

## 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 21 September 2016 that denied the appellant designation as a person with disabilities (PWD). The ministry determined that the appellant did not meet all of the required criteria for PWD designation set out in the *Employment and Assistance for Persons with Disabilities Act*, section 2. Specifically, the ministry determined that the information provided did not establish that the appellant's impairment in the opinion of a medical practitioner is likely to continue for at least 2 years.

The ministry determined that the appellant satisfied the other criteria: she has reached 18 years of age and she has a severe mental or physical impairment that in the opinion of a prescribed professional

- (i) directly and significantly restricts her ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and,
- (ii) as a result of those restrictions, she requires help to perform those activities.

## 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 reconsideration consisted of the following:

1. The appellant's PWD Designation Application dated 04 May 2016. The Application contained:
  - A Self Report (SR) completed by the appellant.
  - A Physician Report (PR) dated 13 May 2016, completed by the appellant's general practitioner (GP) who has known the appellant for >10 years and seen her 2-10 times in the past 12 months.
  - An Assessor Report (AR) dated 13 May 2016, completed by same GP.
2. The appellant's signed Request for Reconsideration dated 09 September 2016, attached to which was a submission by the appellant dated 07 September 2016 and a letter from her GP dated 02 September 2016.

In the PR, the GP lists the following diagnoses related to the appellant's impairment: fractured kneecap – rt. (onset February 2016) and torn meniscus – rt. (onset January 2016).

Under Health History, the GP writes:

“Had Rt. Knee surgery Jan 2016 – debridement and partial medial & lateral meniscus removal. During recovery she slipped and fell on her injured knee and shattered her Rt. patella. This required internal fixation and immobilization.”

The panel will summarize the evidence as it relates only to the PWD duration criterion at issue in this appeal.

PR:

Under Degree and Course of Impairment the GP indicates that the impairment is not likely to continue for two or more years, with no explanation.

Under Additional Comments, the GP writes: “Should recover in ~ 6 months from date of surgery (~ August 2016).

GP's letter of 02 September 2016:

The GP writes:

“I am writing on behalf of my patient regarding ongoing disability issues. She has previously applied for disability but was refused at least in part because the thought was her disability would be short. Regrettably this has not been the case; she suffered an injury to her right knee and ultimately underwent surgery in early January for loose bodies and arthritic debridement. She was recovering from this procedure anticipating an early return to work when her knees gave way resulting in the fall onto her left knee. Unfortunately she suffered a nasty comminuted fracture requiring operative intervention and this was completed February 5<sup>th</sup>. Since this time she has been convalescing however improvement has been slow due to recurrent issues with her right knee giving way. She has been referred back to the orthopedic surgeon for review and is likely facing a further corrective surgery. She is also still waiting for the hardware removal from the left knee and at this point, there is no date for this.

[The appellant] should be considered totally disabled at this point and although her prognosis for return to work is excellent, given our current wait lists, cannot see this happening for at least 3-6

months.”

Appellant’s submission at reconsideration dated 07 September 2016:

“In the initial application it was stated that I should improve within six months (August 2016). It is now September 2016 and I’m still waiting for an orthopedic surgeon to remove the hardware in my right knee. However he has referred me to another orthopedic surgeon to remove this hardware. I do not have an appointment due to the wait time to see him. Today I’ve seen my family doctor who has informed me that due to my right knee injury and my unintentional favoring this knee my left knee now requires surgery. Due to the wear of my left knee it has become weak, and due to this I fell and cracked my left ankle which requires me to wear an air cast. With both knees and left ankle injured I require full assistance from my family in basic housework, getting in and out of the bathtub, unable to stand for short period of time, getting in and out of a vehicle and am unable to walk distances. Because of the pain, not being able to work, and wait times for surgery I’m going into a depression, family doctor has increased my pain medication which is highly addictive and depression medication with a prescription to seek depression counseling.”

The appellant’s Notice of Appeal is dated 26 September 2016. Under Reason for Appeal, she writes: “I feel that the ministry has not contacted me or looked at my paper work hard enough even though I have given [doctor's] letters for disabilities. It has been a very long year for me. I have done everything they have asked me. Please need help.”

