

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of April 25, 2014, which found that the appellant did not meet three of 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 in the opinion of a medical practitioner the appellant’s impairment is likely to continue for at least two 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.

## 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 information before the ministry at the time of reconsideration included the following:

- The appellant's PWD application form dated December, 2013 consisting of the appellant's self-report, a physician's report ("PR") signed by the appellant's general practitioner, and an assessor's report ("AR") signed by a nurse.
- An x-ray report for an examination which took place September 25, 2013.
- A Request for Reconsideration dated April 3, 2014.
- A written submission dated April 17, 2014 prepared by the appellant's advocate.
- A supplementary medical opinion (the "SMO") signed by the appellant's physician on April 15, 2014.

The panel reviewed the evidence as follows:

### *Physical Impairment*

- In the PR the physician (who had seen the appellant 2-10 times in the previous 12 months) diagnosed the appellant with cervical spondylitis/gout, right nephrectomy, and Type 2 diabetes/on diet.
- In the Health History portion of the PR the physician indicated the severity of the appellant's impairments by writing "The conditions have become severe enough and prolonged enough to exclude him from the work force."
- In terms of physical functional skills, the physician reported that the appellant can walk 2 to 4 blocks unaided on a flat surface, can climb 5+ stairs unaided, can lift 5 to 15 pounds, and can remain seated for less than 1 hour.
- In the AR in response to a question as to what mental or physical impairments impact the appellant's ability to manage DLA, the nurse wrote "severe physical disability." (The nurse had seen the appellant once in the past year – for the purpose of completing the AR – though the appellant had been a regular client of the nurse's employer – an employment services contractor – for some time. The nurse had access to information from other staff who had known the appellant for that period of time.)
- With respect to mobility and physical ability the nurse indicated that the appellant needs periodic assistance from others to walk indoors, that he takes 2 times longer than typical walking indoors, and 3 times longer than typical walking outdoors (commenting "very painful – short distance.")
- The nurse reported that the appellant requires continuous assistance climbing stairs, and lifting/carrying/holding. Regarding standing, the nurse reported the appellant as being independent but commented "painful – can't stand to do dishes".
- The SMO was in the form of a letter prepared by the appellant's advocate with spaces for the physician to provide responses. In responding to a request to indicate the severity of the appellant's impairments with respect to his ability to manage DLA independently, the physician indicated that the appellant's cervical spondylitis is "severe", and that the right nephrectomy and Type 2 diabetes are "irrelevant".
- In his self-report the appellant reported that one of his kidneys had failed and been removed. He stated that osteoarthritis in his cervical spine causes pain which interferes with his sleep, and that gout in the big toe of his right foot affects his walking and standing. He indicated that he has tennis elbow in his left arm and has had 2 lumps removed there. He reported that his

hips are very sore when he walks any distance, and that he can walk 2 blocks on a good day - most days he is unable to leave the house. He indicated that he doesn't visit friends anymore because it is too difficult.

- In his Request for Reconsideration the appellant wrote that he needs a special diet for his diabetes and to protect his remaining kidney, that osteoarthritis and kidney pain disrupt sleeping, that gout in his right foot makes it difficult to put on his shoe, that walking to and from the grocery store causes extreme pain, and that he needs transportation. He wrote that he has poor eyesight and that he couldn't comprehend what was required on the PWD application forms and so the nurse had to fill out the self-report for him. He concluded that he gets 5 hours sleep maximum and that getting on his knees is painful because his legs cramp up with gout.
- In his oral testimony the appellant said that:
  - reading causes headaches that muddle his thinking - that was why the nurse completed the self-report. He said that the nurse spent a significant amount of time interviewing him for the AR, while the physician only took 15 minutes to complete the PR.
  - on a good day he can climb more than 4 stairs unaided, but he only has about 2 good days per month. Otherwise, he has to use the railing to get up and down the stairs.
  - the physician's evidence in the PR that the appellant can walk 2 to 4 blocks unaided is misleading, because he can only do so on a "good day".
  - he periodically gets gout in the big toe of his right foot which causes extreme pain.
  - he uses Tylenol for pain relief but hasn't been prescribed any pain killers. He resists using pain killers, and can't use Ibuprofen and certain other pain killers because of the potential risk to his 1 remaining kidney. He's out of Tylenol now and will be making an appointment with his physician for pain killers.
  - he is frustrated because in describing the severity of his impairments the physician used language more suitable for applying for CPP disability benefits. He said physicians are not trained in how to properly complete the PWD application forms.
- In response to questions from the panel the appellant responded that:
  - he manages transfers out of bed on his own but has to roll on his side and push up slowly. He said that he's stubborn and will do things regardless of whether it hurts him or not.
  - there is no laundry facility in his house. If there were, he could "throw a few things in" and do laundry himself.
  - where the AR indicates that he needs continuous help making choices and paying for purchases while shopping, it isn't because he doesn't have the mental capacity but that because of mobility issues he doesn't go shopping ("I'm not there.")
  - he has to climb 21 stairs to reach his apartment and has to use the rail to do so.
  - lately he is getting headaches more often - almost every day. His headaches are related to his neck pain. He generally has to lie down and sleep for a couple of hours to get rid of a headache because he avoids taking Tylenol.

