

Part C – Decision Under Appeal

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the ministry) Reconsideration Decision dated February 1, 2023 which found that the appellant did not meet all of the statutory requirements of section 2 of the *Employment and Assistance for Persons with Disabilities Act* for designation as a Person with Disabilities (PWD). The ministry found that the appellant met the age requirement, that he has an impairment that is likely to continue for at least two years and he has a severe physical impairment. However, the ministry was not satisfied that the evidence established that:

- the appellant's daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and
- as a result of these restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

In addition, the ministry found that it had not been demonstrated that the appellant is one of the prescribed classes of persons who may be eligible for PWD designation on alternative grounds, which includes: a person who is enrolled in palliative care; a person who has at any time been determined eligible for At Home Program payments through the Ministry of Children and Family Development; a person who has at any time been determined eligible by Community Living BC for community living support; and a person who is considered disabled under section 42(2) of the *Canadian Pension Plan Act*.

Part D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act (EAPWDA), section 2

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), section 2

Part E – Summary of Facts***The evidence before the ministry at the time of the Reconsideration Decision included:***

1. The appellant's Persons with Disabilities ("PWD") Application comprised of:
 - The Applicant Information and Self-report ("SR") dated July 18, 2022;
 - The Medical Report ("MR") and Assessor's Report ("AR") dated June 29, 2022 prepared by the appellant's general practitioner ("GP") of 20-30 years, who treated the appellant 2-10 times in the 12 months prior to completing the application. The PWD application was completed by an office interview with the appellant and file/chart information.

2. Request for Reconsideration (RFR), signed and dated August 29, 2023. The appellant described his journey from an athlete in high school to vocational retraining to accommodate his knee injury. The appellant also stated, in part, the following:
 - He is alone and has no one to rely on for help. He is forced to manage his DLA on his own even when in pain.
 - He experiences a severe knee disability, depression and anxiety.
 - He used anti-depressants for depression, but the side-effects were severe, and he had to stop.
 - He has been approved for knee surgery but must lose weight first. Until then nothing can be done.
 - Mental health issues stand in the way of completing DLA independently (such as doing dishes, laundry and changing sheets take enormous effort).
 - There is no cartilage left on the knee so every step is painful and get worse on rainy or overcast days.
 - He is sedentary most of the time.
 - When his knee buckles it is violent and painful.
 - He can only sit as long as needed if the leg is not extended or bent. This means he cannot sit on a bus because there is not enough room for him to adjust his leg as needed.

Diagnoses

In the MR, the GP diagnosed the appellant with severe Osteoarthritis of the right knee (onset not declared).

Health History

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

- 3 prior knee surgeries.
- Only effective treatment would be a knee replacement and he's deemed too young for this surgery.
- Knee pain wakes him up from sleep.
- Unable to fully straighten his knee.
- Difficulty going down-stairs.
- Can't stand for prolonged periods of time.
- His knee will often lock causing swelling and decreased movement.
- Has difficulty exercising – for example, can't ride a bike.
- No medication or treatment that interferes with the ability to perform DLA has been prescribed to the appellant.
- The appellant requires prothesis or aids for his impairment in the form of a crutch or cane for stability and frequently uses a knee sleeve.

Degree and Course of Impairment

In the MR, the GP indicated that the appellant's impairment is likely to continue for two or more years from the date of the application.

Physical Impairment

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

- He can walk 1-2 blocks and climb 2-5 steps unaided, lift 5-15 lbs and remain seated without limitation.

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

- The appellant lives alone.
- He uses an assistive device and takes significantly longer to walk indoors/outdoors and climb stairs.
- He uses an assistive device while standing.
- He requires continued assistance with lifting: "not able to lift heavy objects".

In the SR, the appellant stated the following:

- His right knee has limited range of motion and swelling.
- He cannot walk down stairs in a normal manner. Even walking down a decline causes pain and discomfort.
- He uses stair rails for support and steps one step at a time. Going up is better but he still uses the rail.
- He cannot walk for more than 15 minutes at a time and that is done slowly.
- He cannot sit for longer than 20 minutes because he cannot bend his knee that long.
- When standing still, he supports himself with his left leg.
- His left knee can lock, and the pain lasts for a couple of weeks.
- His right knee buckles without warning and in a violent fashion. This takes a couple weeks to heal. This limits his range of motion and causes swelling. When this occurs, he must use crutches to walk or even shower.