At the hearing, the appellant and her mother reviewed the background to the appellant's medical situation. In the past, the appellant was physically very active and was in good physical condition, though she had had a couple of knee operations due to the stresses placed on her knees as a result of her active lifestyle. About two years ago she began to feel pain in her right leg and was diagnosed with a torn meniscus. In January 2016 she had surgery to address this problem. A couple of weeks later while recovering from this surgery, she fell and broke her right kneecap, shattering it into several pieces. In February 2016 an orthopaedic surgeon operated on in the kneecap, putting it back together with wires and screws. Following the surgery she was placed in a full brace from the hip down. When the brace was removed, she waited many months for the orthopaedic surgeon to remove the hardware, without any success in having this procedure scheduled. She was told that the orthopaedic surgeon was “too busy” to do this and that she was “at the bottom of the priority list.” At this point the wires were showing through and she was in great pain. Finally, her GP took it upon himself to act, arranging for removal of the hardware. This operation that took place on 15 September 2016. The surgeon advised her that she should eventually have knee replacement surgery, but would have to wait several years until she met the age requirement for such a procedure.

The appellant then described how, because of the condition of her right leg, she had had to put all her weight on her left leg when moving about. The additional stress on her left leg resulted in damage to her left knee and a cracked left ankle. In considerable pain, she was taken to the hospital, where she was fitted with an air-cast boot. Her new orthopaedic surgeon has scheduled surgery for her left knee for February 2017.

The appellant explained that, before her surgeries in early 2016, she had a good job working full time as a cashier in a retail outlet. Her employer had stated that they would welcome her back once she

was fit to return to work. However, as this work involves being on her feet nine hours a day, with breaks, and some lifting, she worries that she will not recover fully to her previous level of ability and would become a liability to her employer, or seen that way by the employer.

The ministry stood by its position at reconsideration

*Admissibility of new information*

The ministry did not object to the new information provided by the appellant and her mother at the hearing. The panel finds this information is in support of the information provided by the appellant and her GP at reconsideration, as it tends to clarify and corroborate the different medical conditions relating to the right and left legs/knees. The panel admitted this information as evidence under section 22(4) of the Employment and Assistance Act.

## PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry was reasonable in denying the appellant designation as a person with disabilities (PWD) because the ministry determined that she did not meet all of the required criteria for PWD designation set out in section 2 of the *EAPWDA*. More specifically, the issue is whether the ministry determination that the information provided did not establish that the appellant's impairment in the opinion of a medical practitioner is likely to continue for at least 2 years is reasonably supported by the evidence or is a reasonable application of the legislation in the circumstances of the appellant.

The ministry determined that the appellant satisfied the other criteria: she has reached 18 years of age and she has a severe mental or physical impairment that in the opinion of a prescribed professional

- (i) directly and significantly restricts her ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and,
- (ii) as a result of those restrictions, she requires help to perform those activities.

The applicable legislation is from the *EAPWDA*:

### **Persons with disabilities**

**2** (1) In this section:

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

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

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

- (2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person is in a prescribed class of persons or that the person has a severe mental or physical impairment that
  - (a) in the opinion of a medical practitioner or nurse practitioner is likely to continue for at least 2 years, and
  - (b) in the opinion of a prescribed professional
    - (i) directly and significantly restricts the person's ability to perform daily living activities either
      - (A) continuously, or
      - (B) periodically for extended periods, and
    - (ii) as a result of those restrictions, the person requires help to perform those activities.
- (3) For the purposes of subsection (2),
  - (a) a person who has a severe mental impairment includes a person with a mental disorder, and
  - (b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires
    - (i) an assistive device,
    - (ii) the significant help or supervision of another person, or
    - (iii) the services of an assistance animal.
- (4) The minister may rescind a designation under subsection (2).

