

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated March 30, 2017 which found that the appellant did not meet three of the five 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 and that his impairment is likely to continue for at least two years. However, the ministry was not satisfied the evidence establishes that:

- the appellant has a severe physical or mental impairment;
- the appellant's daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and,
- 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

The evidence before the ministry at the time of the reconsideration decision included the appellant's Persons With Disabilities (PWD) Application comprised of the appellant's information and self-report dated November 17, 2016, a physician report (PR) and an assessor report (AR) dated December 16, 2016 and completed by a general practitioner (GP) who has known the appellant for 2-3 years and saw the appellant 2-10 times in the past 12 months prior to completing the PWD application.

The evidence also included the appellant's Request for Reconsideration dated February 17, 2017 with an attached "Letter of Appeal" (LOA).

Diagnoses

In the PR, the GP diagnosed the appellant with congenital deafness and indicated that the appellant was born with the condition.

Physical Impairment

In the PR and AR, the GP reported:

- With respect to history: the appellant has difficulty with communication and hearing. He is not able to express himself which has affected his learning skills and this affects his abilities in all aspects of life.
- The appellant is not taking any medication that interferes with his ability to perform DLA and that he requires hearing aids but the hearing aids create increased distinction of sound which further impairs his hearing.
- In terms of functional skills the appellant can walk 4+ blocks and climb 5+ steps unaided on flat surfaces, remain seated for unlimited time and the ability to lift was not indicated.
- There are sensory difficulties with communication.
- In terms of significant deficits with cognitive and emotional function, the GP indicated that the appellant has deficits with language and attention or sustained concentration with the comment: "hearing impairment affects language and communication which affects ability to focus and concentrate".
- The appellant is independent in all listed tasks of mobility and physical ability.

In his self-report, the appellant wrote that:

- He is "hard of hearing, it affects [his] everyday life".
- His English skills are still developing since he can barely hear and misses out on information.
- This affects every subject at school and his social life.
- He can barely lip-read.
- His hearing aid simply amplifies sound but does not provide clarity.

In his LOA attached to his Request for Reconsideration, the appellant wrote:

- He has worked before but it was hard to hear and people do not understand him.
- He is in school to improve his English skills but it is stressful and he cannot handle working.
- Being deaf affects his life and his ability to find work.
- He experiences a loss of appetite and sleep due to stress.

Mental Impairment

In the PR and AR, the GP reported:

- The appellant has difficulties with communication due to sensory issues.
- The appellant has significant deficits with cognitive and emotional function in the areas of language and attention or sustained concentration.
- In terms of communication, the appellant's reading and writing is good, speaking is poor and

he is unable to hear.

- In terms of cognitive and emotional functioning, it is reported that there is a major impact in the area of language, minimal impact in the area of motivation, and all other listed areas in this category, including attention/concentration, are reported as having no impact.
- In all listed tasks under 'pay rent and bills', and 'medications', it is reported that the appellant is independent.
- In terms of social functioning, it is reported that the appellant is independent in all listed tasks except 'interacts appropriately with others' which is indicated as requires continual support/supervision with the comment "hearing loss affects his ability to communicate". It is reported that the appellant has good functioning with immediate and extended social networks.

In his LOA that was attached to his Request for Reconsideration, the appellant wrote:

- "This has been stressful. Now with school the stress is worse and I don't handle working".
- "Lack of appetite [and] lack of sleep due to stress.

Daily Living Activities (DLA)

In the PR and the AR, the GP reported:

- The appellant has not been prescribed any medication and/or treatment that interfere with his ability to perform DLA.
- The appellant is independent with all listed tasks of mobility and physical ability.
- The appellant is independent with all listed tasks of DLA.

In his self-report, request of reconsideration and LOA, the appellant did not address DLA or describe the impact his hearing loss has on his DLA.

Need for Help

With respect to the assistance provided by other people, the GP did not report that the appellant receives help. The GP indicated that the appellant uses hearing aids as an assistive device.

