

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 10 January 2017 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 has a severe mental or physical impairment that in the opinion of a prescribed professional

(i) directly and significantly restricts his ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and,

(ii) as a result of those restrictions, he requires help to perform those activities.

The ministry determined that the appellant satisfied the other 2 criteria: he has reached 18 years of age and his impairment in the opinion of a medical practitioner is likely to continue for at least 2 years.

PART D – Relevant Legislation

*Employment and Assistance for Persons with Disabilities Act* (EAPWDA) – section 2  
*Employment and Assistance for Persons with Disabilities Regulation* (EAPWDR) – sections 2 and 2.1.

## PART E – Summary of Facts

The evidence before the ministry at reconsideration consisted of the following:

1. The appellant's PWD Designation Application dated 11 August 2016, submitted on his behalf by the Public Guardian and Trustee of BC ("Public Guardian"). The Application contained:
  - A Self Report (SR).
  - A Physician Report (PR) dated 31 August 2016, completed by general practitioner (GP), who has known the appellant for 25 years and seen him more than 11 times over the past year.
  - An Assessor Report (AR) dated 31 August 2016, completed by the same GP.
  - A Court Order dated 08 December 1997 assigning the Public Guardian and Trustee of BC to manage and administer the affairs of the appellant.
2. The appellant's Request for Reconsideration dated 20 December 2016, to which is attached a letter from the appellant's Public Guardian case manager.

In the PR, the GP diagnoses the appellant with traumatic osteoarthritis of the left knee and left shoulder (onset 1993), and severe head injury (onset 1993).

The panel will first summarize the evidence from the PR and the AR as it relates to the PWD criteria at issue in this appeal.

[Panel note: the GP provided no commentary/explanation/description except as set out below.]

### Severity/health history

#### *Physical impairment*

PR:

Regarding functional skills, the GP reports that the appellant can walk 4+ blocks unaided can climb 5+ steps unaided, and there are no limitations to remaining seated; no information is provided regarding any limitations as to lifting.

The GP indicates that the appellant has not been prescribed any medication and/or treatments that interfere with his ability to perform DLA. He also indicates that the appellant does not require any prostheses or aids for his impairment.

AR:

Asked to describe the appellant's impairment that impacts his ability to manage DLA, the GP writes, "Manages ADL's independently."

As to mobility and physical ability, the GP assesses the appellant as independent for all listed activities: walking indoors, walking outdoors, climbing stairs, standing, lifting, and carrying and holding, commenting that the appellant has a weak left shoulder and weak left knee secondary to injury in 1993.

*Mental impairment*

PR:

Under Health History, the GP writes:

“Severe head injury 1993 with frontal lobe damage. Impulsivity & judgment permanently impaired due to brain injury.”

Under Additional Comments, the GP writes:

“This patient is active and independent. He has travelled to [overseas country] golfing on his own. He is reliable about taking his seizure medications but drinks [alcohol] on occasion which is contraindicated due to brain injury & seizure disorder.”

The GP indicates that the appellant has no difficulties with communication.

The GP indicates that the appellant has significant deficits with cognitive and emotional function. He indicates that these deficits are in area of executive function.

AR:

The GP assesses the appellant's ability to communicate as good for all listed aspects: speaking, reading, writing, and hearing.

Regarding cognitive and emotional functioning, the GP indicates that the appellant's mental impairment has the following impacts:

- Major impact: none.
- Moderate impact: none.
- Minimal impact: impulse control, insight and judgment, attention/concentration, executive, and motivation.
- No impact: bodily functions, consciousness, emotion, memory, motor activity, language, psychotic symptoms, other neuropsychological problems, and other emotional or mental problems.

*Ability to perform DLA*

PR:

The GP indicates that the appellant lives alone, owning his house, with a tenant living in a spare room.

The GP indicates that the appellant's impairment does not directly restrict his ability to perform DLA.

AR:

The GP assesses the assistance required for managing DLA as follows:

- Personal care – independent for all aspects.
- Basic housekeeping – independent in all aspects.
- Shopping – independence in all aspects.
- Meals – independent in all aspects.
- Pay rent and bills – independent for banking; periodic assistance from another person

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- required for budgeting, and paying rent and bills.
  - Medications – independent in all aspects.
  - Transportation – independent for all aspects.

With respect to social functioning, the GP assesses the appellant as independent in all listed areas: making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others, dealing appropriately with unexpected demands, and securing assistance from others.

The GP assesses the impact of the appellant's mental impairment on his immediate social and extended social networks as good functioning.

Help provided/required

PR:

The GP indicates that the appellant does not require any prostheses or aids to compensate for his impairment.

AR:

The GP indicates that help is provided to the appellant by others – “Public Trustee helps with financial planning.”