Mental Impairment

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

- There is no diagnosis of a mental impairment.
- There are no difficulties with communication.
- There are significant deficits with cognitive and emotional function in the areas of memory and emotional disturbance: "depression and anxiety resulting from his severe disability".

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

- The abilities to reading and hearing are good. The abilities to speak and write are satisfactory.
- There are moderate impacts to cognitive and emotional functioning in the areas of bodily functions, emotion, motivation and motor activity. All other listed areas in this category have no impacts.
- Under the DLA of Shopping, the tasks of 'reading labels and prices', 'making appropriate decision', and 'paying for purchases' are completed independently.
- Under the DLA of Paying rent/bills and Medications, all tasks are completed independently.
- The entire section related to Social Functioning was left blank.

In the SR, the appellant stated that his knee issues contribute to feelings of depression.

Daily Living Activities

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

- All listed tasks under all listed DLA are performed independently except as follows:
 - Under the DLA of Personal Care: dressing is performed independently and requires periodic assistance. The type, frequency and duration of the assistance required was not described. Comment: “has trouble getting off chairs and out of bed”.
 - Under the DLA of Basic housekeeping: basic housekeeping is performed independently and requires the use of crutches.
 - Under the DLA of Shopping: carrying purchases home is performed independently and requires periodic assistance. The type, frequency and duration of the assistance required was not described. Comment: “can’t carry heavy bags”. Going to and from stores is performed independently and requires an assistive device. The device was not described. Comment: “walks slow”.
 - Under the DLA of Transportation: getting in/out of a vehicle is performed independently and requires periodic assistance. The type, frequency and duration of the assistance required was not described. Comment: “difficulty exiting low car”. Using public transit is performed independently and requires an assistive device. Comment: “uses crutch”.
 - “Can only stand for short periods of time”.

In the SR, the appellant stated the following:

- It is difficult to get out of bed and standing up from a desk or couch.
- Gets woken up from sleep by an uncomfortable knee.
- Showering is difficult because he has a tub and has to lift his left over the tub’s edge. A step-in shower would be easier.
- He moves around carefully.
- The swelling reduces motion and makes it difficult to reach his foot. This causes difficulty with putting on socks, tying shoes and putting on pants.
- Every step affects his knee but if he walks slowly, he can avoid most instances of his knee giving out.
- He walks backwards to strengthen his knee.
- Standing is a problem and he needs to sit after few minutes. Moving around is better than standing. Walking after a period of standing takes a while as the knee has to ‘warm up’.

Help

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

- Requires crutches and a cane as prostheses or aids for his impairment.

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

- Help with DLA is provided by friends: “When his knee is unstable, he may need help with grocery, shopping, laundry, cooking and cleaning”.
- ‘Assistance provided through the use of Assistive Devices’ - crutches.
- ‘Assistance provided by assistance animals’ – “no”.

In the SR, the appellant indicated that help is needed but he as no one. Therefore, he has no choice but to bear the pain to complete his DLA.

Evidence on Appeal

The appellant submitted a 3-page Notice of Appeal (NOA) dated February 7, 2023, which also included a photograph of his knee that appears bruised and swollen. In the NOA the appellant stated, in part, the following:

- His life has been impacted every day for the past 20 years.

- He has bad and worse days. A good day is when his knee stays in place, and he does not have to walk more than a couple of minutes.
- He sits and walks 2 meters to the kitchen and 4 meters to the washroom.
- His knee 'falls out' which renders him unable to step normally until it 'falls' back. This happens about once per year, and it takes 2 months to recover.
- He does things on his own and has trouble asking for help.
- He has issues with his shoulder, elbow and right hand and has been trying to get that diagnosed.
- He does not talk to anyone or see anyone. He sits, takes short walks with his dog and if he has energy he will apply for jobs.
- He has gained 100 lbs over the past 10 years. He cannot lose weight because all he can do is walk slowly.