Additional information

In his Notice of Appeal (NOA) dated April 8, 2017, the appellant stated that "I am still unable to work and function on my own currently".

At the hearing the appellant submitted a letter dated March 3, 2017 (and issued April 7, 2017). The letter is signed by a physician other than the GP who completed the PWD application and states in part "the patient is suffering from a medical condition. [The appellant] is unable to attend work 3-6 months due to a medical condition".

The appellant was not certain as to why the hearing was taking place. It was explained it was due to his appeal of the ministry's reconsideration decision denying him PWD. The appellant elected to proceed with the hearing.

At the hearing, the appellant's advocate (who is also his father) stated that:

- He too is hearing impaired as are all members of the appellant's family.
- He had to resort to applying for a PWD designation as work is often not available to someone with a hearing impairment for longer than a month or two.
- He experienced many challenges with sustaining employment and sees that now the appellant is too.
- The only sustainable work available to someone with a hearing impairment is in a unionized work place where they are more likely to encounter a protective work environment.

- Sustaining a family on his limited pension income and old age security is difficult and he cannot afford to help the appellant.

At the hearing the appellant stated that:

- His current hearing aids are not working and he cannot afford new ones. They used to be provided every 4 years when he was a child but now that he is an adult he is expected to pay for them.
- He also described his financial difficulties and desire to attend school. However without income he cannot afford to pay his bills.
- Even completing the PWD application independently is impossible. He needs supports such as translators, tutors for school, support for good vision as he has to watch other's signing and financial support.
- His GP only assessed his hearing loss on the PWD application and was not comfortable assessing his mental health issues.
- He was diagnosed in childhood with Attention Deficit Hyperactive Disorder (ADHD) and he experiences anxiety when dealing with the challenges he faces in the community due to the inability to communicate.
- He described the impact of hearing loss in his daily life and in emergency situations.
- He needs access to additional financial, technical supports and an assistive animals.
- He needs access to interpreters and tutors when he has speaking teachers and tutors when he has hearing impaired teachers.

The ministry relied on the reconsideration decision, as summarized at the hearing and added the following:

- ADHD or any other diagnosis whether physical or mental was not provided in the PWD application. Therefore the reconsideration decision is based entirely on the diagnosis of hearing loss.
- The PWD did not provide any information on the help the appellant requires with school or indicate the need for adaptive technologies.

Admissibility of Additional Information

The ministry did not object to the admissibility of the appellant's oral testimony or the letter. The panel considered the information from the appellant, for the most part, as being in support of, and tending to corroborate, the impact from medical conditions referred to in the PWD application and the Request for Reconsideration, which were before the ministry at reconsideration. Therefore, the panel admitted this oral testimony in accordance with Section 22(4)(b) of the *Employment and Assistance Act*. The panel did not admit the appellant's testimony regarding his reference to ADHD as there was no mention in the materials at reconsideration about the appellant's use of an assistive device and, therefore, this is not in support of information and records before the ministry at reconsideration.

The ministry did not object to the admissibility of the letter dated March 3, 2017. The panel considered the information in the letter as not being in support of, and tending to corroborate, the impact from medical conditions referred to in the PWD application and the Request for Reconsideration, which were before the ministry at reconsideration. Therefore, the panel did not admit the letter in accordance with Section 22(4)(b) of the *Employment and Assistance Act*.

PART F – Reasons for Panel Decision

The issue on appeal is whether the ministry's reconsideration decision, which found that the appellant is not eligible for 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. The ministry found that the evidence does not establish that the appellant has a severe mental or physical impairment and that his DLA are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods. Also, 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).

