

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 June 6, 2017, which held that the appellant did not meet 3 of the 5 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 and duration requirement but was not satisfied that:

- 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 those restrictions, the appellant requires an assistive device, the significant help or supervision of another person 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

On March 23, 2017 the ministry received the appellant's PWD application comprised of a Medical Report (MR) and an Assessor Report (AR) completed by the appellant's rheumatologist (the "Physician") on March 9, 2017, and the appellant's Self-report (SR) dated March 10, 2017. The appellant also provided a letter from his neurologist (the "Neurologist") dated February 22, 2017.

The appellant's request for PWD designation was denied on May 3, 2017. On May 25, 2017 the appellant submitted his completed Request for Reconsideration (RFR) with a note from the Neurologist dated May 11, 2017.

On June 15, 2017, the tribunal received the appellant's Notice of Appeal.

Summary of relevant evidence

Diagnoses

In the MR, the Physician diagnoses the appellant with Behcet's Vasculitis in his spinal cord, date of onset January 2013. In the AR, the Physician indicates that the appellant's impairment that impacts his ability to manage DLA is "*Behcet's vasculitis c/b saggital venous thrombosis and myelitis from C7-L1*".

In his letter dated February 22, 2017, the Neurologist states that the appellant suffers from a severe form of Behcet's disease, which was diagnosed formally last summer but had been symptomatic since about 2014.

Physical Impairment

In his letter dated February 22, 2017 the Neurologist states that the appellant has suffered a series of autoimmune attacks within his spinal cord and brainstem, which have caused substantial neurologic disability, fatigue, difficulty walking, and imbalance. He further states that despite the appellant's adherence to aggressive therapy, he still has neurologic deficits that preclude meaningful work. He states that the appellant's prognosis is uncertain but he could conceivably have a recovery within five years.

In the MR the Physician indicates that the appellant has Behcet's vasculitis that led to a saggital sinus thrombosis in January 2014, then he developed myelitis in September 2016 with bilateral lower extremity paralysis. The Physician indicates that the appellant was hospitalized several times for his Behcet's disease and that he continues ongoing treatment, but permanent damage has been done to his spinal cord. The Physician indicates that the appellant has ongoing paresthesia and weakness along with ataxia, for which he uses a cane.

The Physician indicates that the appellant can walk 1 to 2 blocks unaided on a flat surface, can climb 2 to 5 steps unaided, is limited to lifting 5 to 15 pounds, and has no limitation remaining seated. The Physician notes that lifting heavy objects makes the appellant unstable due to lower extremity weakness.

In the AR the Physician indicates that the appellant takes significantly longer than typical with all aspects of mobility and physical ability. The Physician indicates that the appellant uses an assistive device, being a cane, with walking outdoors and that he requires periodic assistance with lifting and carrying and holding, explaining that he needs friends to do groceries. In Section E – Additional

Information, the Physician indicates that the appellant was able to transition from a wheelchair to a cane after receiving the appropriate treatments but that his lower extremity weakness has persisted and there is no change for further recovery at this point.

In the SR, the appellant indicates that he has had an autoimmune condition diagnosed as Behcet's disease that has slowly and systematically reduced his strength, balance and sensation in his legs, requiring hospital admissions 5 times in the past few years. He states that the condition also resulted in a blood clot in his brain that affected his vision and gave him a permanent migraine for months. The appellant states that although he has been making very slight improvements over the past 5 months, he has difficulty walking more than 2 blocks, the bus stop is "*slightly far away and the sky train is way too far*". The appellant states that if he sits for more than 10 minutes it will take some time and a lot of stretching before he can start walking. He states that he has gotten a little better at climbing stairs but it still takes a really long time and wears him out quickly. The appellant states that his condition is not as debilitating as it was because he was previously in a wheelchair, then graduated to a cane, and he now only uses a cane if he has to be on his feet "*for a bit*". The appellant states that his ability to go back to work at his former job is "*still a little ways away*", but he hopes to return, if even on light duty.

