

## PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Social Innovation (the ministry) dated April 25, 2016 which held that the appellant did not meet 4 of the 5 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 but was not satisfied that:

- a medical practitioner confirmed that the appellant has an impairment that is likely to continue for at least 2 years;
- 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
- as a result of those restrictions, in the opinion of a prescribed professional, the appellant requires an assistive device, the significant help or supervision of another person, 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

### Information before the ministry at reconsideration

- A PWD application comprised of the appellant's undated Self-report (SR), a Physician Report (PR) and an Assessor Report (AR) both of which were completed by the appellant's general practitioner (GP) of about 1 year and dated September 3, 2015. As the ministry notes, both the PR and AR include comments in handwriting that is noticeably discernable from that of the GP. These comments are not included in the summary of the GP's information.
- September 1, 2015 prescription for pain medication.
- 1-page April 11, 2016 Request for Reconsideration submission from the appellant.

### Information submitted on appeal

- February 22, 2012, 2-page letter from Workers' Compensation Appeal Tribunal (WCAT) respecting the appellant's request for an increase in his permanent functional impairment award of "4.25% of total disability."
- October 14, 2015, 1-page from a letter from Work Safe BC which notes that the appellant's permanent functional disability award was increased to 6.08%.
- June 6, 2016, 1-page letter from the appellant's girlfriend.

The ministry did not object the above documents being admitted as evidence, noting that the legislation governing workers' compensation is different from the PWD legislation. The panel admitted the above documents and the appellant's oral testimony pursuant to section 22(4) of the Employment and Assistance Act as it corroborated the appellant's previous written testimony respecting the injury to his right foot and therefore was in support of the information before the ministry at reconsideration.

At the hearing, further to comments he made in the PWD application, the appellant explained that his physician had refused to complete the PWD application until ordered to do so by the BC Medical Board. The appellant stated that he was told by the physician to fill out the PWD application form and then the physician would go over it. The panel notes that the information at reconsideration includes a note from the GP who writes that he completed Section 2 [of the PWD application] to the best of his capability and that "pt not compliant to medical advice to maximize health outcome." The appellant also stated that the ministry requested the contact information for the appellant's workers' compensation case manager in order to confirm any compensation payments the appellant was receiving.

No additional evidence was provided by the ministry on appeal.

### Summary of relevant evidence

#### Diagnoses and Duration of Impairment

A medical practitioner, the appellant's GP, diagnosed the appellant with right navicular foot avulsion,

chronic pain and right foot mobility problems, both with an onset date of 2006. When asked if the impairment is likely to continue for two years or more from today, the GP responded “unknown.”

### Physical Impairment

In the PR and AR, the GP provides the following information.

- Unknown severity. Patient complains of mobility issues and states that he has sharp right foot and ankle pain that hinders his driving.
- In the AR, the GP notes the use of a cane for walking.
- The appellant can walk 2 to 4 blocks unaided, climb 5+ steps unaided, and has no limitations in lifting. The appellant can remain seated 2 to 3 hours.
- Walking indoors and outdoors, climbing stairs, standing, and lifting and carrying/holding are managed independently. Patient states he uses a cane 50% of the time.
- Foot goes out {at times??} if he helps with farm work.

The appellant reports that his ankle can go out at any time and that every morning it takes 2 to 6 minutes before he can walk on his right foot. When his foot goes out, he uses a cane – 45% of the time. Once a day he gets an electrical sharp pain so strong it brings him to tears. He can no longer lift more than 40 to 50 lbs. When having a bad day, he rests and uses a tens to help calm his pain just so he can hobble around and do what he has to do. For 10% of the time he is in so much pain he cannot walk at all, and it’s hard to do normal activities like clean or get food.

At the hearing, the appellant described his foot giving out as getting an electric fire burning pain followed by his foot twisting itself and then him falling down. His foot can give out when he is just walking. He stated that he can’t drive that much, about 3 times a week, and otherwise depends on his girlfriend to drive him. He has been told that he can no longer do his former work.

In her letter, the appellant’s girlfriend writes that she witnessed the appellant’s foot give out numerous times during May and that she has continuously seen his foot give out at least twice a month very (sic) 2-3 months with pain lasting from several minutes to hours over the course of an episode. Most of those times the appellant has required her assistance to be able to (sic) with the use of his cane and on multiple occasions has had her drive him around due to the severity of the pain and limited use of his right foot.

### Mental Impairment

In the PR and AR, the GP reports the following.