Severe Impairment

In the reconsideration decision, the ministry was not satisfied that the information provided establishes a severe physical or mental impairment. Determining a severe physical impairment requires weighing the evidence provided against the nature of the impairment and its reported functional skill limitations. The appellant's functional skills are indicated as can walk 4+ blocks unaided, climb 5+ steps unaided, remain seated with no limits and no indication as to how much weight he can lift. The appellant is independent in all listed tasks of mobility and physical ability, such as walking indoors/outdoors, climbing stairs lifting and standing. The ministry wrote that, in this case, the evidence provided is not in keeping with the restrictions, limitations and degree of a severe physical impairment. The ministry's conclusion was that it was not satisfied that the combination of the appellant's functional skills, mobility and physical abilities exhibits a severe physical impairment.

In the reconsideration decision, the ministry was not satisfied that the information provided was sufficient evidence of a severe mental impairment. The ministry noted that the GP did not diagnosis a "mental condition" in the PR. The ministry acknowledged that the appellant experiences some degree of restriction due to his impairment. The GP has reported that the appellant has difficulties with sensory communication and significant deficits to language and attention or sustained concentration. In the AR the GP noted a major impact to language, minor impact to emotions, and all other areas of cognitive and emotional functioning, included attention/concentration, were listed as having either a minimal impact or no impact. The ministry also wrote that the appellant is "attending post-secondary school which involves communication not only with professors/teachers but other students as well. Although [the appellant] describe[s] that [he] misses out on a lot of information in subjects at school, this had not affected [his] ability to continue in the program and participate".

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 or for a reasonable duration. 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.

In the self-report, request for reconsideration and at the hearing, the appellant emphasized his inability to work. The panel finds that employability is not a consideration for eligibility for PWD designation because employability is not a criteria in section 2(2) of the EAPWDA nor is it listed among the prescribed daily living activities in section 2 of the EAPWDR.

Given the GP's report in the PR and the AR of the appellant's good functional skills, independent physical functioning and social functioning, with no revised assessment provided by the GP on the appeal, the panel finds that the ministry reasonably determined that there is not sufficient evidence to establish that the appellant has a severe physical or mental impairment under Section 2(2) of the EAPWDA.

Restrictions in the ability to perform DLA

In the reconsideration decision, the ministry was not satisfied that the appellant has a severe physical or mental impairment that, in the opinion of the prescribed professional, directly and significantly restricts DLA either continuously or periodically for extended periods of time.

According to the legislation, Section 2(2)(b) of the EAPWDA, the ministry must assess direct and significant restrictions to DLA in consideration of the opinion of a prescribed professional, in this case the appellant's GP. This does not mean that the other evidence is not factored in as required to provide clarification of the professional evidence, but the legislative language makes it clear that a

prescribed professional's evidence is fundamental to the ministry's determination as to whether it is "satisfied." Therefore, the prescribed professional completing the assessments has the opportunity to indicate which, if any, DLA are significantly restricted by the appellant's impairments either continuously or periodically for extended periods.

In the reconsideration decision, the ministry reviewed the information provided in the AR and noted that the GP did not assess the appellant as requiring periodic or continuous assistance in any areas of his DLA, with the exception of one, and indicated that the appellant is capable of performing almost all his DLA independently. The ministry wrote that the GP reported "a need for continuous support to interact appropriately with others due to issues [with] communicating. However the ministry finds that the [appellant has] good functioning with [his] immediate and extended social networks". As mentioned previously, the ministry pointed out that the appellant is participating in post-secondary school which requires interaction with professors/teachers and other students.

In the self-report and Request for Reconsideration, the appellant did not speak to how his impairment affects his ability to perform his DLA.

Given the assessment by the GP of independence with all DLA with the sole exception of 'interacts appropriately with others', for which there is a need of continuous assistance, the panel finds that the ministry reasonably determined that there was insufficient evidence from a prescribed professional of significant restrictions. Therefore, the panel finds that the ministry reasonably concluded 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

In the reconsideration decision, the ministry held that, as it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required. 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 GP indicated that the appellant uses hearing aids and requires continuous support for 'interacting appropriately with others', 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 also 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 pursuant to Section 2(2) of the EAPWDA, was reasonably supported by the evidence. The panel therefore confirms the ministry's decision. The appellant's appeal, therefore, is not successful.