

Part C – Decision Under Appeal

The decision under appeal is the Ministry of Social Development and Poverty Reduction’s (“ministry”) reconsideration decision dated December 7, 2022, in which the ministry found the appellant was 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 requirement and the requirement for the impairment to continue for at least 2 years but was not satisfied that:

- the appellant has a severe mental or physical impairment;
- the impairment, in the opinion of a prescribed professional, directly and significantly restricts the ability to perform daily living activities (“DLA”) 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 DLA.

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 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 by the appellant for PWD designation on alternative grounds, the panel considers that matter not to be at issue in this appeal.

Part D – Relevant Legislation

The ministry based the reconsideration decision on the following legislation:

Employment and Assistance for Persons with Disabilities Act - EAPWDA - section 2

Employment and Assistance for Persons with Disabilities Regulation - EAPWDR - section 2

The full text is available in the Schedule after the decision.

Part E – Summary of Facts

The evidence and documentation before the minister at the reconsideration consisted of:

1. Information from the ministry's record of the decision indicating that the PWD application was submitted on September 12, 2022, and denied on October 5, 2022, with *Decision denial summary* explaining the criteria that were not met. On November 8, 2022, the appellant submitted a *Request for Reconsideration* ("RFR") and asked for an extension to December 7, 2022, to submit additional information. The ministry notes that no new information was received. On December 7, 2022, the ministry completed the review of the RFR and found that the eligibility requirements for PWD designation were still not met.

2. The PWD application comprised of:

- the *Applicant Information* (self-report-"SR") signed by the appellant on March 15, 2022;
- a *Medical Report* ("MR") dated August 25, 2022, signed by the appellant's doctor, a specialist in neurosurgery ("Dr. A") who has known the appellant since 2015;
- an *Assessor Report* ("AR") dated August 25, 2022, also completed by Dr. A who indicates they saw the appellant 2-10 times in the past year and based the assessment on medical consult reports ("attached"), office records, and information from a community service organization that assisted the appellant with the PWD application.

Summary of relevant evidence from the application

Diagnoses

In the MR, the appellant is diagnosed with Degenerative disc disease. In Section B-*Health History* and Section F-*Additional Comments*, Dr. A describes neck and arm pain, paresthesia with numbness and arm weakness, cervical radiculopathy and myelopathy, occipital headaches, low back pain, mid-thoracic pain, and leg pain. The doctor notes that the appellant had chronic pain for many years.

Treatment includes several types of medications as well as spinal fusion surgeries in 2015 and 2021. Dr. A said that the treatments result in partial improvement "but not provide cure or pain free status."

In the AR (Section E-*Additional Information*) Dr. A describes chronic "facet osteoarthropathy and myofascial pain" as well as Degenerative disc disease, affirming that the patient's pain is not likely to completely resolve.

The appellant elaborates on the diagnoses in the SR, stating that his neck “is in constant pain” and he has “sharp shooting pain in upper spine through shoulders, elbows, and fingers, harsh burning sensation.” The appellant reports lower back pain, a loss of feeling in his hands, and arthritis throughout his body. The appellant describes “lower back pain from hips, knees to feet, burning pins and needles...I live and breathe constant pain throughout my body with harsh burning.”

Functional skills

Medical Report

In section D-*Functional Skills* Dr. A checked that the appellant can walk 2-4 blocks unaided, climb 5+ steps unaided, lift 5-15 pounds, and remain seated for 1-2 hours. In Section F-*Additional Comments*, Dr. A says the appellant is unlikely to be able to work given the degree of pain.

Regarding mental functions (questions D-5 and D-6) Dr. A indicates *no*, the appellant does not have any difficulties with communication. Dr. A checked *no* when asked if there are any significant deficits with cognitive and emotional function.

Assessor Report

Under Section B-2, *Ability to Communicate*, Dr. A indicates that speaking is *good*, and hearing is *satisfactory*. The appellant’s ability to read and write are marked as *poor* (comment, “unable to concentrate, frequent headaches”).

Under section B-3, *Mobility and Physical Ability*, Dr. A checked *needs continuous assistance* for 3 of the functions listed on the form:

- *Walking indoors*
- *Walking outdoors*
(comment, “sometimes needs help, wheelchair when needed”)
- *Standing*

The appellant takes significantly longer than typical for the 3 other functions:

- *Climbing stairs*
- *Lifting*
- *Carrying and holding*

The space for additional comments was left blank.

In section B-4, *Cognitive and Emotional Functioning*, the assessor is asked to indicate what impacts the appellant’s mental impairment has on various cognitive and emotional

functions. Dr. A indicated impacts in all 14 areas:

- Moderate impact for *Bodily functions, Consciousness, Impulse control, Insight and judgement, Memory, Motivation, Language, Psychotic symptoms, Other neuropsychological problems, and Other emotional or mental problems*
- Major impact for *Emotion, Attention/Concentration, Executive, and Motor activity.*

The appellant elaborates on functional limitations in the SR, stating that headaches and dizziness affect his eyesight and concentration and the constant pain in his neck causes blackouts. The appellant reports loss of memory and says he has difficulty with standing, walking, and lifting more than 2 pounds. The appellant says he “cannot function mentally or physically anymore without some kind of burning pain in my body.”

