

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated December 13, 2016 which found that the appellant did not meet the five statutory requirements of Section 2 of the *Employment and Assistance for Persons with Disabilities Act*, all of which must be met in order for the ministry to grant designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement. However, the ministry was not satisfied that the evidence establishes that:

- the appellant's impairment is likely to continue for at least two 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 these restrictions, the appellant requires the significant help or supervision of another person, the use of 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

With the consent of both parties, the hearing was conducted as a written hearing, pursuant to section 22(3)(b) of the *Employment and Assistance Act*.

The evidence before the ministry at the time of the reconsideration decision included the Persons With Disabilities (PWD) Application comprised of the applicant information and self-report dated July 12, 2016, a physician report (PR) and an assessor report (AR) dated July 12, 2016, both completed by a general practitioner (GP) who met the appellant for the first time as a walk-in patient to complete the application.

The evidence also included the following documents:

- 1) Letter dated June 28, 2016 from a neurologist with attached nerve conduction studies; and,
- 2) Request for Reconsideration dated December 2, 2016 with attached copies of pages from the PWD application with additional notes added.

### **Diagnoses**

In the PR, the GP diagnosed the appellant with bilateral carpal tunnel syndrome with an onset “years ago,” about 5 to 8 years. In the AR, asked to describe the mental or physical impairments that impact the appellant’s ability to manage daily living activities, the GP responded “...ADL’s [activities of daily living] have not been affected. Cannot work however because of hand weakness, numbness and pain.”

### **Duration**

In the PR, regarding the degree and course of the impairment, the GP did not indicate either a “yes” or “no” response to the question whether the appellant's impairment is likely to continue for two years or more and wrote “uncertain.” The GP also wrote that a referral to a neurosurgeon has been initiated in order for the appellant to receive carpal tunnel surgery and “we will have to see what recovery is like post-surgery.”

### **Physical Impairment**

In the PR and AR, the GP reported that:

- In terms of health history, the appellant has “severe carpal tunnel syndrome on the left. Moderate to severe carpal tunnel syndrome on the right. Patient is left-handed. Hands are constantly numb. Develops pain and numbness in the hands whenever he holds anything.”
- The appellant does not require an aid for his impairment.
- In terms of functional skills, the appellant has no limitations as he can walk 4 or more blocks unaided, climb 5 or more stairs unaided, and has no limitation with lifting and no limitation with the time remaining seated.
- The appellant is assessed as independent with walking indoors and walking outdoors, climbing stairs, standing, and lifting. The appellant takes significantly longer than typical with carrying and holding and the GP wrote that the appellant “reports he cannot hold objects for longer than 5 seconds. Takes 3 times longer than normal to do things that require holding objects, like writing, using a computer mouse, or any equipment.”

In the letter dated June 28, 2016, the neurologist reported that:

- The appellant has had symptoms in his hands for at least 5 years. He describes intermittent numbness and tingling in the left greater than right hand. His symptoms have gradually

worsened over the years.

- The nerve conduction tests reveal bilateral carpal tunnel syndrome, severe on the left side and moderate to severe on the right.
- The appellant has very significant bilateral carpal tunnel syndrome.

In his self-report, the appellant wrote that he has carpal tunnel in both hands and it is severe nerve damage and he needs surgery to fix it.

In his Request for Reconsideration with attached pages from the PWD application, the appellant wrote that he cannot hold anything for more than 10 seconds and his hands are always numb.

### ***Mental Impairment***

In the PR and AR, the GP reported:

- The appellant does not have difficulties with communication.
- The appellant has no significant deficits with cognitive and emotional function.
- The appellant has a good ability to communicate in most areas, specifically: speaking, reading and hearing. He has a poor ability with writing “due to bilateral carpal tunnel syndrome.”
- There are no impacts to the appellant’s cognitive and emotional functioning.
- For social functioning, the appellant is independent in all areas, specifically: making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others, dealing appropriately with unexpected demands, and securing assistance from others
- The appellant has good functioning in both his immediate and extended social networks and the GP wrote “not applicable” in this section of the report.

