

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development's (the ministry) reconsideration decision dated May 22, 2013 which found that the appellant did not meet three of the five statutory requirements of section 2 of the *Employment and Assistance for Persons with Disabilities Act* (EAPWDA) for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that the appellant's impairment was likely to continue for at least two or more years. However, the ministry was not satisfied that:

- the evidence establishes that the appellant has a severe physical or mental impairment;
- 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 that
- as a result of those restrictions, the appellant requires the significant help or supervision of another person, an assistive device, or the services of an assistance animal, to perform DLA.

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 reconsideration consisted of:

- 1) The appellant's Request for Reconsideration (RFR) dated April 29, 2013;
- 2) PWD Designation Decision Summary dated March 14, 2013;
- 3) A PWD application comprised of a Self-report (SR) signed by the appellant on December 19, 2012; a Physician Report (PR) dated December 21, 2012 completed by the appellant's general practitioner of 3 months; and an Assessor Report (AR) also dated December 21, 2012 and completed by the appellant's general practitioner. On the PR and AR the general practitioner reports that he has known the appellant since 2006 and seen him two to ten times in the past 12 months;
- 4) Letter from the appellant's neurologist dated May 2, 2011;
- 5) Medical Imaging Report CT Lumbar Spine dated 04/11/10;
- 6) Medical Imaging Report RAD/Lumbar Spine dated 19/10/10;
- 7) Medical Imaging Report CT Head dated 07/08/09;
- 8) Note from the appellant's physician dated August 24, 2009 stating that the appellant has severe tremor in extremities and cannot work;
- 9) Medical Report – Persons with Persistent Multiple Barriers (PPMB) dated November 8, 2012;
- 10) Letter from the ministry to the appellant dated December 3, 2012 advising that he has been approved for the PPMB category;
- 11) The appellant's Notice of Assessment for 2011; and
- 12) Goods and Services Tax (GST) Credit/BC Low Income Climate Action Tax Credit and BC HST Credit Notice dated October 5, 2012.

At the request of the appellant, and with the consent of both parties, the appeal proceeded by way of a written hearing.

New Information

In his Notice of Appeal the appellant provided additional information regarding his seizures and the impact of his impairments. He also states that physical impairment is the issue not mental deficits, and that he needs physical assistance every day and cannot take care of himself due to seizures. The appellant also states that his former physician retired and that he is waiting to see his new physician with an appointment dated June 21, 2013. The appellant states that he will be going for a CT scan of his neck and shoulder, x-rays (chest/asthma) and blood tests at a hospital. The appellant states that since he started this application his health has changed and the stress alone is very damaging. The appellant also states that he is now struggling and has not fared well without his doctor. He states that his cooking skills are now very limited and he can barely make scrambled eggs for breakfast. His "essential tremors" are very severe and he often eats fresh fruit and vegetables or meals that friends make for him.

The appellant states that he no longer does his own laundry as it is frustrating to sort or fold clothes as he vibrates constantly. He states that he has two bath bars in his bathtub and that without these he could not

manage a shower. He reports that he does not shop for himself or carry groceries, vacuum, dust, recycle or clean the bathroom. He reports that his seizures continue and he does not know what treatment will be advised. The appellant also states that he has constant back pain and instability, days he cannot stand and is unable to function reasonably. He also states that the pain never goes away, even with medication, and that he has shaking and extreme vibrations every day and night. The appellant also states that his seizures are usually at night but he had his first day seizure which he believes to be a bad trend in his brain's electrical activity. The appellant states that the upcoming CT Scan will show if there is epilepsy, stroke or other brain activity. The appellant also states that his former physician was very supportive and the physician can be contacted at his home telephone number to verify the appellant's medical problems.

With his Notice of Appeal, the appellant also provided a pharmacy Patient Medical Information printout for the medication Primidone indicating that the medication is used to control seizures.

The panel has admitted the written testimony and the Patient Medical Information into evidence as it is in support of information and records that were before the ministry at the time of reconsideration, in accordance with section 22(4) of the *Employment and Assistance Act*. In particular, the new information relates to the appellant's physical impairment and the impact on his functioning.

By email dated June 27, 2013 the ministry provided a late submission stating that the ministry will not be making any submission as it is relying on the reconsideration decision.

Physical Impairment

In the SR, the appellant states that he broke his back while working and they saved his legs and his life but he was advised by professionals that his back pain is severe, chronic and crippling. The appellant states that he cannot sleep, sleepwalks and has insomnia that "...is not pretty".

