

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated March 23, 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 February 7, 2017, a medical report (MR) and an assessor report (AR) dated February 18, 2017 and completed by a general practitioner (GP) who has known the appellant for at least 2 months and saw the appellant 2-10 times in the past 12 months prior to completing the PWD application.

Additional evidence consisted of:

- Orthopaedic clinic report dated January 23, 2015.
- Radiology report dated December 15, 2014.
- Operative report dated June 5, 2012.
- Imaging report dated April 3, 2013.
- Imaging report dated January 16, 2013.
- Imaging report dated January 15, 2012.
- Clinical report dated March 10, 2015 which includes a treatment plan.
- Medical genetics report dated September 22, 2016.
- Clinical letter dated September 15, 2016.
- Molecular genetics report on connective tissue dated October 13, 2016.
- 6-page health status report and activities of daily living index from another province and signed by a nurse practitioner and dated August 26, 2016.

The evidence also included the appellant's Request for Reconsideration (RFR) dated May 8, 2017 and outlines excerpts from the PWD application which the appellant argues point to a severe impairment that restricts his ability to perform his DLA. For example the appellant stated:

- The GP indicated that meal preparation, daily shopping, use of transportation and basic housework are restricted continuously and/or periodically.
- Lifting and carrying are indicated by the GP was requiring continuous help.
- The GP indicated that "physically the patient is unable to perform repetitive fine motor tasks."
- Ehlers Danlos Syndrome (EDS) Type III cause severe joint pain in every joint.

### ***Diagnoses***

In the MR, the GP diagnosed the appellant with EDS III (onset: lifelong), Major Depressive Disorder (MMD) (onset unspecified).

### ***Physical Impairment***

In the MR and AR, the GP reported:

- "The patient's EDS type III has resulted in severe joint laxity and chronic joint pain".
- "Initially in his shoulders he was diagnosed with multidirectional instability and due to recurrently subluxations/dislocations of the left shoulder, the patient underwent surgery that did not successfully improve his condition".
- "The patient also had several hernia surgeries to correct a painful large hernia, however, due to the laxity of his skin, none of the surgeries were successful".
- "Now the patient has chronic bilateral shoulder and knee pain when standing about less than 1 hour. He cannot walk more than 1.5 km without taking a break and he is unable to lift anything over 20lbs or more than 5lbs repetitively without pain".
- Prescribed medications or treatments do not interfere with the appellant's ability to perform DLA.
- The appellant can walk 4+ blocks and climb 5+ steps unaided, lift 15-35 lbs ("unable to repeat"), and remain seated with no limitation.
- The appellant is independent with walking indoors and outdoors, requires periodic assistance

with climbing stairs and standing, and continuous assistance with lifting and carrying/holding. The GP added the comment “the longer he needs to stand, the more stairs, there will be more pain in his joints” and “the heavier the objects and the longer he has to carry/hold those objects more pain will be provoked”.

In his self-report, the appellant stated in part that:

- He can only lift light objects for small amounts of time.
- Carrying anything longer than 30 minutes starts to cause severe pain in the shoulders.
- Even walking around or standing the weight of his arms starts to hurt.
- He can do dishes and cook but the pain gets intense by the time he finishes.

### ***Mental Impairment***

In the MR and AR, the GP reported:

- The appellant has no difficulties with communication.
- The appellant has no significant deficits with cognitive and emotional function.
- In the MR the GP left blank the restrictions to social functioning.
- In terms of communication, the appellant’s reading, speaking, hearing and writing is good.
- In terms of cognitive and emotional functioning, the GP reported minimal or no impacts to all listed areas of cognitive and emotional functioning. The GP added the comment “the patient developed MMD as a consequence of his physical condition and chronic pain. It is under control at this time.
- All listed tasks related to ‘paying bills/rent’, ‘medications’ and ‘social functioning’ are listed as independent.

In his RFR, the appellant stated in part that:

- “The depression is as under control as it can be. But I hope to die soon. I think about suicide rationally as an option”.