In his self-report, the appellant wrote that he has problems sleeping and even as he was writing the self-report, his hand was completely numb.

In his Request for Reconsideration with attached pages from the PWD application, the appellant wrote:

- His disability is making him depressed, with loss of interest and he is agitated.
- He does not sleep well, he has gained weight because he can no longer work out since he cannot hold anything for more than 10 seconds.
- He has anxiety because he is afraid he will not be able to pay his rent.
- He has major impacts in cognitive and emotional functioning in the areas of bodily functions and motivation. There are moderate impacts in the areas of emotion, motor activity and other emotional or mental problems and no impacts in the remaining listed areas.
- He has extreme sleep disturbance because of the pain in both his hands.
- Every morning, it takes 30 minutes to massage his hands just to be able to move and use them, but they remain numb all day.
- His problem is a physical one, but it is causing depression and a lack of interest in many things in his life, and poor health.

### ***Daily Living Activities (DLA)***

In the PR and AR the GP indicated that:

- The appellant used tools of his trade when working, but now he cannot use these tools because of hand weakness, cramping, and numbness.

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- The appellant has not been prescribed any medication and/or treatments that interfere with his ability to perform daily living activities.
  - The appellant is independent with walking indoors and walking outdoors.
  - The appellant is independent with every task of all the listed DLA, specifically: the personal care DLA, the basic housekeeping DLA, the shopping DLA, the meals DLA, the pay rent and bills DLA, the medications DLA, and the transportation DLA.

In his Request for Reconsideration with attached pages from the PWD application, the appellant wrote:

- He needs disability [assistance] until he can get his hands fixed and then he will be able to work again.
- He needs his hands to work.
- He wants to get the carpal tunnel surgery so he can get back to work and be a productive member of society.

***Need for Help***

In the AR, the GP reported that the appellant “does not require help for DLA.” In the section of the AR for indicating the assistance provided through the use of assistive devices, the GP did not identify any of the listed items, including splints or braces.

***Appellant’s additional information***

In his Notice of Appeal dated December 22, 2016, the appellant expressed his disagreement with the ministry’s reconsideration decision and wrote that it is not true that his impairment was not likely to continue for two or more years since his impairment will only get worse with time and he does have a physical impairment.

The ministry relied on its reconsideration decision as the ministry’s submission in the appeal.

## PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry's reconsideration decision, which found that the appellant is not eligible for designation as a person with disabilities (PWD), was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. The ministry found that the appellant does not have a severe mental or physical impairment that, in the opinion of a medical practitioner, is likely to continue for at least 2 years. The ministry also found that his 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 that, as a result of those restrictions, it could not be determined that the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

The criteria for being designated as a 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 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).

The EAPWDR provides 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.

(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.

## **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).

### *The positions of the parties*

#### *Appellant's position*

The appellant's position is that his physical impairment will only get worse with time and is, therefore, likely to continue for two years or more. The appellant's position is that he has a severe physical impairment as a result of carpal tunnel in both hands with severe nerve damage and he needs surgery to fix it. The appellant argued that he cannot hold anything for more than 10 seconds and his hands are always numb. The appellant's position is that he has a severe mental impairment as, while his problem is a physical one, it is causing depression and a lack of interest in many things in his life, and poor health. The appellant's position is that his physical and mental impairments directly and significantly restrict his ability to perform DLA on an ongoing basis because he cannot work at his job, which requires use of his hands. The appellant argued that he needs disability assistance until he can get his hands fixed through carpal tunnel surgery and then he will be able to work again and be a productive member of society.

#### *Ministry's position*

The ministry's position, as set out in the reconsideration decision, is that the appellant's GP had not confirmed in the PR that the appellant's impairment will continue for two years or more since he wrote "uncertain" and "we will have to see what recovery is like post surgery." The ministry found that there is not sufficient evidence from the GP to demonstrate a severe physical impairment, noting that the GP indicated that the appellant does not require an aid for his impairment and there are no limitations with his basic functional skills. The ministry also found that there is insufficient evidence to establish that the appellant has a severe mental impairment as required by Section 2(2) of the EAPWDA as there is no diagnosis of a mental health condition from a medical practitioner and the GP indicated there are no significant deficits with cognitive, emotional or social functioning, with no additional information provided from the GP. As to DLA, the ministry's position is that the information from the prescribed professional does not establish that the appellant's impairments significantly restrict his DLA either continuously or periodically for extended periods of time. The ministry noted that the GP assessed the appellant as independently able to manage all aspects of his DLA. The ministry's position is that because it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required.