Daily Living Activities

In the opinion of a prescribed professional (Dr. A), the following information is provided:

Medical Report

In Section B-3, Dr. A checked *yes*, the appellant has been prescribed medications or treatments that interfere with the ability to perform DLA. The doctor lists 6 different medications and comments, “can cause drowsiness, lethargy, confusion.” The doctor indicates the appellant will require medication for a long period.

In Section E-*Daily Living Activities*, Dr. A checked that 6 of the 10 activities are **periodically restricted**:

- ***Personal self-care***
- ***Management of medications***
- ***Basic housework***
- ***Daily shopping***
- ***Mobility inside the home***
- ***Mobility outside the home***

When asked to explain “periodic” restrictions, Dr. A wrote “depending on flare up of symptoms.”

Dr. A checked that 4 activities are not restricted:

- *Meal preparation*
- *Use of transportation*
- *Management of finances*
- *Social Functioning*

Assessor Report

In Section B-1, Dr. A indicates that the physical impairments described in the medial consult reports (“attached”) impact the appellant’s ability to manage DLA.

In Section C-*Daily Living Activities*, Dr. A indicated restrictions for 5 of the 8 DLA listed on the form:

The appellant needs **periodic assistance** with 3 DLA:

- **Personal Care:** requires periodic assistance from another person with *dressing, grooming, and bathing*. The appellant is independent with *toileting, feeding self, regulating diet, transfers (bed), and transfers (chair)*;
- **Shopping:** requires periodic assistance with *reading prices and labels, making appropriate choices, and paying for purchases*.
- **Transportation:** requires periodic assistance with *getting in and out of a vehicle*. The appellant is independent with *using public transit and using transit schedules and arranging transportation*.

The appellant needs **continuous assistance** with 3 DLA:

- **Basic Housekeeping:** requires continuous assistance, and uses an **assistive device** for *laundry and basic housekeeping*;
- **Shopping:** requires continuous assistance with *going to and from stores, and carrying purchases home*;
- **Meals:** requires continuous assistance with *meal planning, food preparation, cooking, and safe storage of food*.

Under *Additional comments* for the above DLA the doctor wrote, “has friends and family to assist in support for daily living...some days more difficult depending on effect of pain and medications.”

Dr. A indicates that the appellant is independent with 3 DLA (all activities):

- **Pay Rent and Bills:** independent with *banking, budgeting, and pay rent and bills*;
- **Medications:** independent with *filling/refilling prescriptions, taking as directed, and safe handling and storage*;
- **Social Functioning:** independent with *appropriate social decisions, able to develop and maintain relationships, interacts appropriately with others, able to deal appropriately with unexpected demands, and able to secure assistance from others*.

Dr. A checked *marginal functioning* when asked to describe how a mental impairment affects the appellant’s relationship with his immediate social network. The doctor checked

good functioning for the appellant's extended social networks. Dr. A wrote "yes, needs physical and financial support at this time" to be maintained in the community. The doctor left the *Additional comments* section blank.

Need for help

Medical Report

In Section E Dr. A wrote, "depending on the degree of pain may need help from another person."

Assessor Report

In Section A-1, Dr. A checked that the appellant lives with family. In Section D-*Assistance provided by other people* the doctor checked *family and friends*. Dr. A checked *manual wheelchair* for *Assistance provided through the use of Assistive devices*.

Regarding equipment that is required but is not currently being used, the doctor wrote "will need hospital bed, power wheelchair after next surgery." Dr. A checked *no* the appellant does not have an assistance animal.

3. A medical imaging report (2 identical copies, "CT cervical spine") dated April 8, 2020, and dictated by a physician ("Dr. B"). The report indicates a history of pain, and abnormalities in the appellant's spine (C3 to C7) including degenerative changes and impacts from surgeries.
4. A medical imaging report (2 identical copies, "CT/Lumbar spine Addn'l area WL") dated April 8, 2020, and dictated by Dr. B. The report indicates abnormalities and degenerative changes "offering mechanical sources for low back pain" as well as some anatomical features that are described as unremarkable.
5. Medical images (3) dated in April 2019 and August 2021, that show the appellant's head, neck, shoulder, and spine. The more recent image includes the comment "recent surgery July 5, 2021."
6. Documents from a pharmacy (*Prescriber Notification*-3 pages dated August 8, 2022, and *Physician Notification*-2 pages dated May 17, 2022) that list the medications prescribed to the appellant between November 2019 and September 2021. The prescriptions include 12 daily medications with several indicated for pain.
7. An RFR signed by the appellant on November 8, 2022, with a request for an extension of time to submit information because Dr. A was away.