In the RFR, the appellant states that he has poor fine motor skills, that his back is very unstable and that he was told that he was experiencing seizures due to the previous back breaking and subsequent spinal cord injury. The appellant reports that the neurologist prescribed a medication Primidone to which he had an adverse and toxic reaction so he is not longer taking the medication. The appellant reports that he has had three seizures in the last eight months and on April 19, 2013 he had a particularly bad seizure where he bit his tongue and hurt his back. The appellant also states that he has had two asthma attacks where he passed out and cracked some ribs. He also reports that his lungs are congested and that he has multiple allergies, shortness of breath, trouble sleeping, nightmares, concussions from sleep walking and short term memory loss. The appellant states that he needs help every day and his friends babysit him to keep him safe.

In the Notice of Appeal the appellant states that he needs physical assistance every day and cannot take care of himself because of seizures. The appellant also states that he has constant back pain and instability, days he cannot stand and is unable to function reasonably. He also states that the pain never goes away, even with medication, and that he has shaking and extreme vibrations every day and night. The appellant also states that his seizures are usually at night but he had his first day seizure.

In the PR, the general practitioner reports that the appellant has degenerative disc disease in the L4-L5 to S1 for many years, arthritis for many years, and essential tremor since 2009. Under the "Health History" section, the appellant's physician reports that the appellant injured his back while working as a laborer but WCB rejected his claim and he was fired, that surgery is not an option, and his back will not get better. The appellant was diagnosed with essential tremors in 2009 but he is unable to take beta blockers due to his asthma. The appellant's physician also indicates that the appellant has "*gotten a lot worse due to pain and stiffness and he has not been able to work*". The physician reports that the appellant is 5' 11 ½" and weighs 180 pounds. The physician also reports that the appellant has severe back problems, sciatica, left leg, asthma and allergies.

Functional skills reported in the PR indicate that the appellant can walk 4+ blocks unaided, can climb 5+stairs, can lift between 5-15 pounds, can remain seated 2-3 hours, and has no difficulties with communication.

In the AR, the general practitioner reports that the appellant's ability to communicate in speaking, reading and writing is good. His hearing is noted to be satisfactory as it was damaged due to construction noises. The general practitioner reports that the appellant is independent with lifting, carrying and holding but requires periodic assistance with walking indoors, walking outdoors, climbing stairs and standing due to left hip and back pain. In the comment sections it also states left leg, sciatica, and unstable back. The appellant's physician also reports that the appellant completed the form and that he agrees with what the appellant has written.

The neurologist reports that the appellant's medical imaging reports suggested severe osteoarthritic changes in the lumbar spine and severe spondylitic change at the L4-L5 and L5-S1 levels and soft tissue change more on the right. The neurologist also reports that the appellant has fairly severe asthma that prevents him from using beta blockers and limits his choices with regard to managing his essential tremor. He reports that vigorous activities cause the appellant back discomfort after which the appellant feels uncomfortable for significant periods. The neurologist reports that he advised the appellant to undertake range of motion activities for his osteoarthritic degenerative changes.

Mental Impairment

In the Notice of Appeal the appellant states that his physical impairment is the issue, not mental deficits.

In the PR, the general practitioner reports that the appellant has significant deficits with cognitive and emotional function in the areas of consciousness (fainting), memory (ability to learn and recall information) and other (memory, names of people). Under comments, the PR notes sleep walking and resulting concussions.

In the AR, for section 4, cognitive and emotional functioning, the appellant's physician reports that there is no impact to the following areas: bodily functions, consciousness, emotion, impulse control, insight and judgment, motivation, language, other neuropsychological problems or other emotional or mental problems. There is minimal impact to attention/concentration, executive (names) and memory (names) and major impact to motor activity and psychotic symptoms (sleep walking). Under the comments section the appellant has written that he has disturbed sleep, sleep walking, short term memory loss due to toxic and adverse reaction to the medication prescribed for his essential tremors. The appellant's physician has indicated that he agrees with what the appellant wrote.

DLA

In the SR, the appellant states that he needs help on a daily basis.

In the RFR, the appellant states that he needs help every day and cannot shop without assistance.