### **Panel Decision**

#### **Duration**

Section 2(2)(a) of the EAPWDA requires that a medical practitioner or a nurse practitioner provide an opinion that the appellant's impairment is likely to continue for at least two years. In response to the question in the PR whether the appellant's impairment is likely to continue for two years or more, the GP did not indicate either "yes" or "no" and wrote: "uncertain. The GP also wrote that a referral to a neurosurgeon as been initiated in order for the appellant to receive carpal tunnel surgery and "we will have to see what recovery is like post-surgery." The appellant wrote in his Notice of Appeal that his physical impairment will only get worse with time and is, therefore, likely to continue for two years or more. There was no additional information provided by the appellant on the appeal from either the GP or the neurosurgeon regarding the likely duration of his impairment. As there was no further information provided from a medical or nurse practitioner, the panel finds that the ministry's determination that the medical practitioner had not confirmed that the appellant's impairment will continue for two or more years from the date of the application, as required by Section 2(2)(a) of the EAPWDA, was reasonable.

### **Severe Physical Impairment**

A diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment. An “impairment” is a medical condition that results in restrictions to a person’s ability to function independently or effectively.

To assess the severity of an impairment the ministry must consider 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 the ability to perform DLA is restricted. In making its determination the ministry must consider all the relevant evidence, including that of the appellant. However, the legislation is clear that the fundamental basis for the analysis is the evidence from a “prescribed professional” – in this case, the appellant’s GP and the neurosurgeon.

The GP, who met the appellant for the first time as a walk-in patient to complete the application, diagnosed the appellant with bilateral carpal tunnel syndrome and wrote that the appellant has “severe carpal tunnel syndrome on the left. Moderate to severe carpal tunnel syndrome on the right. Patient is left-handed. Hands are constantly numb. Develops pain and numbness in the hands whenever he holds anything.” The neurosurgeon reported in the letter dated June 28, 2016 that the appellant has had symptoms in his hands for at least 5 years, the appellant described intermittent numbness and tingling in the left greater than right hand, and his symptoms have gradually worsened over the years. The neurosurgeon wrote that the nerve conduction tests revealed bilateral carpal tunnel syndrome, severe on the left side and moderate to severe on the right. In his self-report, the appellant wrote that he has carpal tunnel in both hands and it is severe nerve damage and he needs surgery to fix it.

In terms of the appellant’s physical functioning, the GP reported that the appellant does not require an aid for his impairment and the appellant has no limitations as he can walk 4 or more blocks unaided, climb 5 or more stairs unaided, and has no limitation with lifting and no limitation with the time remaining seated. In the AR, the GP assessed the appellant as independent with walking indoors and walking outdoors, climbing stairs, standing, and lifting.

In his Request for Reconsideration, the appellant wrote that he cannot hold anything for more than 10 seconds and his hands are always numb. The GP indicated that the appellant takes significantly longer than typical with carrying and holding and the GP wrote that the appellant “reports he cannot hold objects for longer than 5 seconds. Takes 3 times longer than normal to do things that require holding objects, like writing, using a computer mouse, or any equipment.” While there are limitations with the appellant’s carrying and holding, the GP also reported that he has no limitations with lifting or with any other physical ability. Also, as discussed in more detail in these reasons for decision under the heading “Restrictions in the Ability to Perform DLA”, the evidence indicates that the limitations to the appellant’s physical functioning have not directly and significantly restricted his ability to perform his DLA either continuously or for extended periods, as required by the EAPWDA.

Given the absence of an assessment by the GP of significant impacts to the appellant’s physical functioning, the panel finds that the ministry reasonably determined that there is not sufficient evidence to establish that the appellant has a severe physical impairment under Section 2(2) of the EAPWDA.

