply at any time with further evidence and encouraged the appellant to see his doctor for an updated assessment.

Conclusion

After reviewing the evidence submitted in this appeal, 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 therefore confirms the decision. The appellant is not successful on appeal.

Schedule of Legislation

Employment and Assistance for Persons with Disabilities Act

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

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....

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Part G – Order

The panel decision is: 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
Emily Drown

Signature of Chair

Date (Year/Month/Day)
2023/01/05

Print Name
SUSANNE DAHLIN

Date (Year/Month/Day)
2023/01/11

Print Name
Peter Mennie

Signature of Member

Date (Year/Month/Day)
2023/01/12