In the RFR the appellant states that even if he could find a job where he could sit all day it would be impossible to get there as the bus stop is out of his walking range. He states that he is unable to stand for more than 10 minutes.

In his note dated May 11, 2017 the Neurologist states that the appellant has suffered a severe and debilitating series of spinal cord injuries from Behcet's Disease, which have caused marked and lasting neurologic impairment. The Neurologist states that the appellant will be unable to work for more than two years due to gait, balance, and bowel/bladder dysfunction. The Neurologist states that "*[i]f he does not qualify for PWD, I don't know who would*".

Mental Impairment

In the MR the physician indicates that the appellant does not have any significant deficits with cognitive and emotional function. In the AR the Physician indicates that the appellant's ability to communicate in all areas is good. The Physician indicates that there is no impact to any of the listed areas for cognitive and emotional functioning.

DLA

In the MR, the Physician did not check yes or no in response to the question regarding whether the appellant's impairment directly restricts his ability to perform DLA. However the Physician indicates that the appellant is continuously restricted with respect to personal care, meal preparation, basic housework, daily shopping, mobility inside the home, mobility outside the home, and use of transportation, The Physician explains that the appellant takes longer to get dressed and perform DLA and that he can only drive and cannot take the bus. The Physician indicates that the appellant is not restricted with respect to management of medications, management of finances or social functioning. The Physician indicates that the appellant has not been prescribed any medication and/or treatments that interfere with his ability to perform DLA.

In the AR the Physician indicates that the appellant takes significantly longer than typical with respect to dressing, grooming, bathing, toileting, transfers in/out of bed, transfers on/off of chair, laundry and basic housekeeping, explaining that due to weakness in the legs, all of these DLA take twice as long

as before the appellant's extensive longitudinal myelitis occurred in the summer of 2016. The Physician indicates that the appellant is independent with feeding self and regulating diet.

The Physician indicates that the appellant takes significantly longer than typical with going to and from stores, reading prices and labels and carrying purchases home but is independent with making appropriate choices and paying for purchases. The Physician comments that the appellant now has to drive two blocks to get his coffee from Tim Horton's that reflects how long and difficult it is for the appellant to walk even a short distance.

The Physician indicates that the appellant is independent with meal planning and safe storage of food, but takes significantly longer with food preparation and requires continuous assistance with food preparation and cooking, explaining that he does not cook for himself due to physical limitations.

With respect to transportation, the Physician indicates that the appellant is independent using transit schedules, is unable to use public transit and takes significantly longer than typical getting in and out of a vehicle, explaining that the appellant cannot use public transit because of walking difficulties. The Physician comments that the appellant cannot walk the 3.5 blocks to the bus stop near his house due to his leg weakness.

The Physician indicates that the appellant is independent with DLA of paying rent and bills, medications, and social functioning. The Physician indicates that the appellant has good functioning with respect to his immediate and extended social networks.

In the SR, the appellant indicates that certain aspects of his life have not changed drastically and he can still drive a car with reasonable proficiency but that the nearest carpool is hard to get to. He states that bathing is difficult because it is a little harder to get in and out of the tub, but "it's not a huge problem". He states that if he sits for more than about 10 minutes it will take some time and a lot of stretching before he can start walking, and that it takes a long time to climb stairs. However, he states that nothing else has been majorly affected, but he sits down a lot more and does not go to as many concerts. The appellant states that when he plays his guitar he uses a stool.

Need for Help

In the MR, the Physician indicates that the appellant has a roommate who does shopping and meal preparation, amongst other DLA. In the AR, the Physician indicates that the appellant receives help from friends and is leaning heavily on friends to function. The Physician indicates that the appellant uses a cane and is applying for a scooter to assist with his mobility. The appellant does not have an Assistance Animal.

Additional information provided

In his Notice of Appeal dated June 15, 2017, the appellant states that he is "*...in stark disagreement with the ministry's decision as their perception of my condition has not yet become accurate*".