- There are no significant deficits with cognitive and emotional functioning.
- There are no difficulties with communication.
- A minimal and moderate impact on daily functioning is reported for motor activity. Minimal impacts are reported for emotion and motivation. There is no impact on daily functioning for the remaining 11 aspects of cognitive and emotional functioning.
- Social functioning is not restricted and is managed independently.
- Good functioning with immediate social networks; marginal functioning with extended social networks.

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- The GP crossed out the response area for describing the support/supervision required to help maintain the appellant in the community and to identify any safety issues.

The appellant reports that his impairment has an emotional toll on his life and that the medication he takes on his worst days, impairs his mental functioning.

### DLA

In the PR, the GP reports that the appellant has not been prescribed medication or treatments that interfere with the ability to perform DLA and that none of the prescribed DLA are restricted, commenting “none presently.”

In the AR, the GP reports that the appellant requires periodic assistance from another person with transfers on/off chairs and in/out of bed with the remaining listed tasks of the DLA personal care managed independently. All listed tasks of all other DLA - personal care, basic housekeeping, shopping, meals, paying rent and bills, medications, and transportation - are managed independently with no identified limitations.

### Need for Help

In the PR, the GP comments “none to my knowledge” when asked what assistance the appellant needs with DLA. In the AR, the GP notes the use of a cane for walking and that “foot gives out at times if he helps with farm work.”

## PART F – Reasons for Panel Decision

### **Issue on Appeal**

The issue on 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:

- a medical practitioner had not confirmed that the appellant has an impairment that is likely to continue for at least 2 years;
- a severe physical or mental impairment was not established;
- the appellant's daily living activities (DLA) are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and
- as a result of those restrictions, in the opinion of a prescribed professional, the appellant does not require an assistive device, the significant help or supervision of another person, or the services of an assistance animal to perform DLA?

### **Relevant Legislation**

#### **EAPWDA**

2 (1) In this section:

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

"**daily living activity**" has the prescribed meaning;

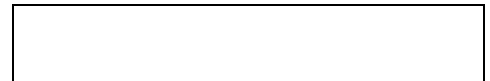
"**prescribed professional**" has the prescribed meaning.

(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person 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).

#### **EAPWDR**

**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 authorized under an enactment to practice the profession of

- (a) medical practitioner,
- (b) registered psychologist,
- (c) registered nurse or registered psychiatric nurse,
- (d) occupational therapist,
- (e) physical therapist,
- (f) social worker,
- (g) chiropractor, or
- (h) nurse practitioner.

### **Duration of Impairment**

The appellant argues that the ministry could have asked his workers' compensation case manager to receive confirmation of his injury in 2006.

The ministry's position is that the GP does not indicate the appellant's impairment is likely to continue for two or more years from today.

#### *Panel Decision*

Section 2(2)(a) of the EAPWDA requires that the minister be satisfied that in the opinion of a *medical practitioner* an applicant's impairment is likely to continue for at least two years. In this case, the only information from a medical practitioner is from the appellant's GP who did not tick either the "yes" or "no" boxes in response to the question "Is the impairment likely to continue for two years or more from today?" Instead, the GP responded by writing "unknown." The panel finds that the ministry reasonably concluded that the information from the medical practitioner did not establish that the appellant's impairment is likely to continue for two years or more.

### **Severe Physical Impairment**

The appellant argues that his GP has not been cooperative and when he finally did complete the PR and AR, they were done in haste with little thought. The appellant argues that the information he and his girlfriend have provided establishes a severe physical impairment.

The ministry's position is that the physical functional skills and independence with all listed areas of mobility and physical ability reported by the GP is not indicative of a severe impairment of physical functioning. The ministry also argues that the information respecting the use of a cane 50% of the time reflects the appellant's self-assessment, not that of the GP, and that the inability to perform farm labour is not considered indicative of a severe impairment. The ministry concluded that based on the assessments provided by the appellant and his GP, a severe impairment of physical functioning has not been established.

#### *Panel Decision*

The legislation 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. While the legislation does not define "impairment", the PR and AR define "impairment" as a "loss or abnormality of psychological, anatomical or physiological structure or functioning causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration." While this is not a legislative definition, and is therefore not binding on the panel, in the panel's opinion, it reflects the legislative intent and provides an appropriate analytical framework for assessing the degree of impairment resulting from a medical condition.