Additional information

With the consent of both parties the appeal was held as a written hearing pursuant to section 22(3)(b) of the *Employment and Assistance Act*.

Appellant

Subsequent to the reconsideration decision the appellant filed a *Notice of Appeal* with 2 letters attached:

1. A 2-page letter written by an advocate and signed by both the appellant and the advocate on January 19, 2023.
2. A 3-page letter from the appellant dated October 28, 2022. The appellant indicates the letter is his submission for the reconsideration.

[panel note: this letter was not submitted with the RFR and was not before the ministry at reconsideration].

Notice of Appeal submission: letter dated January 19, 2023

This letter sets out the appellant's argument and highlights restrictions to the following DLA:

- *Prepare own meals*
- *Shop for personal needs*
- *Use public 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*
- *Make decisions about personal activities, care or finances*
- *Interact with others effectively.*

Notice of Appeal submission: letter dated October 28, 2022

The appellant says he required assistance to write the letter due to "difficulty focusing my thoughts and writing coherently." In addition to argument, the letter includes the following information:

Diagnoses

- The appellant says he is diagnosed with Degenerative disc disease, Type II diabetes, and depression.
- Symptoms include (“but are not limited to”) sharp burning pains from his cervical spine to his shoulders, arms, and fingers; frequent headaches, migraines, and dizziness; constant lower back and hip pain; reduced mobility; feelings of being overwhelmed; daily fatigue; and the inability to focus.

Functional skills

- The appellant says that walking any distance outdoors takes “at least 2-3 times longer than normal and requires that I stop frequently to rest due to significant pain.” The appellant states that most days he is “too weak and in too much pain to leave my home.”
- The appellant says that climbing stairs takes 2-3 times longer and the resulting pain in his back, hips, knees and feet “requires that I stop and rest before going on.”
- The appellant says that he “generally avoids lifting altogether” because he has “terrible burning, shooting pains” from his shoulders down his arms, and “any lifting or carrying only worsens it.”

DLA

- The appellant says that his medical condition “prevents me from pursuing social activities and generally going out into the community.”
- On a typical day, the appellant says that he “struggles out of bed, a process that takes me at least 3 times longer than normal.”
- The appellant reports that “dressing, grooming, and bathing take 2-3 times longer than normal...but some days I am in too much pain to perform these tasks.”
- The appellant says that he cannot adequately perform housework, cook healthy meals, or shop for basic needs due to the level of pain he experiences.
- The appellant reports that his medication causes “drowsiness and confusion, making it difficult for me to concentrate and focus on what others are saying to me.”

Need for help

- The appellant reports that he needs daily help with “putting on certain items of clothing such as helping get my arms through coats and tying up shoelaces.” The appellant says that he needs a “bath bench” in the shower so that he can sit down,

and he needs help getting in and out of the shower (to not slip and fall).

- The appellant says that he requires weekly assistance with carrying bags of groceries and other items because he is limited to walking “very short distances and avoids lifting and carrying any amount of weight.”
- The appellant says that he needs weekly assistance lifting and folding loads of laundry, vacuuming, washing floors, “and performing any daily household task that requires bending, lifting, or is remotely physical.”
- A friend cooks daily meals for the appellant to re-heat.
- The appellant says that most days, he is unable to walk far enough or stand long enough to take public transit. He relies on family to drive him to appointments.
- The appellant clarifies that until this year, he used a power scooter outdoors so that he didn’t have to walk and exacerbate the pain. The appellant explains that the scooter was old and stopped working, so now he has a manual wheelchair “that I am unable to push myself due to cervical disc disease and the burning pain in my arms.” The appellant explains that he can only use the manual wheelchair “when someone is available to push me when I need to go out once or twice a week.”
- The appellant reports relying on daily assistance from family members and a close friend.

Admissibility

The ministry did not object to the letters being accepted as evidence. The panel finds that the letters from the appellant and advocate provide detailed self-report about the appellant’s symptoms and daily functioning and note the legislative criteria in section 2 of the EAPWDA. The panel admits the letters under section 22(4) of the *Employment and Assistance Act* as evidence that is reasonably required for a full and fair disclosure of all matters related to the decision under appeal.

Subsequent to the *Notice of Appeal* the appellant provided an additional submission that was received by the Tribunal on February 7, 2023. The submission included:

1. A letter from the appellant dated January 31, 2023, explaining that when Dr. A was away, he did not have a general practitioner (“GP”) who could endorse the RFR submission (letter of October 28, 2022). The appellant states that he has a new GP who has taken him on as a patient and can verify the severity of the impairment.

At the bottom of the letter is an endorsement by the appellant’s new GP (“Dr. C”) dated February 2, 2023. Regarding the legislative criteria at issue in the appeal, Dr. C states “I can confirm that [the appellant] is struggling with medical conditions...that combined, are severe enough to restrict his basic mobility and further restricts the performance of his

daily living activities to the point where he requires significant assistance from others or takes an inordinate amount of time to perform.”