### *Mental Impairment*

- In the PR the physician indicated that the appellant has no significant deficits with cognitive and emotional function, and that the appellant has no difficulties with communication.
- In describing the appellant's ability to communicate the nurse indicated that the appellant has good hearing and speaking ability, satisfactory reading, and poor writing.
- In Part B4 of the AR form, which is to be completed for an applicant with an identified mental

impairment or brain injury, the nurse indicated that the appellant has major impacts in 5 of 14 categories of cognitive and emotional function: bodily functions, consciousness, emotion, motivation, and motor activity. She commented "frequent headaches affect his functioning." She reported minimal or no impacts in the remaining categories.

#### DLA

- In the PR the physician reported that the appellant has not been prescribed any medication and/or treatments that interfere with his ability to perform DLA.
- The physician indicated that the appellant is restricted in his ability to perform 5 of the 10 prescribed DLA: *personal self-care, meal preparation, basic housework, daily shopping, and mobility indoors and outdoors*. He indicated that the appellant requires periodic assistance with 3 of these DLA (*personal self-care, meal preparation, and mobility indoors and outdoors*), and made no mention as to whether the restriction to *daily shopping* and *basic housework* was continuous or periodic. In explaining his use of the term "periodic", the physician wrote "can't stand for too long eg. at a sink/ or to prepare meals."
- The physician reported no restrictions to the remaining 5 prescribed DLA.
- The nurse reported the appellant as being able to independently manage the DLA of *use of transportation*. She also reported him as being able to independently manage most tasks related to *personal self-care*, but she indicated he needs continuous assistance from another person with transfers on/off bed and chair. With respect to the DLA of *social functioning*, the nurse reported that the appellant has very disrupted functioning with both his immediate and extended social networks.
- The nurse reported the appellant as requiring continuous assistance with all tasks related to all other DLA.
- The SMO contains information included by the appellant's advocate to the effect that the appellant's chronic pain and fatigue affect his ability to manage DLA, that his wife does the majority of household chores, that friends provide transportation, that the appellant has poor eyesight, and that he required assistance to complete the self-report portion of the PWD application. Asked to comment on the degree of assistance the appellant requires to manage DLA, the physician wrote "Can't walk more than 4 blocks without pain. Can't stand for prolonged periods – wife has to help."
- In his Request for Reconsideration the appellant wrote that he needs to have a railing to pull himself up the stairs and that friends help with shopping due to limited lifting.
- Led through her oral testimony by the appellant's advocate, the appellant's spouse testified that:
  - she prepares most of the meals. The appellant cooks on his "better days" and she helps.
  - with respect to personal finances, they receive a joint check so they go over the finances and the budgeting together. She does most of the shopping and the majority of the banking, but either of them can pay bills online.
  - the appellant doesn't like to use the bus because it jostles him too much which is painful.
  - most times she does the housework. The appellant can help when he is not too sore. Most of the time he needs help.
  - with respect to mobility, there are a lot of days when the appellant can't go up and down the stairs. He mostly stays home. When he does go out he is sore afterwards.

- she helps the appellant with his self-care.
- she picks up the appellant's medications at the store, otherwise he can manage them himself.
- she does the laundry. She gets a ride from her brother in order to do the laundry. The appellant doesn't help with laundry because it is too hard to go up and down the stairs. There is no elevator.
- as a general statement the appellant is in pain most of the time. He takes his time walking and does not sleep well at night.
- she can't help the appellant with transfers. He usually rolls himself in and out of bed. It takes him a "little bit" longer than typical to do so.
- In response to questions from the panel, the appellant's spouse said that;
  - there is no particular area of household chores for which he is responsible. He helps when he is able, and tries to do what he can.
  - The majority of the time the appellant manages his own self-care. His spouse sometimes helps him a bit in the shower. He dresses on his own.
  - If the appellant helps with meal preparation, he can for example lift a pot and drain it. If he's sore she takes over. The appellant gets sore from standing too long.
  - The appellant only goes up and down the stairs if he has to. If he didn't use the rail he wouldn't be able to use the stairs.