The appellant's GP diagnoses right navicular foot avulsion, chronic pain and right foot mobility problems which result in the appellant being limited to walking 2 to 4 blocks unaided. The GP also reports that the appellant independently manages walking indoors and outdoors, climbing stairs, standing, lifting, and carrying and holding, but that the appellant's foot gives out at times if he helps with farm work. The GP notes the use of a cane for walking, which the panel finds based on the appellant's reported ability to walk unaided indoors and for 2 to 4 blocks outdoors, likely refers to walking longer distances or at times when his foot gives out. The workers' compensation information confirms the injury to the appellant's right foot but does not include information from a physician respecting the appellant's physical abilities. The information from the appellant's girlfriend is that the appellant's foot gave out at least five times in May but that it also occurs with less frequency, described as at least twice a month every 2 – 3 months. While the appellant reports the use of a cane half of the time and the inability to walk at all for 10% of the time, this degree of limitation is not supported by the GP's information.

The panel concludes that the ministry was reasonable to determine that a severe physical impairment has not been established given the level of independent physical functioning assessed by the GP.

### **Severe Mental Impairment**

The appellant notes that his physical impairment has taken an emotional toll and that the medication he takes on his worst days impairs his mental functioning but does not expressly argue that he has a severe mental impairment.

The ministry notes that although the appellant is not diagnosed with a mental impairment or brain injury, the GP completed the sections applicable to those diagnoses. The ministry argues that while minimal and minimal to moderate impacts on daily functioning are indicated for 3 of 14 listed areas of cognitive and emotional functioning and marginal functioning with extended social networks is reported, the GP otherwise reports no significant deficits with cognitive and emotional functioning. Additionally, the appellant is reported as having good communication abilities, no restrictions with social functioning, and good functioning with immediate social networks, and the GP does not describe any support/supervision required to maintain the appellant in the community or identify any safety issues with social functioning. The ministry concludes that based on the assessments provided by the appellant and his GP, a severe impairment of mental functioning has not been established.

### *Panel Decision*

While the GP indicates an impact on daily functioning in a few areas of cognitive and emotional functioning, the impact is mostly minimal, and there is no diagnosis of a mental impairment or reported difficulties with communication or decision-making, and social functioning is managed independently. The appellant's own information primarily addresses his physical functioning. The panel finds that the ministry reasonably concluded that the information from the appellant and his GP does not establish a severe mental impairment.



### **Restrictions in the ability to perform DLA**

The appellant argues that the impact on his daily activities is evident based on the fact that his foot gives out at any time and that he is reliant on his girlfriend to drive when his foot gives out.

The ministry notes that while the legislation does not specifically require the frequency or duration of restrictions be explained, this information is valuable in determining the significance of the restrictions. The ministry's position is that as the GP reports that the appellant is independent with the majority of DLA, describes the degree of restriction as "none presently," and the need for help "at times" without information to establish the duration and frequency of the assistance required with transfers, a significant restriction in the ability to perform DLA either continuously or periodically for extended periods is not established.

#### *Panel Decision*

The legislative requirement respecting DLA set out in section 2(2)(b)(i) of the EAPWDA is that the minister be satisfied that as a result of a severe physical or mental impairment a person is, in the opinion of a prescribed professional, directly and significantly restricted in the ability to perform DLA either continuously or periodically for extended periods. Consequently, while other evidence may be considered for clarification or support, the ministry's determination as to whether or not it is satisfied, is dependent upon the evidence from prescribed professionals. DLA are defined in section 2(1) of the EAPWDR and are listed in both the PR and the AR sections of the PWD application with the opportunity for the prescribed professional to check marked boxes and provide additional narrative. As the ministry notes in its reconsideration decision, employability or the ability to work is not a prescribed DLA or a criterion under the legislation.

In the appellant's case, the prescribed professional is his GP. With the exception of needing periodic assistance from another person with transfers on/off chairs and in/out of bed, the GP reports that the appellant is not restricted in his ability to manage his DLA. Additionally, as the ministry notes, the GP comments "none presently" when asked to describe the degree of restriction with DLA and does not describe the frequency or duration of the assistance required for transfers. As the appellant is reported as managing almost all tasks of DLA independently without any noted restrictions, the panel finds that the ministry reasonably determined that the information does not establish that the appellant is directly and significantly restricted in his ability to perform DLA continuously or periodically for extended periods.

### **Help to perform DLA**

The appellant argues that he requires the use of a cane and the assistance of his girlfriend.

The ministry's position is that because it has not been established that DLA are significantly restricted, it cannot be determined that help is required.

#### *Panel Decision*

Section 2(2)(b)(ii) of the EAPWDA requires that, as a result of being directly and significantly

restricted in the ability to perform DLA either continuously or periodically for extended periods, a person requires help to perform those activities. That is, the establishment of direct and significant restrictions under section 2(2)(b)(i) is a precondition of meeting the need for help criterion. 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 a DLA.

As the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established, the panel finds that the ministry reasonably concluded that it cannot be determined that the appellant requires help to perform DLA.

**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 therefore confirms the decision.