2. A copy of the letters that were submitted with the *Notice of Appeal*: January 19, 2023 letter from the advocate; and October 28, 2022 letter from the appellant.

Admissibility

The ministry did not object to the additional letter of January 31, 2023. The panel finds that the letter is relevant as it contains information from the appellant’s new doctor. The panel admits the letter under section 22(4) of the *Employment and Assistance Act* as evidence that is reasonably required for a full and fair disclosure of all matters related to the decision under appeal.

Ministry

The ministry did not submit any new evidence or argument. In an email to the Tribunal, the ministry states that the reconsideration summary is the ministry’s submission on appeal.

Part F – Reasons for Panel Decision

The issue on appeal is whether the ministry's decision that found the appellant ineligible for PWD designation was reasonably supported by the evidence or was a reasonable application of the legislation in the circumstances of the appellant. The panel's role is to determine whether the ministry was reasonable in finding that the following eligibility criteria in section 2 of the EAPWDA were not met:

- the appellant has a severe mental or physical impairment;
- the impairment, in the opinion of a prescribed professional, directly and significantly restricts the ability to perform DLA 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 DLA.

Analysis**Severe mental or physical impairment*****Arguments - Appellant***

The appellant's position is that he meets the legislative requirement for a severe impairment because he experiences significant daily pain that reduces his physical mobility as well as his mental focus. The appellant argues that the "sharp burning pains" through his spine to most of his limbs, combined with weakness and fatigue, reduces his ability to walk, climb stairs, and lift/carry any amount of weight.

The appellant acknowledges that the ministry found that Dr. A's reports contained some inconsistencies and insufficient explanations to demonstrate the severity of the impairment. The appellant argues that his additional self-reports will help clarify his circumstances.

Regarding Dr. A's assessments in the MR, the appellant argues that he would only be able to walk 2-4 blocks unaided "under ideal circumstances on flat, level ground." The appellant argues that walking causes significant pain and requires frequent rest stops. The appellant submits that he is too weak and in too much pain to leave his home "most days."

The appellant says that while he can push himself to climb 5+ stairs using the handrail, the resulting pain in his back, hips, knees and feet, makes him stop frequently. Thus, both stairs and walking take 2-3 times longer than normal. The appellant argues that the assessment for lifting (5-15 pounds) "is completely unrealistic" because he generally avoids lifting as it worsens the "terrible burning, shooting pains" in his shoulders and arms.

The appellant further argues that the cumulative impact of the cognitive and emotional deficits reported in the AR combined with his physical restrictions, results "in a very severe overall impairment." The appellant argues that the information in the MR (no significant deficits with cognitive and emotional functioning) was an oversight and more weight should be given to the impacts reported in the AR.

The advocate argues that it is "critically important" to consider section 8 of the *Interpretation Act* which states that "every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its object." The advocate notes that the BC supreme Court in *Hudson v. Employment and Assistance Appeal Tribunal* said that benefit-conferring legislation (such as the EAPWDA) "must be interpreted generously" with "any ambiguity being resolved in favour of the appellant."

Arguments - Ministry

The ministry's position is that the information in the PWD application does not indicate a severe impairment of physical or mental functioning. The ministry acknowledges that the appellant experiences some limitations due to pain but argues that the assessments in the MR (for walking, climbing stairs, and lifting) do not demonstrate a severe degree of restriction.

The ministry acknowledges that Dr. A indicates the appellant needs continuous assistance and takes significantly longer with most physical functions but argues that a severe impairment was not established on the evidence because there was no explanation for how much longer activities take, or how often the appellant needs to use a wheelchair.

Regarding a mental impairment, the ministry argues that a severe impairment was not established on the evidence because Dr. A has not diagnosed a mental condition, and there was inconsistent information between the MR and AR on deficits/impacts to cognitive and emotional functions. The ministry further argues that there was no explanation for why the appellant has difficulties with concentration that impact reading and writing.

Legislative requirement

To be eligible for PWD designation, the legislation (EAPWDA section 2) requires several criteria to be met including the minister being satisfied that the applicant has a severe mental or physical impairment. The ministry found the appellant was not eligible for PWD because not all criteria were met.

“Severe” is not defined in the legislation but an impairment is defined in the PWD application as a “loss or abnormality of psychological, anatomical, or physiological structure or function causing a restriction in the ability to function independently, effectively, appropriately, or for a reasonable duration.” In the ministry’s view, the diagnosis of a serious medical condition does not in itself establish a severe impairment of mental or physical functioning.

The PWD medical reports ask for information on functional skills and abilities and the ministry indicates that it also takes the appellant’s information into account. The panel finds that the ministry’s assessment of severity based on a fulsome review of daily function is a reasonable interpretation of the legislation.