### Help

- In the PR, in response to a question as to what assistance the appellant needs with DLA, the physician wrote "girlfriend helps with laundry/housework". The physician indicated that the appellant does not require any prostheses or aids for his impairment.
- In the AR the nurse reported the appellant as receiving assistance from his family, commenting "wife helps." In terms of assistive devices, the nurse recommended that a "scooter would get him out of the house." She reported that the appellant does not have an assistance animal.
- Responding to a question in the SMO as to whether he felt the appellant would benefit from the use of a cane and scooter to improve mobility, the physician wrote "No."

### Admissibility of New Information

In their oral testimony the appellant and his spouse provided new information regarding his impairment. This information generally provides additional detail tending to support evidence in the original PWD application. Accordingly, the panel has admitted this new information as being in support of information and records that were before the ministry at the time of reconsideration, in accordance with s. 22(4) of the *Employment and Assistance Act*.

The appellant, through his advocate, also submitted one double-sided document consisting of three pages of written argument and one page citing section 8 of the British Columbia *Interpretation Act*. The panel accepted this document as argument.

The ministry relied on its reconsideration decision and submitted no new information.

## PART F – Reasons for Panel Decision

The issue on this appeal is whether the ministry's decision to deny the appellant 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. In particular, was the ministry reasonable in determining that the appellant does not have a severe physical or mental impairment, and that in the opinion of a prescribed professional the appellant's impairments do not directly and significantly restrict him from performing DLA either continuously or periodically for extended periods, and that as a result of those restrictions the appellant does not require help to perform DLA.

The relevant legislation is as follows:

### 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 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.

**EAPWDR section 2(1):**

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.

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**Severe Physical Impairment**

The appellant's position is that the physician expressed the opinion that the appellant's cervical spondylitis and gout constitute a severe physical impairment. He argued through his advocate that the ministry unreasonably tends to dismiss a statement that indicates that a person can't work as being irrelevant, and that the restrictions of an impairment that prevent him from doing any type of

work (limited mobility, limited ability to stand, limited ability to lift) are the same limitations that prevent him from being able to manage DLA. The appellant cited section 8 of the *Interpretation Act* in arguing for a "fair, large and liberal construction and interpretation" of the relevant legislation.

The ministry's position, as set out in its reconsideration decision, is that the appellant's level of functional skills and the impacts described by the physician and the nurse are more in keeping with a moderate degree of impairment. The ministry argued that there is not enough evidence to establish a severe physical impairment.

### Panel Decision

A diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment. An "impairment" is the resulting restrictions to a person's ability to function independently or effectively.

To assess the severity of an impairment the nature of the impairment and the extent of its impact on daily functioning as evidenced by functional skill limitations and the degree to which performing DLA is restricted are key considerations. A medical barrier to the appellant's ability to engage in paid employment is not a legislated criterion for severity. In making its determination the ministry must consider all the relevant evidence, including that of the appellant. While the legislation is clear that the fundamental basis for the analysis is the evidence from prescribed professionals, in exercising its decision-making power the ministry cannot merely defer to the opinion of the professionals with respect to whether the statutory requirements are met as that approach would amount to an improper fettering of discretion. The professional evidence has to be weighed and assessed like any other evidence.

Because the nurse had only met with the appellant once, and because of the conflicts between her evidence and that of the appellant and his spouse (particularly regarding the appellant's ability to manage transfers to/from bed and chair, and his ability to manage finances and medications) the panel has generally given more weight to the physician's evidence where it conflicts with the nurse's.

The physician's evidence from the PR and the SMO indicate that the appellant's main impairment is the cervical spondylitis with gout. When asked in the SMO about the impacts of the appellant's nephrectomy and Type 2 diabetes on his ability to manage DLA, the physician wrote that they were "irrelevant". The evidence of the appellant and his spouse indicates that pain, including headache pain and periodic gout pain, is a significant factor in his impairment. There is, however, no evidence that the appellant is under any course of treatment for pain management. His evidence is that he periodically uses an over-the-counter analgesic in the form of Tylenol, and that only now is the pain becoming sufficiently advanced that he is planning to make an appointment with his physician to obtain prescribed pain relief. It is premature to conclude that the appellant's cervical spondylitis is "severe" as contemplated by the legislation without evidence of the results of treatment (if any).

The appellant and his spouse testified that he can negotiate the 21 stairs to and from his apartment by using the handrail, though it causes him pain and he avoids going out as much as possible. The panel notes that a handrail is not an "assistive device", since it is not a device which is "designed to enable a person to perform a [DLA] that, because of a severe mental or physical impairment, the person is unable to perform" as defined in the EAPWDA. A stair rail is designed for use by anyone



primarily for safety purposes.