Evidence Prior to the Hearing

Prior to the hearing the appellant submitted the following:

I will not be attending the meeting today.

I have no hope that I will receive any help and I am on my own, unable to do any physical job that most would be able to do and unable to secure employment using my inefficient brain and degree I obtained in 2021.

I have also just found out that the diabetes on my father's side is now showing in me, and the heart condition that killed my mom, aunt, and sister at a young age is now in me. I have no doubt that I was able to keep these diseases at bay until now because I was able to remain active, (not to mention a doctor just yesterday suggested I get tested for ADHD, which is a whole other issue.) For the last five years I have not been able to do anything but walk, and it gets worse each year. My days are likely numbered, and I am heading to be homeless.

I appreciate you providing me with information, but I have no support outside of the government and I just see no way out without the government's help, and I see no possible way that they will help. Perhaps if I was 67 and not 47.

Evidence at the Hearing

At the hearing, the ministry relied on its reconsideration decision and added that there was no indication in the PWD application that the appellant requires significant help.

Admissibility of Additional Information

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

The ministry did not object to the admission of the submission made prior to the hearing.

The panel found that the NOA and the submission prior to the hearing provided additional detail or disclosed information that was provides a full and fair disclosure of all matters related to the decision under appeal. The panel has admitted this new information as being in accordance with s. 22(4) of the *Employment and Assistance Act*. However, this information provided in these submissions was not confirmed by a medical practitioner. As such the panel places little weight on this information.

Part F – Reasons for Panel Decision

The issue on appeal is whether the ministry's reconsideration decision, which found that the appellant is not eligible for designation as a PWD, was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant.

The ministry found that the evidence does not establish that the appellant's the severe physical impairment, in the opinion of a prescribed professional, directly and significantly restricted DLA either continuously or periodically for extended periods. Also, as a result of those restrictions, it could not be determined that the appellant requires the significant help or supervision of another person.

The relevant legislation can be found in Appendix A.

Panel Decision

The panel finds that employability is not a consideration for eligibility for PWD designation because employability is not a criterion in section 2(2) of the EAPWDA nor is it listed among the prescribed daily living activities in section 2 of the EAPWDR.

Restrictions in the ability to perform DLA

Section 2(2)(b)(i) of the EAPWDA requires that the minister be satisfied that in the opinion of a prescribed professional, a severe mental or physical impairment directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods. While other evidence may be considered for clarification or support, the ministry's determination as to whether or not it is satisfied that the legislative criteria are met, is dependent upon the evidence from prescribed professionals.

The term "directly" means that there must be a causal link between the severe impairment and the restriction. The direct restriction must also be significant. Finally, there is a component related to time or duration – the direct and significant restriction may be either continuous or periodic. If periodic, it must be for extended periods. Any analysis of periodicity must also include consideration of how frequently the activity is restricted. All other things being equal, a restriction that only arises once a year is less likely to be significant than one that occurs several times a week. Accordingly, in circumstances where the evidence indicates that a restriction arises periodically, it is appropriate for the ministry to require evidence of the duration and frequency of the restriction to be "satisfied" that this legislative criterion is met.

DLA are defined in section 2(1) of the EAPWDR and are listed in both the MR and the AR sections of the PWD application with the opportunity for the prescribed professional to check marked boxes and provide additional narrative. DLA, as defined in the legislation, do not include the ability to work.

The appellant argued that his knee pain and limited range of motion and movement prevent him from completing his DLA independently.

The ministry argued that considering the appellant's medical history, it is reasonable to expect that he would encounter some restrictions to the ability to perform DLA and require assistance as a result. However, the ministry argued that there is not enough evidence from the GP to confirm that the appellant's impairment significantly restricts his ability to perform his DLA continuously or periodically for extended periods. Therefore, the legislative criteria have not been met.