Mental and physical impairment - specific considerations

To assess the severity of a mental impairment, the ministry considers the extent of any impact on daily functioning as evidenced by limitations/restrictions with mental functions and emotion. The ministry does not only look at the diagnosis or a medical practitioner’s comment that the condition is “severe” but considers functional abilities and whether there are restrictions to DLA requiring mental/social functioning including any safety issues. The panel finds that an assessment of severity based on cognitive, emotional, and social functioning is a reasonable interpretation of the legislation.

To assess whether the applicant has a severe physical impairment, the ministry considers information on the degree of restrictions to physical functioning and whether the applicant requires significant help or any assistive devices to manage physical tasks. The panel finds that the assessment of severity based on daily physical functioning is a reasonable interpretation of the legislation.

Panel's unanimous decision - mental impairment

The panel is unanimous in finding the ministry's decision reasonable. The appellant is not diagnosed with a mental impairment in any of the medical reports submitted with the application. In the additional submissions on appeal, the appellant states that he is diagnosed with depression but there is no confirmation by a medical practitioner that the appellant has depression or another mental impairment that will continue for at least 2 years as required by the legislation. The endorsement from the appellant's new doctor, Dr. C does not specify a mental impairment.

The panel acknowledges the impact of the appellant's medications and pain on his mental functioning. Dr. A. indicates in the MR (section B-3) that the appellant's medications can cause drowsiness and confusion. In section B-*Health History*, Dr. A notes pain that is extensive and chronic and states that treatments will not provide a cure or pain free status.

The self-reports from the appellant, including the additional letter of October 28, 2022, substantiate the cognitive/emotional impacts that were reported in the AR. The appellant describes the impact of chronic pain including "major headaches...affects my eyesight and concentration...loss of memory...feeling overwhelmed, daily fatigue, and being unable to mentally focus." The appellant also notes that medication side effects make it difficult to concentrate.

The totality of evidence shows that the appellant's cognitive and emotional functioning is clearly impacted by his many medications and experience of living with chronic pain, but these impacts stem from the appellant's Degenerative disc disease and other physical impairments rather than a mental impairment. The panel is unanimous in finding that the ministry's decision for mental impairment is reasonably supported by the evidence.

Panel majority decision - physical impairment

The ministry says that the information in the record does not establish a severe impairment of physical functioning. In the panel majority's view, the evidence in the original application with additional submissions on appeal confirms that the appellant has a severe physical impairment.

The majority acknowledges that the MR assessments for walking, climbing stairs, and lifting are in the low to moderate range of restriction on the rating scales. However, the majority gives more weight to the greater degree of restrictions reported in the AR because the AR assessments are more consistent with Dr. A's descriptions of widespread and longstanding pain that has not resolved with treatment.

In the AR, the appellant needs continuous assistance with walking and standing and takes significantly longer than typical with climbing stairs, lifting, and carrying/holding. The appellant "sometimes needs help" and "wheelchair when needed" for mobility. The majority finds that this information is consistent with the appellant's self-reported limitations. The majority is satisfied that the self-reports resolve the contradiction between "continuous" and "sometimes" because the appellant explains that he needs help and the use of his wheelchair for all outdoor mobility.

The appellant explains that while he could in theory walk 2-4 blocks unaided and climb 5 or more steps with just the handrail, doing so would result in significant pain and require frequent rest breaks. The appellant's candid and detailed account of the pain he experiences every day, supports Dr. A's assessments of "continuous assistance" and taking significantly longer with physical functions.

The self-reports fill in the details that the ministry notes were missing from the AR. For example, the appellant indicates how much longer it takes for him to walk any distance and climb stairs ("2-3 times longer than normal"). Most days, the appellant is too weak and in too much pain to leave his home.

Regarding how often he needs a wheelchair, the appellant explains that he uses an assistive device (scooter or wheelchair) outdoors so that he can avoid walking and exacerbating his pain. The appellant explains that he can only use the manual wheelchair when someone is available to push it which is generally once or twice a week when the appellant needs to go out. As noted, the appellant stays home most of the time because he finds it too painful to mobilize. The evidence indicates that the appellant's mobility is significantly restricted by pain.

The panel majority acknowledges the inconsistent information for lifting. Dr. A indicates the appellant can lift/carry up to 15 pounds, but it would take the appellant significantly longer than typical. The appellant says that he has difficulty lifting more than 2 pounds due to shoulder, arm, and hip pain.

While it is unclear on the evidence how much weight the appellant can lift, the panel majority accepts that the appellant “avoids lifting and carrying any amount of weight” due to the significant discomfort it causes him. Dr. A confirmed chronic neck and arm pain, paresthesia with numbness and arm weakness, low back pain, and leg pain which the panel majority finds is consistent with and supports the appellant’s evidence that he “generally avoids lifting altogether” because lifting and carrying worsens “the burning, shooting pains from my shoulders down my arms.”

The ministry notes that it considers self-reported restrictions in conjunction with the medical reports, but it has not changed its position upon receiving the appellant’s detailed appeal submissions. The panel majority has given significant weight to the appellant’s information because it is detailed, candid, and complete, and the legislation does not require an assessment of severity based solely on information from medical practitioners.