For the foregoing reasons, the panel has concluded that while the appellant does have some physical health issues, the ministry reasonably determined that the evidence falls short of establishing that he has a severe physical impairment as contemplated by the legislation.

### **Severe Mental Impairment**

The appellant did not advance an argument with respect to having a severe mental impairment.

The ministry's position is that the evidence is insufficient to establish a severe mental impairment. It argues that there is no explanation for the conflicts in the evidence between the physician and the nurse regarding the appellant's communication skills and impacts to cognitive and emotional functioning.

### **Panel Decision**

Section 2 of the EAPWDA requires that any impairment must be confirmed by a medical practitioner. The physician did not diagnose a mental impairment.

In the AR the nurse described the appellant's impairment as "severe physical disability". Though she indicated that the appellant has major impacts in cognitive and emotional functioning, the physician reported no such impacts.

Section 2(1)(b) of the EAPWDR prescribes two DLA that are specific to mental impairment – make decisions about personal activities, care or finances (*decision making*), and relate to, communicate or interact with others effectively (*social functioning*).

The nurse's evidence that the appellant requires continuous assistance with respect to the decision-making aspects of the DLA of *meal preparation, managing personal finances, managing personal medications, and daily shopping* (making appropriate choices), is not supported by the evidence of the physician, the appellant, or his spouse. The evidence of the appellant and his spouse indicates that the appellant is capable of independently paying his bills on line, his limitation in making shopping choices is physical in that mobility limits his attendance at stores, and he manages his own personal medications except that his spouse picks the medications up at the store.

With respect to *social functioning*, there is evidence to indicate that the appellant is isolating himself to some extent due to pain. The nurse indicates that the appellant's *social functioning* is very disrupted. There is no evidence before the panel as to what sort of support or supervision the appellant may require for *social functioning*, and the physician's evidence indicates that the appellant is not restricted.

Considering the evidence as a whole, the panel concludes that the ministry reasonably determined that it does not demonstrate a severe mental impairment.

### Significant Restrictions to DLA

The appellant's position is that his DLA are significantly restricted. He stated that he is limited by mobility issues, neck pain, headache pain, and pain from gout and that he relies on his spouse to perform most of his DLA. The appellant said that gout is an episodic condition that is very painful. The appellant argued that the fact that the physician indicated the appellant requires periodic assistance with some DLA while the nurse indicated the majority of DLA require continuous assistance is not contrary. He said that the physician only met with him to fill out the PR for 15 minutes while the nurse met with him for over an hour and took into account information from another staff member who had known the appellant for a year.

The ministry's position is that the appellant's functional skills are more in keeping with a moderate degree of impairment, and that the information provided by the physician and the nurse is insufficient to confirm that his impairment significantly restricts his ability to perform DLA continuously or periodically for extended periods.

### Panel Decision

The legislation requires that 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. 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, any analysis of periodicity must also include consideration of the frequency. All other things being equal, a restriction that only arises once a year is less likely to be significant than one which 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 in order to be "satisfied" that this legislative criterion is met.

In the PR the physician explained that the appellant requires periodic assistance with 3 of the prescribed DLA: *personal self-care, meal preparation, and mobility indoors and outdoors*. He explained that the periodicity was related to the appellant's limitations in standing. The physician did not provide evidence as to whether the restrictions to *basic housework* and *daily shopping* were periodic or continuous. The evidence of the appellant's spouse was that the appellant independently manages his *personal self-care* other than "a bit" of help in the shower.

Considering the evidence as a whole, it indicates that the appellant does experience restrictions in mobility. Those restrictions have an impact on his ability to manage physical tasks related to some DLA. However, given the panel's conclusions with respect to the severity of the impairment and the lack of evidence of any treatment regime for pain management, the panel finds that the ministry reasonably held that there is insufficient evidence to establish that the appellant is significantly restricted in his ability to perform DLA either continuously or periodically for extended periods.

### Help with DLA

The appellant's position is that he relies almost entirely on his spouse to perform the majority of his

DLA.

The ministry's position is that since it has not been established that the appellant's DLA are significantly restricted, it cannot be determined that significant help is required from other persons.

Panel Decision

Findings of a severe impairment and significant restrictions in the ability to perform DLA are preconditions to a finding that an appellant requires help with DLA.

For the reasons provided above, the panel finds that the ministry reasonably concluded it could not be determined that the appellant requires help with DLA as defined by s. 2(3)(b) of the EAPWDA.

Conclusion

The panel acknowledges that the appellant's medical conditions have some impact on his ability to function. However, having reviewed and considered all of the evidence and the relevant legislation, the panel concludes that the ministry's decision which found the appellant ineligible for PWD designation is reasonably supported by the evidence. The panel therefore confirms the ministry's decision.