And from the *EAPWDA*:

### **Definitions for Act**

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

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

- (i) prepare own meals;
- (ii) manage personal finances;
- (iii) shop for personal needs;

- (iv) use public or personal transportation facilities;
- (v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
- (vi) move about indoors and outdoors;
- (vii) perform personal hygiene and self care;
- (viii) manage personal medication, and
- (b) in relation to a person who has a severe mental impairment, includes the following activities:
- (i) make decisions about personal activities, care or finances;
- (ii) relate to, communicate or interact with others effectively.
- (2) For the purposes of the Act, "**prescribed professional**" means a person who is
- (a) authorized under an enactment to practise the profession of
- (i) medical practitioner,
- (ii) registered psychologist,
- (iii) registered nurse or registered psychiatric nurse,
- (iv) occupational therapist,
- (v) physical therapist,
- (vi) social worker,
- (vii) chiropractor, or
- (viii) nurse practitioner, or
- (b) acting in the course of the person's employment as a school psychologist by
- (i) an authority, as that term is defined in section 1 (1) of the *Independent School Act*, or
- (ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the *School Act*, if qualifications in psychology are a condition of such employment.
- (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.

[am. B.C. Regs. 196/2007; 197/2012, Sch. 2, s. 2; 70/2013.]

#### **Part 1.1 — Persons with Disabilities**

##### **Alternative grounds for designation under section 2 of Act**

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

- (a) a person who is enrolled in Plan P (Palliative Care) under the Drug Plans Regulation, B.C. Reg. 73/2015;
- (b) a person who has at any time been determined to be eligible to be the subject of payments made through the Ministry of Children and Family Development's At Home Program;
- (c) a person who has at any time been determined by Community Living British Columbia to be eligible to receive community living support under the *Community Living Authority Act*;
- (d) a person whose family has at any time been determined by Community Living British Columbia to be eligible to receive community living support under the *Community Living Authority Act* to assist that family in caring for the person;
- (e) a person who is considered to be disabled under section 42 (2) of the *Canada Pension Plan* (Canada).

[en. B.C. Reg. 165/2016, Sch.]

#### *The position of the parties*

##### *The appellant's position*

The position of the appellant, as she explained at the hearing, is that that she has gone through a lot in the past year, with three operations so far in 2016 and another one scheduled for early 2017. She has many months of rehabilitation to come as well as eventually having to have knee replacement surgery. Given the uncertainty of the outcomes of these procedures, it is unreasonable for the ministry to have determined that she did not meet the 2-year duration criterion for PWD designation.

##### *The ministry's position*

In the reconsideration decision, the ministry noted that the GP has indicated that the appellant's impairment is not likely to continue for two years or more. The ministry also noted that in a letter

included with the Request for Reconsideration, the GP wrote: “[The appellant] should be considered totally disabled at this point and although her prognosis for return is excellent, given our current wait lists, cannot see this happening for at least 3-6 month.” The position of the ministry is that, based on the information provided by the GP in the PWD application and with the Request for Reconsideration, it cannot be established that in the opinion of a medical practitioner or nurse practitioner the appellant's impairment is likely to continue for two years or more.

At the hearing, the ministry representative noted that the opinion of a medical practitioner or nurse practitioner that the impairment is likely to continue for at least 2 years must be on a moving forward basis from when the opinion is submitted, not backward looking from the date of onset of the medical condition.

### Panel decision

Section 2(2) states that for PWD designation, the minister must be satisfied that, along with the person meeting the other criteria, a medical practitioner or nurse practitioner has provided an opinion that the person's impairment will continue for at least 2 years. As the ministry argued, in the PR the GP specifically indicated that the appellant's impairment would not continue for at least 2 years. In his comments in the PR and in his letter at reconsideration, the GP refers to recovery after surgery of ~ 6 months and to wait times for surgery of 3-6 months. Since the GP provided his earliest opinion in the PR dated 13 May 2016, the wait time plus the recovery period together would not place the continuation of the impairment past the 2-year period beginning in May 2018. Accordingly, the panel finds that the ministry was reasonable in determining that the 2-year duration criterion has not been established.

### **Conclusion**

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