### **Severe Mental Impairment**

The GP did not diagnose the appellant with a mental disorder and reported in the PR that the



appellant has no significant deficits to cognitive and emotional functioning and assessed no impacts to all areas of cognitive and emotional functioning. The appellant wrote in his Request for Reconsideration that he has major impacts in cognitive and emotional functioning in the areas of bodily functions and motivation, and that there are moderate impacts in the areas of emotion, motor activity and other emotional or mental problems. The appellant wrote that he has extreme sleep disturbance because of the pain in both his hands and although his problem is a physical one, it is causing depression and a lack of interest in many things in his life, and poor health. The appellant wrote that there are significant impacts to his cognitive and emotional functioning, but this was not supported by the GP and there was no further information provided on the appeal from the GP or from a mental health specialist.

The GP reported that the appellant is independent in all areas of social functioning, and he has good functioning in both his immediate and extended social networks. The GP also indicated that the appellant has a good ability to communicate in most areas, specifically: speaking, reading, and hearing. While the appellant is assessed with a poor ability to communicate with writing, the GP indicated that the limitation is “due to bilateral carpal tunnel syndrome” and, therefore, not reported to be related to a mental health condition.

Given the absence of evidence from the GP of significant impacts to the appellant’s cognitive, emotional and social functioning, the panel finds that the ministry reasonably determined that a severe mental impairment was not established under Section 2(2) of the EAPWDA.

**Restrictions in the ability to perform DLA**

Section 2(2)(b) of the EAPWDA requires that the ministry be satisfied that a prescribed professional has provided an opinion that an applicant’s severe impairment directly and significantly restricts his DLA, continuously or periodically for extended periods. In this case, the GP is the prescribed professional. DLA are defined in Section 2(1) of the EAPWDR and are also listed in the PR and, with additional details, in the AR. Therefore, the prescribed professional completing these forms has the opportunity to indicate which, if any, DLA are significantly restricted by the appellant’s impairments continuously or periodically for extended periods.

In the appellant’s circumstances, the GP reported that the appellant has not been prescribed any medication and/or treatments that interfere with his ability to perform DLA. In the AR, when asked to describe the mental or physical impairments that impact the appellant’s ability to manage DLA, the GP responded “...ADL’s have not been affected. Cannot work however because of hand weakness, numbness and pain.” In the PR, the GP wrote that the appellant used tools of his trade when working, but now he cannot use these tools because of hand weakness, cramping, and numbness. In his Request for Reconsideration, the appellant wrote that he needs disability assistance until he can get his hands fixed and then he will be able to work again. The appellant wrote that he needs his hands to work and he wants to get the carpal tunnel surgery so he can get back to work and be a productive member of society. The panel finds that employability is not a criterion in section 2(2) of the EAPWDA nor is it listed among the prescribed DLA in section 2 of the EAPWDR.

The GP reported that the appellant is independent with walking indoors and walking outdoors as well as with every task of all the listed DLA, specifically: the personal care DLA, the basic housekeeping DLA, the shopping DLA, the meals DLA, the pay rent and bills DLA, the medications DLA, and the transportation DLA.

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Given the emphasis by the GP and the appellant on his inability to work, as well as the assessment by the GP of no restrictions to the appellant's ability to perform his DLA, the panel finds that the ministry was reasonable to conclude that the evidence is insufficient to show that the appellant's overall ability to perform his DLA is significantly restricted either continuously or periodically for extended periods, pursuant to Section 2(2)(b)(i) of the EAPWDA.

**Help to perform DLA**

Section 2(2)(b)(ii) of the EAPWDA requires that, 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) 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.

The GP reported in the AR that the appellant "does not require help for DLA" and, in the section of the AR for indicating the assistance provided through the use of assistive devices, the GP did not identify any of the listed items, including splints or braces.

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 help to perform DLA as a result of those restrictions, as defined by section 2(3)(b) of the EAPWDA.

**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 since the evidence does not satisfy all of the criteria in Section 2(2) of the EAPWDA, was reasonably supported by the evidence, and therefore confirms the decision. The appellant's appeal, therefore, is not successful.