In its reconsideration decision the ministry noted the following:

- In the MR, the GP indicates the appellant has not been prescribed medication/treatment that interferes with the ability to perform daily living activities.
- In Section C of the AR, the GP notes the use of a crutch to manage basic housekeeping, using public transit, and going to and from stores. Further, periodic assistance from another person is required to manage dressing, carrying purchases home and getting in and out of a vehicle. The ministry acknowledges that the appellant has certain limitations resulting from knee pain and requires periodic assistance with dressing, carrying purchases home and getting in and out of a vehicle. However, the frequency and duration of these periods are not described to determine if they represent a significant restriction to the overall level of functioning. For example, a restriction that only arises once a month is less likely to be significant than one which occurs several times a week.
- In the RFR the appellant stated that “If I could send someone to get groceries or help with daily activities, I would, but I don’t and therefore have no options but to do it myself. There are times when I can barely walk but need to do things, and so I do them. I suck it up and do it, like I have done for 20 years”. The ministry finds the assessments provided by the GP are indicative of a moderate level of restriction.
- The information provided by the GP does not establish that a severe impairment significantly restricts daily living activities continuously or periodically for extended periods.

The ministry concluded that the assessments provided by the GP are indicative of a moderate level of restriction. The information provided by the GP does not establish that a severe impairment significantly restricts daily living activities continuously or periodically for extended periods.

The information provided by the appellant at appeal and at the hearing allowed for a better understanding of his impairment and how the impairment impacts his ability to complete his DLA. In this case, the evidence provided by the GP regarding DLA differs from the information provided by the appellant. However, the legislation requires that it is the opinion of a prescribed professional helps confirm if the criteria for DLA has been met. The panel notes that at appeal and at the hearing, no additional information was provided by the GP or any other prescribed professional.

The panel considered the evidence as presented by the GP. The panel finds the ministry’s analysis of the evidence and its conclusion is reasonable based upon the evidence before it. The panel finds that the evidence does not provide enough information to support a determination that DLA are continuously or periodically restricted for extended periods pursuant to the legislation. For example, in the MR the GP indicated that the appellant is periodically restricted with performing ‘getting in/out of vehicle’, ‘carrying purchases home’ and ‘dressing’. However, no information was provided regarding the type and frequency of the help required. Also, it was not explained how a task can be performed both independently and requiring periodic assistance.

With tasks that require the uses of an assistive device, such as ‘basic housekeeping’, the GP indicated that this task is performed independently with a crutch. The panel finds that ability to independently complete a task with the use of a crutch is not deemed to be a significant restriction. Similarly, the GP indicated that ‘going to/from stores’ is performed independently and uses an assistive device. However, the GP indicated that the assistive device is ‘walks slow’. The panel finds that walking slow is not an assistive device. The panel also notes that the GP indicated that the majority of the tasks listed under each DLA are completed independently (with the exception of basic housekeeping). Though the panel empathizes with the appellant’s situation, the panel must determine the reasonableness of the ministry’s decision. To do this the panel considers the evidence and the legislative requirements. In this case, the GP did not provide enough evidence to confirm that the appellant’s DLA are restricted due to a causal link to his impairment.

As such, the panel finds that the evidence provided by the prescribed professional did not describe or indicate that a severe impairment restricts the appellant's ability to perform DLA either continuously or periodically for extended periods. Given the evidence as a whole, the panel finds that the ministry reasonably concluded that the evidence does not establish that an impairment significantly restricts DLA continuously or periodically for extended periods, pursuant to Section 2(2)(b)(i) of the EAPWDA.

Help to perform DLA

Section 2(2)(b)(ii) of the EAPWDA requires that, *as a result of direct and significant restrictions in the ability to perform DLA*, a person requires help to perform those activities. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform DLA.

The appellant indicated that he requires assistance with DLA but has not help.

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

Given that confirmation of direct and significant restrictions with DLA is a precondition of the need for help criterion and because the panel found that the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established, the panel also finds that the ministry reasonably concluded that it cannot be determined that the appellant requires help to perform DLA as required by section 2(2)(b)(ii) of the EAPWDA.