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

In the MR and the AR, the GP reported:

- Restrictions to meal preparation, basic housework, daily shopping and use of transportation without indicating if any of the restrictions are periodic or continuous.
- All DLA are performed independently except: laundry, basic housekeeping, going to/from stores, carrying purchases home, meal planning, cooking, safe storage of food, and using public transit, all of which are indicated as requiring periodic assistance.
- The GP also indicated that food preparation, going to/from stores and carrying purchases home require continuous assistance.

In his self-report, the appellant did not address DLA.

### ***Need for Help***

With respect to the need for help, the GP reported that the appellant requires a bilateral multidimensional instability shoulder brace and does not use assistive devices or animals. The GP indicated that the appellant receives help from friends and his common-law girlfriend.

### ***Additional information***

In his Notice of Appeal (NOA), signed and dated May 31, 2017, the appellant stated in part that he takes medical marijuana for his chronic pain and that it interferes with his ability perform his DLA.

Prior to the hearing the appellant submitted the following:

- Letter (letter) from his GP, signed and dated June 14, 2017, which describes EDS type III and the appellants history with it in detail. It also stated “this directly and significantly restricts the patient’s ability to perform DLA on a continuous basis” and “ when a dislocation/subluxation occurs the patient’s abilities can drastically decrease making the patient unable to [perform] DLA such as bathing, eating. This directly and significantly restricts the patient’s ability to perform DLA on a periodic basis”.
- Revised section E from the MR which indicates that meal preparation, basic housework, daily shopping and use of transportation are restricted, with the additional notation that these items are restricted continuously. The GP added that personal self-care, mobility inside and outside the home are restricted periodically. The GP added comments which were not present on the original PWD application.
- Medical imaging report dated April 5, 2017.

At the hearing the appellant stated, in part, the following:

- He needs assistance with everything. He can do things but that causes pain and the possibility of dislocations and therefore he avoids things.
- He was under the impression that the GP completed the PWD application correctly and he also tried to secure an advocate but could not.
- EDS is difficult to diagnose and he has a 9/9 Beighton score and was referred to medical genetics as indicated in the information before the ministry at the time of reconsideration.
- He had to stop the use of opiates for pain due to the risk of intestinal rupture and therefore now uses medical marijuana. The marijuana interferes with his DLA as he is confused, tired and started a fire when cooking on one occasion. As a result, those around him do not allow him to cook any longer and he has to ‘beg’ everyone around him for money to purchase the medical marijuana because the cost of the drug is not covered by medical insurance. Without the marijuana he cannot do anything even walk.
- He tried to work but that is impossible -- he cannot even type.
- Regardless of antidepressants, he still feels the pain and still contemplates suicide.
- He wears a jacket to brace his arms as he cannot afford a comfortable brace, there is no brace available which also protects his elbow joint and his jacket provides protection from dislocations.
- Even sitting on the public bus can cause a dislocation of the joints with the jerking movements.
- He believes that his GP explained the severity of EDS.
- His friends and girlfriend help when they can but if they do not help then things are neglected including personal hygiene.
- He relies on Boost for nutrition when others cannot cook for him.

At the hearing the ministry relied on the reconsideration decision.

### ***Admissibility of Additional Information***

The ministry objected to the admissibility of the appellant’s submissions due to their content and timing.

The panel considered the information from the letter, for the most part, as being in support of, and tending to corroborate the information referred to in the PWD application and the Request for Reconsideration, which were before the ministry at reconsideration. Therefore, the panel admitted the letter in accordance with Section 22(4)(b) of the *Employment and Assistance Act*. However the panel did not admit any reference to DLA being either periodically or continuously restricted as this information was not before the ministry at reconsideration and the GP did not explain why there has been a change to his assessment of the DLA. Therefore, the panel did not admit the parts of the

letter that made reference to DLA in accordance with Section 22(4)(b) of the *Employment and Assistance Act*.

The panel considered the imaging report dated April 5, 2017 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 the imaging report in accordance with Section 22(4)(b) of the *Employment and Assistance Act*.