In the Notice of Appeal, the appellant states that his cooking skills are now very limited and he can barely make scrambled eggs for breakfast. His "essential tremors" are very severe and he often eats fresh fruit and vegetables or meals that friends make for him. He no longer does his own laundry as it is frustrating to sort or fold clothes as he vibrates constantly. He states that he has two bath bars in his bathtub and that without these he could not manage a shower. He reports that he does not shop for himself or carry groceries, vacuum, dust, recycle or clean the bathroom.

In the PR, the general practitioner reports that the appellant's impairment directly restricts his ability to perform DLA of meal preparation, basic housework and daily shopping but the boxes for continuous or periodic assistance are not checked off. For the additional comments if periodic assistance is required the appellant

has written that his most noticeable affect of his disability is the lack of physical strength, mobility and endurance. Under additional comments, the appellant has written that due to his left leg and sciatica, if standing in one place more than 10 minutes, his left leg is unstable and he may need a ride home.

In the AR, the general practitioner reports that the appellant is independent with the following tasks: dressing, grooming, bathing, toileting, feeding self, regulating diet, transfers, reading prices and labels, making appropriate choices, paying for purchases, meal planning, safe storage of food, banking, budgeting, paying rent and bills, filling/refilling prescriptions, taking medications as directed, safe handling and storage of medications, getting in and out of a vehicle, using public transit and using transit schedules and arranging transportation.

In the AR, the general practitioner indicates that the appellant requires periodic assistance from another person with the following tasks: laundry, basic housekeeping, going to and from stores, carrying purchases home, food preparation and cooking. In the additional comments section, the appellant has written that he sometimes needs help with laundry, cooking, cleaning and shopping and that friends help out. He also reports that he is very proud, fears the scooter, and wants to retain his independence.

With respect to social functioning, the general practitioner reports that the appellant is independent with all aspects of social functioning: making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others and securing assistance from others. The general practitioner also reports that the appellant has good functioning with his extended social networks.

Need for Help

In the SR, the appellant states that he needs help with housework and meals and that his friends provide meals for him.

In the RFR, the appellant states that his friends babysit him to keep him safe.

In the Notice of Appeal the appellant states that he needs physical assistance every day.

In the PR, the appellant has written that he often needs a friend to walk with him and he has his cell phone to call for assistance when he has trouble walking.

In the AR, the general practitioner reports that the appellant requires assistance from friends and that he uses a cane. The appellant has written that he volunteers with a community organization, is rich in friends, sometimes uses a cane, and that he calls friends for pick up as he never knows when his left hip or back will not work. The appellant's physician confirms that he agrees with the appellant's written comments.

PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry's reconsideration decision denying the appellant designation as a PWD was reasonably supported by the evidence or was a reasonable application of the applicable legislation in the circumstances of the appellant. In particular, was the ministry reasonable in determining that the appellant:

- does not have a severe physical or mental impairment;
- that the appellant's DLA's are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and that
- as a result of those restrictions, the appellant does not require the significant help or supervision of another person, an assistive device, or the services of an assistance animal, to perform DLA?

The criteria for being designated as a person with disabilities (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 has a severe mental or physical impairment that

(a) in the opinion of a medical 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).

Section 2(1)(a) of the EAPWDR defines DLA for a person who has a severe physical or mental impairment 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.

Severe physical impairment:

The appellant's position is that he has left hip and back pain, essential tremors, asthma, allergy, and seizures and that as a result he has trouble walking safely, cannot shower without his grab bars, trouble sleeping and sleep walking. He reports that he needs help every day and cannot function well and has trouble performing many household tasks such as meal preparation, cooking, carrying groceries, sweeping, vacuuming, laundry and cleaning the bathroom. He states that the stress of this application is causing his health conditions to get worse.

The ministry argues that the functional skills limitations described by the general practitioner are more in keeping with a moderate degree of impairment and that the evidence does not establish that the appellant has a severe physical impairment. The ministry also states that while the appellant's physician indicates that the appellant will be unable to work, the PWD application is not intended to assess employability or vocational abilities and that employability is not an eligibility criterion for designation as a PWD.

Panel Decision

The panel finds that a medical practitioner, the appellant's general practitioner, has diagnosed the appellant with degenerative disc disease in the L4-L5 to S1, arthritis, essential tremor, asthma and allergies that cause the appellant ongoing back pain, difficulty standing, shaking and vibration and difficulties with meal preparation, basic housework and shopping.

