

Part C – Decision Under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Poverty Reduction (“ministry”) dated January 5, 2023, in which the ministry denied the appellant designation as a person with disabilities (“PWD”) under the Employment and Assistance for Persons with Disabilities Act (“EAPWDA”). The ministry found that the appellant met the requirements for age (over 18) and duration (impairment to continue for at least 2 years) and was satisfied that the appellant had a severe physical impairment. The ministry was not satisfied that:

1. the appellant has a severe mental impairment;
2. the appellant’s impairment significantly restricts her ability to perform daily living activities continuously or periodically for extended periods; and
3. the appellant requires significant help or supervision of another person to perform daily living activities restricted by her impairment.

The ministry also found that the appellant is not in one of the prescribed classes of people who may be eligible for PWD designation on the alternative grounds set out in section 2.1 of the Employment and Assistance for Persons with Disabilities Regulation (“EAPWDR”). As there was no information or argument provided for PWD designation on alternative grounds, the panel considers that matter not to be at issue in this appeal.

Part D – Relevant Legislation

EAPWDA, section 2
EAPWDR, section 2

Full text of the legislation is provided in the Schedule of Legislation after the reasons.

Part E – Summary of FactsEvidence Before the Ministry at Reconsideration:

The appellant is over 18 years of age. In support of her application, she submitted a medical report and an assessor report completed by a nurse practitioner, and her self-report. The appellant provided an additional typed submission in the Request for Reconsideration.

Medical Report:*Diagnoses:*

The appellant has been diagnosed with HIV, a mood disorder, osteoporosis, and kyphosis and experiences symptoms of related low mood and back pain.

Health History:

The nurse practitioner (“NP”) states that these conditions impede daily function. The appellant cannot sit for longer than one hour, and sometimes less, and she cannot drive because she cannot twist or shoulder check. The appellant is unable to lift and carry 5 lbs., as it results in back pain. The NP reports that the appellant says it “takes her a long time to complete general housekeeping” and “states does 1 chore a day (i.e. clean one room) due to limitations.”

The NP indicates that the appellant does not require any prostheses or aids for their impairment.

Functional Skills:

The NP indicates that the appellant can walk 2 to 4 blocks “slow”, climb 5+ steps “slow”, lift under 5 lbs. and remain seated for less than 1 hour. The NP indicates significant deficits with cognitive and emotional function, specifying “low mood.”

Daily Living Activities:

The NP states that the appellant’s impairment directly restricts her ability to perform daily living activities. The NP identifies continuous restrictions in basic housework, daily shopping, mobility outside the home and use of transportation. They comment that restrictions are “related to slow movements/mobility, inability to safely drive, & length of time to complete basic housework.”

In answer to the question of what assistance the appellant needs with daily living activities, the NP states: “No assistance for housework and mobility – this is just restricted due to pain & movement & time to complete. Unable to drive. So relies on public transit.”

Assessor Report:

The NP indicates that the appellant lives with family, friends, or caregiver, and reiterates that the appellant’s mental and physical impairments are low mood and mobility restrictions due to osteoporotic fractures in her back.

Mobility and Physical Ability:

The NP indicates that the appellant takes significantly longer than typical in all areas except for standing, which is independent. The appellant takes longer than typical to walk indoors and outdoors, climb stairs, lift, carry and hold, with the NP noting that the appellant is able to lift, carry and hold 5 lbs. without pain.

Cognitive and Emotional Functioning:

The NP indicates that the appellant's low mood and osteoporotic back fractures have minimal impacts on sleep, with sleep disturbance noted, and emotion.

Daily Living Activities:

The NP indicates that the appellant is independent in the aspects of daily living activities listed on the form, except the following, which take significantly longer than typical:

- transfers in and out of bed and on and off chairs
- laundry: "needs to take breaks"
- basic housekeeping: "takes long time & spaces throughout week"
- going to and from stores: "relies on transit & slow movements"
- carrying purchases home: "unable to carry more than 5 lbs."
- food preparation and cooking: "takes breaks to complete"

Assistance Provided for Applicant:

The NP indicates that help required for daily living activities is provided by family. The sections for comments or description of assistance that would be necessary are left blank.

Self-Report:

The appellant describes her disability as back bone fractures (osteoporosis), HIV and back pain. She describes limited mobility and restricted movement for driving and walking, and says she has problems sitting longer than one hour and lifting more than 5 lbs. She says she experiences distress because of the pain and inability to work.

Request for Reconsideration form:

The appellant says that medication for HIV resulted in osteoporosis, and many fractures in her backbones. The fractures cause "indescribably pain" to the point where, some days, she cannot get out of bed or prepare food. She says she depends on the help of family and friends for daily living activities, and needs help from family and friends every day "for any single move, such as medical appointments, preparing food, shopping, laundry, cleaning my living area and plates, etc."