At the hearing the appellant stated while he can technically walk two blocks with a cane, he rarely does so and rarely leaves his apartment. He states that he can probably climb 2 to 5 stairs but he almost never has to. He states that he can perform most DLA but they are more difficult for him and take him much longer. The appellant states that bathing is difficult, because he has to rely on his arm strength, as lifting his leg over the bathtub is hard. The appellant states that he will drive to the grocery store with his roommate, but let his roommate go in and get most of the shopping done then he will go in to the store to pay for the groceries. The appellant stated that he can do some cooking

but it is difficult because his standing is limited. He stated that his roommate does the laundry and dishes. The appellant stated that he cannot work and that the income assistance he receives is not enough to live on. The appellant stated that he is not looking for a hand out but that he is in severe financial need, does not know what to do, and has no other options.

At the hearing the appellant provided a document listing his income and expenses.

Admissibility of New Information

The ministry did not object to the information regarding the appellant's expenses. The panel has admitted the information in the appellant's oral testimony and the information regarding his income and expenses as it is evidence in support of information and records that were before the ministry at the time of reconsideration, in accordance with section 22(4) of the *Employment and Assistance Act*. In particular, the information relates to information at reconsideration respecting the self-reported severity of the appellant's impairment and to the appellant's prior evidence regarding his financial circumstances.

The panel has accepted the information in the Notice of Appeal as argument.

PART F – Reasons for Panel Decision

Issue on Appeal

The issue on appeal is whether the ministry's decision to deny the appellant 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. In particular, was the ministry reasonable when concluding it was not satisfied that

- a severe physical or mental impairment was established;
- 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 those restrictions, in the opinion of a prescribed professional, the appellant requires help, as it is defined in the legislation, to perform DLA?

Relevant Legislation

EAPWDA

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 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).

EAPWDR

Definitions for Act

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

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

- (i) prepare own meals;
- (ii) manage personal finances;
- (iii) shop for personal needs;
- (iv) use public or personal transportation facilities;
- (v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
- (vi) move about indoors and outdoors;
- (vii) perform personal hygiene and self care;
- (viii) manage personal medication, and

(b) in relation to a person who has a severe mental impairment, includes the following activities:

- (i) make decisions about personal activities, care or finances;
- (ii) relate to, communicate or interact with others effectively.

(2) For the purposes of the Act, "**prescribed professional**" means a person who is

(a) authorized under an enactment to practise the profession of

- (i) medical practitioner,
- (ii) registered psychologist,
- (iii) registered nurse or registered psychiatric nurse,
- (iv) occupational therapist,
- (v) physical therapist,
- (vi) social worker,
- (vii) chiropractor, or
- (viii) nurse practitioner, or

(b) acting in the course of the person's employment as a school psychologist by

- (i) an authority, as that term is defined in section 1 (1) of the [Independent School Act](#), or
- (ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the [School Act](#),
if qualifications in psychology are a condition of such employment.

(3) The definition of "parent" in section 1 (1) applies for the purposes of the definition of "dependent child" in section 1 (1) of the Act.

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).

Panel Decision

Severe Physical or Mental Impairment

The legislation provides that the determination of severity of an impairment is at the discretion of the minister, taking into account all of the evidence including that of the appellant. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a prescribed professional respecting the nature of the impairment and its impact on daily functioning. While the legislation does not define "impairment", the MR and AR define "impairment" as a "loss or abnormality of psychological, anatomical or physiological structure or functioning causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration." While this is not a legislative definition, and is therefore not binding on the panel, in the panel's opinion, it reflects the legislative intent and provides an appropriate analytical framework for assessing the degree of impairment resulting from a medical condition.

When considering the evidence provided respecting the severity of an impairment, the ministry must exercise its decision-making discretion reasonably by weighing and assessing all of the relevant evidence and cannot simply defer to the opinion of a prescribed professional as that would be an improper fettering of its decision-making authority.