In the Notice of Appeal, the appellant reports that he needs help every day and cannot take care of himself because of his seizures. In the RFR, the appellant reports that he has had three seizures in the last eight months and one of them was particularly bad. However, the panel notes that there is a gap in the medical evidence as neither the appellant's physician nor the neurologist have provided any medical evidence regarding the seizures and their impact on the appellant's functioning. Although the appellant indicates, in his Notice of Appeal, that the tribunal can call his general practitioner for confirmation of his disability, the panel notes that it is the appellant's obligation to put forward all the evidence that he believes is relevant and wants the tribunal to consider. The panel can only consider the evidence in the appeal record or additional admissible evidence submitted by the appellant and does not have the jurisdiction to independently obtain further evidence to consider with the appellant's appeal.

In addition, although the AR indicates that the appellant requires periodic assistance with walking indoors, walking outdoors, climbing stairs and standing due to left hip and back pain, the physician has not provided any further information to indicate how much longer than normal any of these tasks take. The panel also notes that while the appellant has been diagnosed with essential tremors, the medical evidence does not explain

how the tremors restrict his ability to function independently and effectively.

The panel also notes that while the PR indicates that the appellant does not require any prostheses or aids for his impairment, the AR indicates that the appellant sometimes uses a cane and the RFR indicates that he has grab bars in the shower and the panel accepts the appellant's evidence with respect to the use of the bath bars and cane.

Although the appellant's general practitioner reports that the appellant is unable to work, the panel notes that employability is not a criterion for designation as PWD.

The panel also notes that the Medical Report – PPMB completed by the appellant's family physician confirms the diagnosis of severe spondylosis L4-L5 S1, and that the appellant's medical condition is episodic in nature and that it will not improve. The panel also notes that the letter from the ministry to the appellant dated December 3, 2012 indicates that the appellant's application for PPMB designation was approved. However, the panel also notes that the criteria for designation as PPMB as compared to PWD are different so the fact that the appellant was approved for PPMB designation does not indicate that he will necessarily meet the criteria required for PWD designation.

The legislation clearly provides that the determination of severity of impairment is at the discretion of the minister, taking into account all of the evidence including that of the appellant. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a prescribed professional respecting the nature of the impairment and its impact on daily functioning.

The panel finds that the functional limitations noted by the general practitioner in the PR and AR were written by the appellant and confirmed by the appellant's physician. The evidence, when considered together, along with the appellant's evidence in the SR and the RFR indicate that the appellant's functional limitations were in the moderate range rather than severe. From the appellant's evidence in the Notice of Appeal it appears that the appellant's physical condition may be deteriorating and his functional limitations may have increased, but the medical evidence regarding his impairment and consequent functional limitations does not reflect that change.

The panel concludes that the ministry reasonably determined that the appellant's level of independent physical functioning does not establish that the appellant has a severe physical impairment under section 2(2) of the EAPWDA. Therefore, the panel finds that the ministry's decision, which concluded that the evidence does not establish a severe physical impairment under section 2(2) of the EAPWDA, was reasonable.

Severity of mental impairment:

The ministry's position is that although there are significant deficits identified in the areas of cognitive and emotional functions regarding consciousness (fainting) and memory, major impacts to motor activity and psychotic symptoms (sleep walking); and minimal impact to attention/concentration, executive and memory, disturbed sleep, short term memory loss due to toxic and adverse reaction from the medications taken for the essential tremors there is no impact to the remainder of the appellant's cognitive and emotional functioning. The ministry's position is that there is not enough evidence to establish a severe mental impairment.

The appellant's position, as stated in his Notice of Appeal, is that it is his physical impairment that is the issue, not mental deficits.

Panel Decision

The panel finds that the impacts to the appellant's cognitive and emotional function are minimal. In addition, based on the appellant's evidence that it is his physical impairment that is the issue, not mental deficits, the

panel finds that the ministry's decision, which concluded that the evidence does not establish a severe mental impairment under section 2(2) of the EAPWDA, was reasonable.

Restrictions in the ability to perform DLA

The appellant's position is that his physical impairments directly and significantly restrict his ability to perform DLA including meal preparation, shopping, showering, walking, carrying items, vacuuming, sweeping, mopping, doing laundry, and obtaining groceries.

The ministry's position is that the appellant's physician indicates that the majority of the appellant's DLA are performed independently and there is no evidence to indicate that it takes the appellant significantly longer to perform these activities. In addition, although the evidence indicates that the appellant requires periodic assistance with some DLA (laundry, basic housekeeping, going to/from stores, carrying purchases home, food preparation and cooking) there is no information provided on how often the appellant requires assistance. The ministry also notes that both the appellant and his physician indicate that he is independent in all aspects of social functioning and has good functioning with extended social networks.