Regarding assistive devices, the GP indicates that the appellant routinely uses a brace for his left knee to compensate for his impairment.

Self report

In the SP, the appellant's Public Guardian case manager describes his impairment as “ Head injury from a motor vehicle accident [...] 1993.”

She describes how his disability affects his life as follows: “Unable to work due to disability from motor vehicle accident.”

Request for Reconsideration

In her letter, the appellant's Public Guardian case manager writes:

“[The appellant] has been a client of the Public Guardian since December 1997, a few years after he sustained a severe head injury. He has been struggling in managing his affairs and also had been financially abused by others around him.

For nearly the last 20 years, the Public Guardian has assisted [the appellant] as he has been deemed incapable of managing due to a severe mental handicap. As such all of his financial and legal matters are managed by our office. The Public Guardian has had to set up supports in place such as purchasing a property on behalf of [the appellant] so that he would have a permanent place to reside, and also contracts maintenance and upkeep on the property. We are liaison with his doctor and pharmacy and we also [make] weekly disbursements to help him with his money management and ensure his bills are paid. It is

only with the assistance of the Public Guardian that [the appellant] is able to enjoy a carefree enhanced quality of life. If the Public Guardian was not a constant in his life, [the appellant's] severe disabilities would be more prevalent in that he would not be able to take care of his home and would end up homeless, or worse.

Typically, when an individual has been deemed incapable of managing their affairs and fall under a government agency to take them over, I would consider this individual is a person with a disability. I disagree with the doctor's assessment that he requires "periodic assistance" as this is not the case. This client does not have positive relationships and does have major social isolation. All of these items fall under the "continuous assistance" as well as the social functioning. I would implore [the ministry] contact the doctor to review this information."

### **Notice of Appeal**

The appellant's Notice of Appeal, submitted on his behalf by his public guardian case manager, is dated 31 January 2017. She writes:

"[The appellant] is supported by the Public Guardian and Trustee as he has been found incapable of managing his legal and financial affairs.

### **The Hearing**

At the hearing, the appellant's case manager described the support of Public Guardian provides the appellant as a "vulnerable adult," much along the lines set out in her letter at reconsideration. She explained that the support she provides relates mainly to the appellant's financial and legal affairs. For instance, she sees to having the appellant's income tax return completed and filed, his utility bills and property tax paid and his house inspected annually. In terms of liaising with the GP and the pharmacy, she has set up an account with the pharmacy to pay for prescription medications not covered by MSP. She also arranges appointments for the appellant to see the GP, and coordinated the preparation of the PWD designation application. The appellant has a debit card for day-to-day purchases and the case manager transfers funds to the account attached to this card on a weekly basis.

In arguing that the appellant is deemed to be a person with disabilities by other government agencies, she noted that the appellant is a recipient of a CPP disability pension, with that amount deducted from his monthly income assistance rate.

The balance of the case manager's presentation went to argument (see Part F, Reasons for Panel Decision, below).

The ministry stood by its position at reconsideration.

### **Admissibility of additional information**

With the exception noted below, the panel finds that the testimony of the appellant's case manager at the hearing is in support of the information and records before the ministry at reconsideration, as the information provided tends to corroborate that in her letter at reconsideration. The panel therefore admits this information as evidence under section 22(4) of

the *Employment and Assistance Act*.

The panel does not admit as evidence the information provided by the case manager that the appellant is a recipient of a CPP disability pension, as this information was not before the ministry at reconsideration – that is, this information is not included in the Record of the Ministry Decision.

While not admitting this information as evidence, the appellant or his case manager may wish to advise the ministry immediately that, in connection with PWD designation, he is a recipient of a CPP disability pension. Section 2(2) of the EAPWDA (as amended 01 September 2016) provides that the minister may designate a person as PWD if the minister is satisfied that the person is in a prescribed class of persons. Section 2.1 of the EAPWDR sets out these alternative grounds for PWD designation, including “(e) a person who is considered to be disabled under section 42 (2) of the *Canada Pension Plan* (Canada).” If, as the case manager states, the appellant is receiving a CPP disability pension, then he would have, in order to qualify, been considered to be “disabled” under the CPP legislation.

For reference, section 42 (2) of the CPP legislation is shown below.

**When person deemed disabled**

**42 (2)** For the purposes of this Act,

(a) a person shall be considered to be disabled only if he is determined in prescribed manner to have a severe and prolonged mental or physical disability, and for the purposes of this paragraph,

(i) a disability is severe only if by reason thereof the person in respect of whom the determination is made is incapable regularly of pursuing any substantially gainful occupation, and

(ii) a disability is prolonged only if it is determined in prescribed manner that the disability is likely to be long continued and of indefinite duration or is likely to result in death; and

(b) a person is deemed to have become or to have ceased to be disabled at the time that is determined in the prescribed manner to be the time when the person became or ceased to be, as the case may be, disabled, but in no case shall a person — including a contributor referred to in subparagraph 44(1)(b)(ii) — be deemed to have become disabled earlier than fifteen months before the time of the making of any application in respect of which the determination is made.

## PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry decision that determined that the appellant did not meet three of the five statutory requirements of Section 2 of the EAPWDA for designation as a person with disabilities (PWD) is reasonably supported by the evidence or is a reasonable application of the legislation in the circumstances of the appellant. The ministry found that the appellant met the age requirement and that, in the opinion of a medical practitioner, his 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 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.

The following section of the *EAPWDA* applies to this appeal:

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 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 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.

The following sections of the *EAPWDR* applies to this appeal:

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;

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- (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.

#### **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).

#### **Alternative grounds for designation.**

##### Panel decision

The appellant's case manager argues that typically, when an individual has been deemed incapable of managing their affairs and falls under a government agency to take them over, this individual would be considered a person with a disability. The ministry did not address this possibility in the reconsideration decision. As explained above under "Admissibility of new information," section 2(2) of the EAPWDA provides that the minister may designate a person as PWD if the minister is satisfied that the person is in a prescribed class of persons. However, a person in receipt of services provided by the Public Guardian is not a proscribed classes of persons listed in section 2.1 of the EAPWDR. As there was no information in the Record of the Ministry Decision that the appellant fell under one of the prescribe classes of persons, the panel finds that the ministry was reasonable in applying the 4 "impairment" criteria set out in section 2 of the EAPWDA.



## **Severity of impairment**

### Physical impairment

#### *Panel decision.*

At the hearing, the case manager stated that the appellant does not argue that he has a severe physical impairment. The GP diagnosed the appellant as having traumatic osteoarthritis of the left knee and left shoulder, but did not indicate that the appellant had any limitations with regard to functional skills requiring physical effort (can walk 4+ blocks unaided, etc.) and assessed the appellant as independent in all listed aspects of mobility and physical functioning. While the GP notes that the appellant uses a brace for his left knee, he also states that the appellant "Manages ADLs independently." Accordingly, the panel finds that the ministry was reasonable in determining that a severe impairment of the appellant's physical functioning had not been established.

### Mental impairment

#### *The appellant's position*

In her letter at reconsideration and at the hearing, the appellant's case manager argued that the appellant suffered a severe head injury in 1993. It is only with the assistance of the Public Guardian that he is able to enjoy a carefree enhanced quality of life. If the Public Guardian was not a constant in his life, the appellant's severe disabilities would result in him not being able to take care of his home and he would end up homeless, or worse. The case manager therefore submits that it was unreasonable for the ministry to have determined that the appellant does not have a severe mental impairment.

#### *The ministry's position*

In the reconsideration decision, the ministry reviewed the assessments provided by the GP in the PR and in the AR related to the appellant's mental functioning, including the appellant having a significant deficit with cognitive and emotional functioning in one area, that of executive, with this deficit resulting in minimal impacts to daily functioning in 5 areas. The ministry also noted that the GP indicates that the appellant does not require support/supervision with any aspects of social functioning and that he has good functioning with both his immediate and extended social networks. The ministry concluded that the information provided by the GP does not establish that the appellant has a severe mental impairment.

#### Panel decision

A diagnosis of a serious medical condition does not in itself determine PWD eligibility. Under the legislation, eligibility for PWD hinges on an "impairment" and its severity. An "impairment" is more than a diagnosed medical condition. An impairment is a medical condition that results in restrictions to a person's ability to function independently, appropriately, effectively or for a reasonable duration.

To assess the severity of impairment one 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. The legislation makes it clear that the determination of severity is at the discretion of the minister, taking into account all of the evidence. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a medical practitioner and a prescribed professional – in this case, the appellant’s GP. The legislation requires that for PWD designation, the minister must be “satisfied” that the person has a severe mental or physical impairment.

For the minister to be “satisfied” that the person’s impairment is severe, the panel considers it reasonable for the ministry to expect that the information provided by the medical practitioner and prescribed professional presents a comprehensive overview of the nature and extent of the impacts of the person’s medical conditions on daily functioning, not only with the “check mark” assessments sought in the PR and AR forms, but through providing the explanations, descriptions or examples in the spaces provided.

The determination of the severity of impairment must be based on assessments of the degree of restrictions on daily functioning arising from the applicant’s current medical condition, not, as the case manager suggests, on speculation as to what the applicant’s condition or situation might or might have been in the absence of support or treatment.