Conclusion

The panel finds that the ministry's reconsideration decision, which determined that the appellant was not eligible for PWD designation, was reasonably supported by the evidence and is a reasonable application of the applicable enactment, and therefore confirms the decision. The appellant is not successful on appeal.

Appendix A

The criteria for being designated as a PWD are set out in Section 2 of the EAPWDA as follows:

Persons with disabilities

2 (1) In this section:

"assistive device" means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform;

"daily living activity" has the prescribed meaning;

"prescribed professional" has the prescribed meaning.

(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the

purposes of this Act if the minister is satisfied that the person is in a prescribed class of persons or that the person

has a severe mental or physical impairment that

(a) in the opinion of a medical practitioner or nurse practitioner is likely to continue for at least 2 years, and

(b) in the opinion of a prescribed professional

(i) directly and significantly restricts the person's ability to perform daily living activities either

(A) continuously, or

(B) periodically for extended periods, and

(ii) as a result of those restrictions, the person requires help to perform those activities.

(3) For the purposes of subsection (2),

(a) a person who has a severe mental impairment includes a person with a mental disorder, and

(b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires

(i) an assistive device,

(ii) the significant help or supervision of another person, or

(iii) the services of an assistance animal.

(4) The minister may rescind a designation under subsection (2).

The EAPWDR provides as follows:

Definitions for Act

2 (1) For the purposes of the Act and this regulation, "**daily living activities**" ,

(a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following

activities:

(i) prepare own meals;

(ii) manage personal finances;

(iii) shop for personal needs;

(iv) use public or personal transportation facilities;

(v) perform housework to maintain the person's place of residence in acceptable sanitary condition;

(vi) move about indoors and outdoors;

(vii) perform personal hygiene and self care;

(viii) manage personal medication, and

(b) in relation to a person who has a severe mental impairment, includes the following activities:

(i) make decisions about personal activities, care or finances;

(ii) relate to, communicate or interact with others effectively.

(2) For the purposes of the Act, "**prescribed professional**" means a person who is

(a) authorized under an enactment to practise the profession of

- (i) medical practitioner,
- (ii) registered psychologist,
- (iii) registered nurse or registered psychiatric nurse,
- (iv) occupational therapist,
- (v) physical therapist,
- (vi) social worker,
- (vii) chiropractor, or
- (viii) nurse practitioner, or

(b) acting in the course of the person's employment as a school psychologist by

- (i) an authority, as that term is defined in section 1 (1) of the Independent School Act, or
- (ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the School Act, if qualifications in psychology are a condition of such employment.

Alternative grounds for designation under section 2 of Act

2.1 The following classes of persons are prescribed for the purposes of section 2 (2) [*persons with disabilities*] of the Act:

(a) a person who is enrolled in Plan P (Palliative Care) under the Drug Plans Regulation, B.C. Reg. 73/2015;

(b) a person who has at any time been determined to be eligible to be the subject of payments made through the Ministry of Children and Family Development's At Home Program;

(c) a person who has at any time been determined by Community Living British Columbia to be eligible to receive community living support under the *Community Living Authority Act*;

(d) a person whose family has at any time been determined by Community Living British Columbia to be eligible to receive community living support under the *Community Living Authority Act* to assist that family in caring for the person;

(e) a person who is considered to be disabled under section 42 (2) of the *Canada Pension Plan*

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Part G – Order

The panel decision is: (Check one) Unanimous By Majority

The Panel Confirms the Ministry Decision Rescinds the Ministry Decision

If the ministry decision is rescinded, is the panel decision referred back to the Minister for a decision as to amount? Yes No

Legislative Authority for the Decision:

Employment and Assistance Act

Section 24(1)(a) or Section 24(1)(b)

Section 24(2)(a) or Section 24(2)(b)

Part H – Signatures

Print Name
Neena Keram

Signature of Chair

Date: (Year/Month/Day)
2023/03/01

Print Name
Maryam Majedi

Signature of Member

Date: (Year/Month/Day)
2023/03/01

Print Name
Jan Broocke

Signature of Member

Date: (Year/Month/Day)
2023/03/01