The ministry's position is that the evidence does not establish that the appellant has a severe physical or mental impairment that in the opinion of a prescribed professional significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods.

Panel Decision

The legislation requires that in the opinion of a prescribed professional a severe impairment directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods. 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 – it must be more than trifling and more than merely an inconvenience. Finally, there is a component related to time or duration. The direct and significant restriction may be either continuous or periodic. If it is periodic it must be for an extended time. Inherently, an analysis of periodicity must also include consideration of the frequency. All other things being equal, a restriction that only arises a few times a year is less likely to be significant than one which occurs several times a week. While the legislation must be interpreted in a large and liberal manner, there still must be sufficient evidence on each of the legislative criteria to reasonably satisfy the ministry that they have been met.

In the PR, the physician reports that the appellant's impairment directly restricts the appellant's meal preparation, basic housework and daily shopping but the boxes for whether the impact is continuous or periodic are not checked off. The appellant, under the heading "if periodic" has indicated that the most noticeable affect of his disability is the lack of physical strength, mobility and endurance.

In the AR the physician reports that the appellant requires periodic assistance with laundry, basic housekeeping, going to and from stores, carrying purchases home, food preparation and cooking.

Based on the evidence in the PR and the AR, the evidence of the prescribed professional indicates that the appellant's impairment directly restricts 4 of the 8 prescribed DLA in relation to a person who has a severe physical impairment as per EAPWDA section 2(1)(a) (*prepare own meals, shop for personal needs, perform housework to maintain the person's place of residence in acceptable sanitary condition, and move about indoors and outdoors*).

The general practitioner indicated that the appellant is unrestricted in the remaining 4 of the 8 prescribed DLA (*manage personal finances, use public or personal transportation facilities, perform personal hygiene and self care and manage personal medication*).

The panel finds that while there are restrictions to some aspects of 4 of the 8 prescribed DLA, there is no information to indicate how much or how often the appellant requires periodic assistance, under what circumstances the periodic assistance is required, or whether it takes the appellant significantly longer to perform any of the DLA. For example while the PR indicates that the appellant often has a friend walk with him as he has trouble walking, there is no further information to indicate if "often" means every day, once a week, a few times per week or a few times a month; or the duration of time that the friend will walk with the appellant at any one time.

There is no evidence to indicate that the appellant requires continuous assistance with any DLA.

The panel concludes that the ministry was reasonable in finding that the appellant's impairment does not significantly restrict his ability to perform DLA, either continuously or periodically for extended periods.

Therefore, the panel finds that the ministry reasonably determined that, based on the evidence provided by the prescribed professional, the noted restrictions in the appellant's ability to perform some aspects of some DLA did not constitute a direct and significant restriction of the appellant's ability to perform DLA thereby not satisfying the legislative criteria of section 2(2)(b)(i) of the EAPWDA.

Help with DLA

The appellant's position is that he requires help with meal preparation, cooking, laundry, cleaning the bathroom, sweeping, vacuuming, going to and from stores, carrying purchases home. He also states that his friends babysit him and he requires physical help every day. He also states that he uses a cane to walk sometimes and could not shower without the bath bars in his shower.

The ministry's position is that as it has not been established that DLA's are significantly restricted, it cannot be determined that significant help is required from other persons, and no assistive devices are required.

Section 2(2)(b)(ii) of the EAPWDA requires that, in the opinion of a prescribed professional, 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) of 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 a DLA.

The panel accepts the appellant's evidence that he requires some periodic assistance from his friends and the PR and AR are consistent with that evidence. However, the evidence does not establish that the appellant requires the significant help or supervision of another person in order to perform DLA.

It may be that the physician's information does not provide a complete picture of the appellant's functional limitations and the amount of assistance he requires with DLA and it may be that the appellant now requires more help than he required at the time of reconsideration, but based on the evidence, the panel finds that the ministry reasonably determined that, as direct and significant restrictions in the appellant's ability to perform DLA have not been established, it cannot be determined that the appellant requires significant help to perform DLA as a result of those restrictions.

Conclusion

Having reviewed and considered all of the evidence and relevant legislation, 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 a reasonable application of the applicable legislation in the circumstances of the appellant. Therefore, the panel confirms the ministry's reconsideration decision.