The appellant’s additional evidence supports the doctor’s descriptions of chronic, widespread pain that has not resolved despite spinal surgeries and prescriptions for up to 12 daily medications since 2019. The appellant’s additional evidence supports the doctor’s assessments of the need for continuous assistance and taking significantly longer across a variety of physical functions. The panel majority finds that the requirement for a severe impairment under section 2(2) of the EAPWDA is met because the totality of evidence demonstrates a severe physical impairment.

Restrictions to daily living activities

Arguments - Appellant

The appellant’s position is that his DLA are significantly restricted by the pain and mobility restrictions he experiences. The appellant argues that on a typical day “I suffer overwhelming pain, weakness, fatigue.” The advocate argues that the appellant’s physicians have endorsed significant restrictions with a range of physical tasks including personal care, shopping, housekeeping, preparing meals, and use of transportation.

Arguments - Ministry

The ministry’s position is that the information from the prescribed professional (Dr. A) does not establish that the appellant’s impairments significantly restrict DLA continuously or periodically for extended periods as required by the legislation. The ministry acknowledges that periodic or continuous restrictions were reported for some physical DLA including personal care, housework, shopping, and transportation (getting in and out of a vehicle).

However, the ministry was not satisfied that the reported restrictions are significant because “no information is provided to explain the type and degree of assistance you require” or how often “flare ups” of pain result in periodic restrictions. The ministry further argues that restrictions to meal preparation and transportation could not be confirmed because of conflicting information between the MR (“not restricted”), and the AR in which restrictions are reported.

Legislative requirement

Subsection 2(2)(b)(i) of the EAPWDA requires the ministry to be satisfied that, in the opinion of a prescribed professional, a severe impairment directly and significantly restricts a person’s ability to perform DLA either continuously, or periodically for extended periods. This means that restrictions to DLA must be confirmed by the appellant’s doctor or one of the practitioners named in the legislation such as a psychologist or psychiatric nurse.

The term “directly” means that the severe impairment must cause or result in restrictions to activities. The direct restriction must also be significant. This means that not being able to do DLA without a lot of help from other people, or support from an assistive device will have a large impact on the person’s life.

Finally, there is a time or duration factor. Under the legislation the restriction may be either *continuous* or *periodic*. Continuous means that the activity must generally be restricted all the time, while a periodic restriction is considered significant when it occurs frequently or for longer periods of time; for example, the activity is restricted most days of the week, or for the whole day on the days that the person cannot do the activity without help or support.

The panel views the ministry’s interpretation of the legislation as reasonable. Accordingly, where the evidence indicates that the appellant needs periodic assistance to manage an activity, it is appropriate for the ministry to require information on the type and frequency of the help or support that is needed. With that information, the ministry can assess whether the legislative requirement is met.

DLA are defined in section 2(1) of the EAPWDR and are also listed in the MR, with additional details in the AR. Therefore, the doctor or other practitioner completing these forms can indicate which, if any, DLA are significantly restricted by the applicant's impairments either continuously or periodically for extended periods and to provide additional details. It is important to note that the ability to work is not considered a DLA under the legislation.

Regarding how many DLA need to be impacted for the legislative requirements to be met, the BC Supreme Court decision *Hudson v. Employment and Assistance Appeal Tribunal* [2009 BCSC 1461] states that there must be evidence from a prescribed professional indicating a direct and significant restriction on at least two DLA. Not all DLA need to be affected by the severe impairment.

Panel majority decision - restrictions to DLA

The panel majority finds that the ministry's decision is not reasonable. The majority concluded that a severe physical impairment is established on the evidence. The majority further finds that there is sufficient evidence from prescribed professionals (Dr. A and Dr. C) to confirm that DLA are directly and significantly restricted by Degenerative disc disease; facet osteoarthropathy and myofascial pain; and the cervical and lumbar abnormalities identified by Dr. B in the consult reports.

Regarding specific DLA, the panel majority provides the following analysis:

Perform personal hygiene and self-care

Dr. A assessed periodic restrictions to personal care in both the MR and AR. In the MR, *personal self-care* is periodically restricted depending on "flare up of symptoms" and "degree of pain". In the AR, the appellant needs periodic assistance with dressing, grooming, and bathing.

Regarding the frequency of the restriction and how often the appellant needs help, Dr. A's comments confirm pain that is continuous and chronic and the appellant notes that he suffers from pain daily and the pain is exacerbated by physical movement. The appellant indicates needing "daily help" with dressing "such as helping get my arms through coats and tying up shoelaces."

The appellant reports needing help to get in and out of the shower, another activity that is generally done frequently. The panel majority is satisfied that the evidence from Dr. A with additional details from the appellant confirms that personal care is restricted for extended periods.