The panel considered the revised section E of the MR as not being in support of, or tending to corroborate, the information referred to in the PWD application and the Request for Reconsideration, which were before the ministry at reconsideration. Therefore, the panel did not admitted the revised section E of the MR 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 Physical 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. 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 reconsideration decision, the ministry noted that in the MR, the GP indicated that the appellant can walk 4+ blocks unaided, climb 5+ steps unaided, lift 15-35 lbs and remain seated without limitation. The ministry noted that in the AR the GP indicated that walking indoors and outdoors is performed independently. Yet the same GP indicated periodic assistance is required with climbing stairs and standing, and continuous assistance is required for lifting and carrying/holding. The panel notes that there are inconsistent assessments in the MR and AR of the appellant's ability to climb stairs, stand, lift and carrying/holding as the AR points to restrictions in functional ability in these two areas and the MR indicates that the appellant is independent in these areas.

The ministry concluded that the PWD application demonstrates that the appellant experiences limitations to his physical functioning due to pain in the joints. However, the assessments provided by the appellant's GP speak to a moderate rather than a severe physical impairment.

Section 2(2) of the *EAPWDA* requires that the minister must be satisfied that a person has a severe mental or physical impairment that results in restrictions to a person's ability to function independently or effectively. The evidence given by the GP in the MR, indicates that the appellant's functional ability is good and in the AR the assessment of mobility and physical functioning differs without explanation as to why the assessment is different in the AR. Therefore the panel finds that the ministry was reasonable in its determination that the evidence does not support a finding that the appellant suffers from a severe physical impairment.

### **Severe Mental Impairment**

In the reconsideration decision, the ministry was not satisfied that the information provided established that the appellant suffered from a severe mental impairment. The ministry noted that in the MR, the GP noted no significant deficits with cognitive and emotional functioning and stated "none at this time. I would consider his depression to be controlled". The ministry noted that in the AR the GP indicated no or minimal impacts to the listed items under cognitive and emotional functioning. The ministry noted that the GP noted no difficulties with communication and indicated that speaking, reading, writing and hearing are good. The ministry further notes that the GP indicates that the appellant is independent with all listed areas of social functioning and he has good functioning with immediate and extended social networks.

Section 2(2) of the *EAPWDA* requires that the minister must be satisfied that a person has a severe mental impairment that results in restrictions to a person's ability to function independently or effectively. The evidence given by the GP indicates that the appellant's depression is under control, he has no major or moderate impacts to cognitive and emotional functioning and there is no indication that he requires help in areas specific to mental impairment (making decision about personal activities, care or finances, and related to communication or interact with others effectively). Therefore the panel finds that the ministry was reasonable in its determination that the evidence does not support a finding that the appellant suffers from a severe physical impairment.

### **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 noted that in the RFR the appellant noted that his medical marijuana interferes with his ability to perform DLA. However in the MR, the GP indicated that the appellant has not been prescribed medication or treatments that would interfere with his ability to perform DLA.

The ministry noted that the appellant has certain limitations resulting from joint pain. However, the ministry argued that the frequency and duration of these periods are not described in order to determine if they represent a significant restriction to the overall level of functioning.

The ministry further noted that in the 6-page health status report and activities of daily living index, the nurse practitioner noted that the appellant has 3 moderate limitations or requires considerably longer times to complete the task and may on some occasions be unable to complete the task without accommodation or without moderate pain in the areas of physical strength, ability to participate physically in sustained activity and do housekeeping.

The panel finds that the ministry reasonably determined that it could not conclude that periodic restrictions have a significant impact on the appellant's overall functioning because the frequency and duration of periodic restrictions on the appellant's ability to perform DLA are not described by the prescribed professional.

Given the assessment by the GP and additional information submitted with the PWD application, the panel finds that the ministry reasonably determined that the assessments provided are indicative of a moderate level of restriction. Therefore, the panel finds that the ministry reasonably concluded that the evidence did not establish that the appellant's 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.

Given the GP's evidence in its entirety, the panel finds that the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established, and therefore 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.