Additional Evidence:

Written submission:

On appeal the appellant provided a statement titled "Reason for Appeal", part of which is argument. She states that due to irreversible backbone fractures she is not able to perform daily

living activities, including preparing meals, shopping for personal needs, using personal transportation, performing housework, moving indoors and outdoors, and “performing hygiene and self care.” She repeats that her family and friends help her for “every single move for my daily living activities,” and without their help, she would have to be enrolled in palliative care or a health care home program. She does not want to reveal her situation to outside caregivers because of her HIV status.

Admissibility of Additional Evidence:

The panel finds that the appellant’s written submission is admissible under section 22(4) of the Employment and Assistance Act. While it repeats some information found elsewhere in the evidence, it provides some additional information about specific daily living activities that the appellant says she cannot perform. Therefore, the panel finds that the additional evidence is reasonably necessary for the full and fair disclosure of all matters relating to the decision under appeal.

Part F – Reasons for Panel Decision

The issue on appeal is whether the ministry's reconsideration decision, in which the ministry found the appellant to be ineligible for PWD designation under the EAPWDA, was reasonably supported by the evidence or was a reasonable application of the legislation in the appellant's circumstances. The ministry found that the appellant met the requirements for age (over 18) and duration (impairment to continue at least two years) and was satisfied that the appellant has a severe physical disability. The ministry was not satisfied that:

- the appellant has a severe mental disability;
- the appellant's impairment, in the opinion of a prescribed professional, directly and significantly restricts her ability to perform daily living activities either continuously or periodically for extended periods; and
- as a result of restrictions caused by the impairment, the appellant requires an assistive device, the significant help or supervision of another person, or the services of an assistance animal to perform daily living activities.

Appellant's Position:

The appellant maintains that, as a result of her physical disabilities, diagnosed as HIV, and osteoporosis and kyphosis with back pain, her ability to perform activities of daily living is directly and significantly restricted. In particular, the appellant says that she is not able to prepare meals, shop for personal needs, use transportation, perform housework, move about indoors and outdoors and perform personal care. She says that her family and friends help her with all daily living activities.

Ministry Position:

The ministry acknowledges that the appellant has some restrictions in daily living activities as a result of the severe physical impairment. However, the ministry maintains that there is insufficient evidence from the NP to establish that the appellant's ability to perform daily living activities is directly and significantly restricted continuously or periodically for extended periods. The ministry says that the majority of daily living activities are performed independently and do not require help from others.

As it was not established that daily living activities are significantly restricted, the ministry says that it cannot determine that the appellant needs significant help from other people, or an assistive device.

Panel Decision:

To find a person eligible for PWD designation under the EAPWDA, the ministry must be satisfied that the appellant has met all the requirements in section 2 of the legislation. The ministry was satisfied that the appellant met the criteria for age and duration, and that the appellant has a severe physical impairment. However, a severe mental or physical impairment is only one of the criteria in the EAPWDA. A serious medical condition can be a severe

impairment, without directly and significantly restricting the person's ability to perform the daily living activities specified in the EAPWDR, or without the person needing help to perform those activities.

Severe Mental Impairment:

As the appellant does not raise the issue of a severe mental impairment in the Reason for Appeal, the panel considers that the appellant does not dispute the ministry's determination that she does not have a severe mental impairment. In any event, the panel finds that the ministry reasonably determined that the appellant does not have a severe mental impairment. The NP indicates that the appellant has a low mood because of her medical conditions and physical impairment. In the assessor report, the NP provides no responses about the impact on cognitive and emotional functioning other than with sleep and emotions, where they indicate minimal impact. While the panel acknowledges that the appellant experiences low mood, the panel finds that the evidence does not indicate a severe mental impairment.

Restrictions to Daily Living Activities:

Under section 2(2)(b)(i) of the EAPWDR, if the ministry is satisfied that a person has a severe mental or physical impairment, the ministry must also be satisfied that, in the opinion of a prescribed professional, the appellant's ability to perform daily living activities is directly and significantly restricted by the severe impairment, either continuously or periodically for extended periods. Not all daily living activities must be directly and significantly restricted. However, in *Hudson v. British Columbia (Employment and Assistance Appeal Tribunal)*, 2009 BCSC 1461, the court stated that "there must be evidence from a prescribed professional indicating a direct and significant restriction on at least two daily living activities."

Under the EAPWDR section 2(1)(b), for a person who has a severe physical or mental impairment, "daily living activities" means:

- prepare own meals;
- manage personal finances;
- shop for personal needs;
- use public or personal transportation facilities;
- perform housework to maintain the persons place of residence in acceptable sanitary conditions;
- move about indoors and outdoors;
- perform personal hygiene and self-care;
- manage personal medication.

The ministry is satisfied that the functional skill limitations described by the NP demonstrate a severe degree of physical impairment. In the reconsideration decision, the ministry noted that the appellant takes significantly longer to walk indoors and outdoors and climb stairs. The appellant is unable to lift, carry and hold items weighing 5 lbs or more, without pain. She cannot sit for more than one hour, and sometimes less. The NP indicates that the appellant has been prescribed treatment that interferes with her ability to perform daily living activities. Specifically,

prescribed treatment is to prevent and slow down further osteoporotic fractures, and “pain control for symptom management.”