Shop for personal needs, and perform housework

The panel majority acknowledges the inconsistent information between the MR and AR. In the MR, shopping and housework are assessed as periodically restricted depending on “flare up of symptoms” and “degree of pain”. In the AR, the appellant requires continuous assistance with laundry, housekeeping, going to and from stores, and carrying purchases.

The majority gives more weight to the information in the AR which is consistent with the chronic nature of the appellant’s pain as reported by both the appellant and his doctors. Dr. A states that some days are more difficult depending on pain and the effects of medications, but also notes that the degree of pain precludes the appellant from working. While employability is not a DLA under the legislation, the appellant noted in the SR that his past employment involved everyday physical movements such as bending and lifting.

The evidence indicates the appellant is significantly restricted in his daily activities due to severe ongoing pain. Given the appellant’s mobility restrictions and avoidance of lifting and carrying any weight due to shoulder and arm pain especially, it follows that the appellant would always have difficulty with lifting and carrying groceries, doing laundry, and cleaning.

Regarding medication side effects, the appellant has been taking 6-12 daily medications at any given time, so it is reasonable to expect that he would experience drowsiness, lethargy (and other side effects reported by Dr. A) on a regular basis. The appellant requires the medications for partial (but not total) relief from pain but even with the medications the evidence is that his daily life is impacted by pain, slow movement, and avoidance of physical tasks.

In the appeal submissions, the appellant explains that his impairment prevents him from “generally going out into the community” and that he cannot adequately do housework or shop for basic needs due to the level of pain he experiences. The appellant reports needing assistance with weekly activities such as carrying groceries, washing floors, doing laundry, vacuuming, and performing other household chores that require bending, lifting, or basic mobility.

The appellant's evidence supports Dr. A's assessment in the AR that these activities are restricted continuously. The panel majority is satisfied that the evidence from Dr. A with additional details from the appellant confirms that the appellant is continuously restricted with shopping and housework.

Prepare own meals, and use public or personal transportation

The panel majority acknowledges the contradictory information between the MR and AR for *Meals and Transportation*. In the MR, Dr. A indicates that these DLA are not restricted. In the AR, food preparation and cooking are continuously restricted, and the appellant requires periodic assistance with getting in and out of a vehicle depending on his level of pain.

Based on the doctor's and appellant's descriptions of widespread and chronic pain, the majority accepts that the appellant suffers from daily pain that typically includes "burning shooting pains" in his upper body and arms. The majority gives more weight to the information in the AR and finds that Dr. A has confirmed significant restrictions with meals and with travelling by vehicle due to pain that makes physical movements very uncomfortable and challenging.

The appellant details the assistance he gets with meals; a friend prepares "daily meals" that the appellant heats up. Given that the appellant has restrictions with mobility and physical movement due to ongoing pain, and lethargy from his medications, it is reasonable to conclude that he needs regular assistance with getting in and out of a vehicle. The panel majority finds that there is enough evidence from Dr. A, with additional details from the appellant, to confirm that *Meals and Transportation* are significantly restricted either continuously or periodically for extended periods.

Summary

The assessments by Dr. A, with the appellant's additional information on the frequency and duration of the help he receives, indicates that at least two DLA are directly and significantly restricted by the appellant's pain conditions. The evidence indicates that the appellant is restricted with personal care, housework, shopping, meal preparation, and using a vehicle for transportation either continuously or periodically for extended periods. These legislative criteria are therefore met.

Restrictions to DLA have been confirmed by both Dr. A and the appellant's new doctor. While Dr. C does not detail specific DLA, they endorse the appellant's position that DLA are significantly restricted by a severe impairment that impacts the appellant's mobility. The panel majority finds that the ministry's decision was not reasonable because all the criteria in subsection 2(2)(b)(i) of the EAPWDA are established on the evidence.

Help with daily living activities

Arguments - Appellant

The appellant's position is that he cannot manage DLA without assistance from his family and friends. The appellant argues that he needs an assistive device (currently a manual wheelchair) for outdoor mobility, because walking even a short distance worsens his pain.

Arguments - Ministry

In the reconsideration decision, the ministry acknowledges Dr. A's information; the appellant gets help and support with DLA from family and friends and uses a wheelchair. The ministry argues that the criteria for help were not met because DLA are not significantly restricted. The ministry said it could therefore not determine that significant help from other persons, or help from an assistive device, is required.

Legislative requirement

Subsection 2(2)(b)(ii) of the EAPWDA requires that, because 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 to perform DLA. An "assistive device" is defined in section 2(1) of the EAPWDA as a device specifically 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.

Panel majority decision - help with daily living activities

The majority finds that the ministry was not reasonable in saying that the help criteria are not met. Dr. A confirms that the appellant relies on help from his family and friends and uses a manual wheelchair "when needed." In the appeal submissions, the appellant explains that he uses the wheelchair (and previously a scooter) for outdoor mobility because walking exacerbates his pain.