Physical Impairment

The appellant argues that he has a severe impairment due to his ongoing Behcet's disease that causes him weakness and limited mobility. The appellant's position is that he is unable to walk more than two blocks or stand more than 10 minutes. The appellant argues that the information from the Neurologist in his note dated May 11, 2017 in which the Neurologist states that "*[i]f he does not qualify for PWD, I don't know who would*" should be sufficient to establish that he qualifies for designation as PWD. The appellant also states that there are errors in the reconsideration decision as the ministry inaccurately attributes some statements to the Physician that were statements of the Neurologist. The appellant's position is that these errors indicate that the ministry did not give his application or the supporting documentation appropriate consideration.

The ministry's position is that it is difficult to establish a severe impairment of physical functioning based on the assessment from the Physician. In particular the ministry notes that although the appellant uses a cane, the Physician indicates that he can walk up to 2 blocks unaided. The Physician also indicates that the appellant can lift 5 to 15 pounds, which the ministry considers sufficient ability to lift a variety of household and shopping items.

Although the medical evidence indicates that the appellant has ongoing lower extremity weakness and is only able to walk 1 to 2 blocks unaided on a flat surface, the Physician indicates that the appellant can climb 2 to 5 stairs unaided, can lift 5 to 15 pounds and has no limitation with respect to being seated. In addition, the Physician has not provided any information on how long the appellant can remain standing. The panel notes that the level of functioning reported by the Physician is not at the most restricted end of the rating scale in the MR.

The panel notes that the ministry has made errors in attributing statements of the Neurologist as being statements of the Physician. The panel notes that both the Physician and the Neurologist have the same last names and it appears that the ministry did not look at the names or the two different physician's credentials in order to note that the information provided is actually from two different physicians. In his letter dated February 22, 2017 the Neurologist states that the appellant's prognosis is uncertain but he could conceivably have a recovery within five years. In the AR, the Physician indicates that there is no chance for further recovery. While the ministry inaccurately considered these two statements as being from the Physician, the panel finds that the inconsistency between these two statements, whether from one doctor or two separate doctors, results in it being difficult to determine the severity of the appellant's physical condition and prognosis for improvement. The panel finds that whether the ministry attributed the statements to the wrong doctor or not would not make any significant difference to the ministry's decision.

While the appellant argues that the Neurologist's statement that "[f]he does not qualify for PWD, I don't know who would" strongly supports his application, the panel notes that opinions of this nature are not sufficient on their own, as there must be information describing the restrictions to mobility and physical ability resulting from the impairment. Likewise, while the Neurologist states that the appellant has suffered a severe and debilitating series of spinal cord injuries which have caused marked and lasting neurologic impairment, the use of the words "severe", "marked" or "debilitating", without further information describing the appellant's actual function and limitations, is not sufficient.

While the Neurologist and the appellant both indicate that the appellant is unable to work because of his impairment, employability is not a criterion for PWD designation. Likewise, while the appellant provided evidence regarding his financial circumstances and need for additional income to cover his expenses, financial need is not a criterion for designation of PWD.

The panel therefore finds that the ministry reasonably determined that a severe physical impairment has not been established.

Mental Impairment

At the hearing, the appellant stated that he has some difficulty with short-term memory so he has to write information down, but he did not argue that he has a mental impairment. The information provided by the Physician in the MR and the AR indicates that there are no significant deficits to cognitive and emotional function and no impact on daily functioning in the areas of cognitive and emotional function,

The panel finds that ministry reasonably determined that the evidence respecting the appellant's cognitive, emotional and social functioning does not establish a severe impairment of mental functioning.

Restrictions in the ability to perform DLA

Section 2(2)(b)(i) of the EAPWDA requires that the minister be satisfied that in the opinion of a prescribed professional, a severe mental or physical impairment directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods. While other evidence may be considered for clarification or support, the ministry's determination as to whether or not it is satisfied that the legislative criteria are met, is dependent upon the evidence from prescribed professionals. The term "directly" means that there must be a causal link between the severe impairment and the restriction. The direct restriction must also be significant. Finally, there is a component related to time or duration – the direct and significant restriction may be either continuous or periodic. If periodic, it must be for extended periods. Inherently, any analysis of periodicity must also include consideration of how frequently the activity is restricted. All other things being equal, a restriction that only arises once a year is less likely to be significant than one that occurs several times a week. Accordingly, in circumstances where the evidence indicates that a restriction arises periodically, it is appropriate for the ministry to require evidence of the duration and frequency of the restriction in order to be "satisfied" that this legislative criterion is met.