In this case, the GP has diagnosed the appellant with a severe head injury in 1993. Under Health History, the GP explains that there is frontal lobe damage and as a result impulsivity and judgment are permanently impaired. Despite this, under Additional Comments, the GP writes that the appellant is active and independent, and has travelled to an overseas country, golfing on his own; he is also reliable about taking his medication; he drinks alcohol on occasion, something that is contraindicated due to his condition, but the GP does not elaborate on the seriousness of this situation.

In terms of the impact of the appellant’s head injury on daily functioning, the GP assesses no major or moderate impacts, while indicating minor impacts in the areas of impulse control, insight and judgment, attention/concentration, executive, and motivation, without any further explanation as to how or under what circumstances these minor impacts affect daily functioning.

The GP assessed the appellant is having no difficulties with communication, and as the ministry noted, the GP assessed the appellant as independent with respect to social functioning and having good functioning with his immediate and extended social networks.

Considering the above assessments, including the GP’s assessments that there were no major or moderate impacts of the appellant’s head injury on daily functioning, the panel finds the ministry was reasonable in determining the information provided did not establish a severe mental impairment.

### **Direct and significant restrictions in the ability to perform DLA**

#### *The appellant’s position*

The position of the appellant is that, as a direct result of his head injury, he has been deemed incapable of managing his financial affairs, as demonstrated by a court order assigning the Public Guardian to manage and administer his affairs. As “manage personal finances” is a DLA under the legislation, it is unreasonable for the ministry to have determined that the appellant is not significantly

restricted in his ability to perform DLA on a continuous basis.

*The ministry's position*

In the reconsideration decision, the ministry noted that the GP indicated that the appellant has not been prescribed medication/treatment that interferes with his ability to perform DLA. In the PR the GP indicated that the appellant's impairment does not directly restrict his ability to perform DLA and that he is not restricted with any aspects of DLA with the exception of requiring continuous assistance with management of finances. The ministry also noted that in the AR, the GP indicated that the appellant is able to manage all aspects of DLA with the exception of periodic assistance managing budgeting and paying rent and bills, noting that the Public trustee helps with financial planning.

On the basis of these assessments the ministry found that the information provided does not establish that a severe impairment significantly restricts the appellant's ability to perform DLA continuously or periodically for extended periods.

*Panel decision*

The panel notes that, according to the legislation, the direct and significant restriction in the ability to perform DLA must be a result of a severe impairment. The legislation – section 2(2)(b)(i) of the *EAPWDA* – also requires the minister to assess direct and significant restrictions of DLA in consideration of the opinion of a prescribed professional, in this case the appellant's GP.

This does not mean that other evidence should not be factored in as required to provide clarification of the professional evidence, but the legislative language makes it clear that the prescribed professional's evidence is fundamental to the ministry's determination as to whether it is "satisfied." And for the minister to be "satisfied," it is reasonable for the ministry to expect that a prescribed professional provides a clear picture of the degree to which the ability to perform DLA is restricted in order for the ministry to determine whether the restrictions are "significant."

Based on the assessments provided by the GP, and taking into account the Court Order and the case manager's testimony, the panel acknowledges that the appellant is considerably restricted in his ability to perform the DLA of "manage personal finances," and in the related and overlapping DLA, applicable to a person with a mental impairment, of the finances aspect of "make decisions about personal activities, care or finances." However, the evidence is also clear that the appellant is independent – i.e. not restricted – in his ability to perform all other DLA, including the social functioning DLA of "relate to, communicate or interact with others effectively."

The legislation requires that the applicant have a severe mental or physical impairment – not established in this case – that, in the opinion of the prescribed professional, directly and significantly restricts the person's daily living activities [*plural*]. Thus the legislation calls for significant restrictions in the ability to perform DLA be across a broad spectrum of DLA, not just one of them.

Accordingly, considering that a severe impairment had not been established and that the appellant was assessed as independent across all DLA except as related to management of finances, the panel finds that the ministry was reasonable in determining that the information provided did not establish that the appellant has a severe impairment that directly and significantly restricts his DLA

continuously or periodically for extended periods.

### **Help with DLA**

#### *The appellant's position*

The position of the appellant is that, by Court Order, he must rely of the services of the Public Guardian for the management of his finances.

#### *The ministry's position*

The position of the ministry is that, as it has not been established that DLA are significantly restricted, it cannot be determined that significant 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 must also require 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.

While the appellant benefits from the financial management services of the Public Guardian, 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 under section 2(2)(b)(ii) of the *EAPWDA* it cannot be determined that the appellant requires help to perform DLA.

#### 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, and therefore confirms the decision. The appellant is thus not successful on appeal.

The panel refers the appellant and his case manager to the last paragraph of Part E above regarding alternative grounds for designation.