The appellant explains that a friend provides daily help with meals. The appellant receives help from family with weekly activities including laundry, shopping, and cleaning. The appellant lives with family members who assist him with regular activities such as putting on clothing and getting in and out of the shower. Dr. C endorses that the appellant's DLA are restricted "to the point where he requires significant assistance from others."

The legislation requires confirmation of direct and significant restrictions to DLA as a precondition for needing help to perform DLA. The panel majority found that the ministry's determination that significant restrictions to DLA were not established on the evidence was not reasonable for the reasons stated earlier.

Based on the totality of evidence including the appeal submissions and endorsement by the appellant's new doctor, the panel majority finds that the ministry's decision is not a reasonable application of the legislation in the appellant's circumstances. The criteria for help under subsection 2(2)(b)(ii) of the EAPWDA are established on the evidence.

Panel majority conclusion

The panel majority finds that the reconsideration decision is not reasonably supported by the evidence. The appellant meets all of the requirements for PWD designation including having a severe physical impairment that significantly restricts DLA either continuously or periodically for extended periods. The appellant requires significant help from another person as well as an assistive device (wheelchair) to perform DLA. Restrictions to at least two DLA including shopping, housekeeping, and meal preparation were confirmed by the appellant's doctors with additional details from the appellant.

The reconsideration decision is rescinded based on the panel majority reasons. The panel majority decision is referred back to the ministry for a determination on the amount of disability assistance the appellant can receive. The appellant is successful with his appeal.

Dissenting Reasons

One panel member would confirm the ministry's decision for the following reasons.

Dissent

Part 1, Section 2 (2) (a & b), (3) (a & b), of the EAPWDA defines both daily living activities in relation to severe physical and mental impairment as determined by a medical practitioner or nurse practitioner and was in the opinion of a prescribed professional. Section 2 (a) defines what is a prescribed professional.

Key to my dissent is that the legislation is clear a prescribed professional must provide an opinion that an appellant's severe impairment directly and significantly restricts their daily living activities (DLA), continuously or periodically for extended periods. In this case, the appellant's physician, Dr A, is the main prescribed professional who has known the appellant since 2015. Therefore, prescribed professional completing these forms can indicate which, if any, DLA are significantly restricted by the appellant's impairments either continuously or periodically for extended periods. There is no dispute the medical professional has determined the appellant has a degenerative disk disease but as stated by the Ministry, a diagnosis of a serious medical condition alone does not solely justify or deny PWD determination.

There is not enough evidence from a prescribed professional to establish that the appellant's impairments significantly restrict his ability to manage DLA either continuously or periodically for extended periods, as required under section 2 (2) (b) (i) of the EAPWDA. What we read in this appeal was mostly what the appellant had to say regarding his own medical issues.

The legislation does not allow the panel, in my opinion, to take a substantive weighting of a medical condition from an appellant unless confirmed by a professional. This would be a difficult analysis to replicate in other cases moving forward when having to deny an appellant's "evidence" without backup.

I suggest that perhaps the resolution to such a disparity with an appeal like this should be an ability for the panel to redirect the appellant back to their long-term medical professional, Dr A, to confirm or deny their added medical information.

Dr A, who has known the appellant since 2015, reported in the PR that the appellant is able to walk 4 or more blocks unaided on a flat surface, climb 5 or more steps unaided, lift 5 to 15 lbs., and remain seated for 2 to 3 hours.

Periodic, as described by the medical professional is not severe or significant (as per the legislation). Dr A described periodic as when a "flare up" might happen. Flare ups are treated by the medical professional with various medicine and drugs so a change in treatment can eliminate a flare up. While the medical professional did state there would be a need for a power wheelchair and a hospital bed it would not be until after the "next" surgery. At that time the appellant is free to reapply for a PWD.

Although the appellant stated that he has a new physician, as of this year, who the appellant says can verify the severity of his impairment I have to question the submission

given that the other submission is from a professional who has known the appellant for upwards of 8 years, and therefore would have all the appellants history. We are faced with accepting a professional who has provided us with detailed information regarding this appellant's condition vs a professional who signed off commentary written by the appellant and has met with the appellant once this year. I am unable to give much weight to the approval from this second medical professional.

This is not to say the appellant isn't telling us the truth. In fact, he might very well be in dire straits physically, but the legislation is clear that any diagnosis should be accepted from a professional not an appellant. To properly assess this situation, I believe we should have the ability to return to the original professional and allow him to determine the diagnosis with the additional information from the appellant. As a panel member I am not a medical professional, so I am unable to make such a determination and suggest it is not reasonable to place substantial weight on "evidence" provided by an appellant.

Schedule – Relevant Legislation

EAPWDA

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).

EAPWDR

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.

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
Margaret Koren

Signature of Chair

Date (Year/Month/Day)
2023/02/27

Print Name
Perihan (Iris) Sucu

Signature of Member

Date (Year/Month/Day)
2023/02/27

Print Name
Barbara Sharp (Dissenting)

Signature of Member

Date (Year/Month/Day)
2023/02/27