DLA are defined in section 2(1) of the EAPWDR and are listed in both the MR and the AR sections of the PWD application with the opportunity for the prescribed professional to check marked boxes and provide additional narrative. DLA, as defined in the legislation, do not include the ability to work.

The appellant states that he has a severe physical impairment that makes it impossible to walk to the bus stop and to walk more than 2 blocks or stand more than 10 minutes. The appellant's position is that he is out of options and does not know what he can do.

The ministry's position is that the information provided by the Physician is not sufficient to establish significant restrictions to DLA. In particular, the ministry notes that while the Physician indicates continuous restrictions with personal self-care, meal preparation, basic housework, daily shopping, mobility inside the home, mobility outside the home and use of transportation, the Physician does not, in the MR, describe how much longer than typical is required to perform DLA. The ministry notes that in the AR the Physician indicate that it takes the appellant twice as long to perform DLA of dressing, grooming, bathing, toileting, transfers, laundry and basic housekeeping. However, the ministry does not consider taking "*twice as long as typical*" to be indicative of significant restrictions.

The ministry also notes that in the PR the Physician indicated that the appellant could lift 5 to 15 pounds and there is no information regarding the appellant's limitations with respect to standing, so the ministry finds it difficult to establish why the appellant requires continuous assistance from another person with food preparation and cooking.

The panel finds that the evidence establishes that the appellant has an impairment which impacts his ability to walk and the panel accepts that the appellant has some difficulty with standing. However, the panel finds the ministry reasonable in determining that the information provided is not sufficient to establish significant restrictions to DLA. In addition there are several inconsistencies in the information that make it difficult to establish the restrictions to the appellant's functioning. For example, the appellant states that he is out of options and does not know what to do, but in the SR, he states that certain aspects of his life have not changed drastically and at the hearing, the appellant stated that he can perform most DLA, as he has learned how to modify his activities.

There are also inconsistencies regarding other items. For example, while the Physician indicates that the appellant requires continuous assistance with food preparation and cooking, the appellant stated at the hearing that he is able to do some of his own cooking. In the SR, the appellant indicates that he has difficulty with walking, that the bus stop is “*slightly far away*” and the “*skytrain is way too far*”, difficulty with climbing stairs, that he has difficulty with getting in and out of the bathtub, and that if he sits for more than 10 minutes, it will take more time and a lot of stretching before he can start walking. However, he also states that “[*n*]othing else has been majorly affected” but that he sits a lot more and does not go to as many concerts. He also indicates that he is not in a wheelchair anymore and his condition is not as debilitating as it was previously.

Based on the above analysis, the panel finds that the ministry has reasonably determined that the independence with which the prescribed professionals report that the appellant manages his DLA does not confirm that the appellant has a severe impairment that significantly restricts his ability to perform DLA continuously or periodically for extended periods.

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 DLA.

The appellant’s position is that he requires help with DLA because of his severe physical impairment.

The ministry argues that because it has not been established that DLA are significantly restricted, it cannot be determined that help is required.

The Physician indicates that the appellant requires the use of a cane and help from friends to do groceries and the appellant indicates that he requires assistance from his roommate with some household tasks and shopping, but he does not provide any information regarding how much help he needs or how frequently he needs help. There is no information from the appellant or his roommate on the frequency or duration of help provided.

However, given that confirmation of direct and significant restrictions with DLA is a precondition of the need for help criterion and as the panel found that the ministry reasonably determined that direct and significant restrictions in the appellant’s ability to perform DLA have not been established, the panel also finds that the ministry reasonably concluded that it cannot be determined that the appellant requires help to perform DLA as required by section 2(2)(b)(ii) of the EAPWDA.

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 is a reasonable application of the applicable enactment, and therefore confirms the decision. The appellant is not successful on appeal.