The categories of daily living activities in the ministry forms do not match exactly the categories in the legislation. However, the panel finds that, in the medical report and the assessor report, the nurse practitioner has confirmed continuous, significant restrictions in the following daily living activities set out in the EAPWDR, because of the severe physical impairments described above:

- shop for personal needs: the appellant cannot lift, carry, or hold items weighing 5 lbs. or more, and moves very slowly while shopping
- use public or personal transportation facilities: the appellant cannot drive a vehicle because she cannot twist or turn her head; she cannot sit for more than an hour and sometimes less
- perform housework to maintain the person’s place of residence in acceptable sanitary conditions: the appellant takes significantly longer than typical to perform housework; she spaces housework throughout the weeks, can do only one chore a day, and takes breaks while doing that one task
- move about indoors and outdoors: the appellant takes significantly longer than typical to walk indoors and outdoors, climb stairs and transfer in and out of bed and chairs.

Therefore, the panel finds that, in the opinion of a prescribed professional, the appellant’s severe physical impairment directly, significantly, and continuously restricts her ability to perform 2 or more daily living activities.

Help to Perform Daily Living Activities:

The ministry determined that, as it was not established that daily living activities were significantly restricted, it could not be determined that the appellant required significant help. The panel has found that the appellant’s ability to perform daily living activities is significantly restricted. However, under section 2(2)(b)(ii) and(3)(b) of the EAPWDR, the ministry must be satisfied that in the opinion of a prescribed professional the appellant needs an assistive device, the significant help or supervision of another person, or the services of an assistance animal to perform those activities.

The NP has not consistently confirmed that the appellant needs help. In fact, in answer to the question in the medical report “What assistance does your patient need with Daily Living Activities?” the nurse practitioner writes: “no assistance for housework & mobility – this just restricted due to pain & movement.” They also indicate that the appellant does not need any prostheses or aids for their impairment. In the assessor report, in the section of the form where the prescribed professional is asked to explain or describe the type and amount of assistance required, the nurse practitioner writes only of the appellant’s need to take breaks or go slowly.

In the section of the assessor report titled “Assistance Provided for Appellant,” the nurse practitioner does tick a box to indicate that help required for daily living activities is provided by family. However, the panel finds that, as the NP has stated in the medical report that no

assistance is required, there is no opinion from a prescribed professional that the appellant requires help to perform daily living activities. The appellant's evidence is that she receives considerable help from family and friends every day. Under the legislation the ministry must have the opinion of a prescribed professional that the appellant needs the significant help or supervision of another person or needs an assistive device or the services of an assistance animal. The appellant's statement is not enough.

Given the description of the appellant's severe physical impairment, and the panel's finding that, in the opinion of the NP, the appellant is significantly restricted in performing daily living activities, it is hard to understand the NP's comment that no assistance, in the form of help from another person, or an assistive device, is required. However, that is the evidence, and therefore, the panel finds that the ministry's conclusion that the criterion in section 2(2)(b)(ii), the need for assistance, is not met, is reasonably supported by the evidence.

Conclusion:

The panel confirms the ministry's reconsideration decision that found the appellant ineligible for PWD designation.

The ministry determined that the appellant met the criteria for age (over 18) and duration (impairment to continue at least two years) and was satisfied that the appellant has a severe physical impairment. The ministry was not satisfied that the appellant has a severe mental impairment, that the appellant's physical impairment directly and significantly restricts her ability to perform daily living activities, or that, as a result, she needs significant help or supervision from another person, or an assistive device.

The panel finds that the ministry was reasonable in determining that the appellant does not have a severe mental impairment. While the panel finds that the ministry was not reasonable in finding that appellant's ability to perform daily living activities is not significantly restricted, the panel finds that the ministry was reasonable in finding that the appellant did not meet the remaining criterion, the need for the significant help of another person or an assistive device to perform daily living activities.

The panel notes the appellant's evidence about the amount of help her family and friends provide with daily living activities. The panel encourages the appellant to reapply for PWD designation if the appellant is able to obtain an opinion from a medical practitioner, NP, or other prescribed professional that clarifies or resolves the inconsistent evidence of the NP and confirms the significant help the appellant describes.

The appellant is not successful in the appeal.

Schedule – Relevant Legislation
Employment and Assistance for Persons with Disabilities Act

Persons with disabilities

s. 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

s.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.

(3) The definition of "parent" in section 1 (1) applies for the purposes of the definition of "dependent child" in section 1 (1) of the Act.

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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

Susan Ferguson

Signature of Chair

Date (Year/Month/Day)

2023/March/02

Print Name

Carmen Pickering

Signature of Member

Date (Year/Month/Day)

2023/March/04

Print Name

Adam Shee

Signature of Member

Date (Year/Month/Day)

2023/March/02