

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 May 18, 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 requirement and that a medical practitioner has confirmed that the appellant's impairment is likely to continue for at least 2 years.

However, the ministry was not satisfied 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, in the opinion of a prescribed professional, the appellant requires an assistive device, the significant help or supervision of another person, or the services of an assistance animal to perform DLA.

The ministry also determined that the appellant is not in any of the classes of persons set out in section 2.1 of the *Employment and Assistance for Persons with Disabilities Regulation* who may be eligible for PWD designation on alternative grounds.

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 and section 2.1

PART E – Summary of Facts

On February 3, 2017, the ministry received the appellant's PWD application comprised of a Physician Report (PR) and an Assessor Report (AR), both completed by a general practitioner on January 22, 2017. The appellant did not complete the Self-report (SR) section of the PWD application.

The appellant's request for PWD designation was denied on April 4, 2017. On May 4, 2017, the ministry received the appellant's Request for Reconsideration together with the completed SR of the PWD application. On March 18, 2017, the ministry issued its reconsideration decision, which again denied the appellant's request for PWD designation.

Additional information provided on appeal comprised the appellant's Notice of Appeal (NOA), received by the tribunal on April 5, 2017, and the oral testimony provided at hearing by the appellant and his landlady. As the additional information tends to corroborate the information available at reconsideration, it was therefore admitted as supporting information in accordance with section 22(4) of the Employment and Assistance Act.

At the hearing, the ministry reviewed the reconsideration decision but did not introduce additional information.

Summary of relevant evidence

Diagnoses

In the MR, where asked to provide a specific diagnosis and provide health history, the GP writes:

- COPD (Chronic obstructive pulmonary disease). "Progressive, shortness of breath preventing him to walk long distances. Lung moderate. Still under surveillance."
- Secondary polycythemia.
- Chronic back pain. "Mechanical back pain preventing him to lift weight more > 7 kg despite spinal treatments."
- Diverticulosis.
- Depression. "Socially withdrawn with lack of resources and inability to work due to recurrent medical conditions."

Physical Impairment

The GP provides the following information in the PWD application:

- No prostheses or aids are required.
- In the PR, the GP reports that the appellant is able to walk less than 1 block unaided on a flat surface, climb 2 to 5 steps unaided, lift 5 to 15 lbs., and remain seated with no limitation.
- In the AR, the GP reports that walking indoors and standing are managed independently. Walking outdoors and climbing stairs require periodic assistance from another person. "Short of breath on exertion." Lifting (chronic back pain) and carrying/holding (chronic back pain and COPD) require continuous assistance from another person. Not able to carry heavy weights.

In his SR, the appellant writes that due to a motor vehicle accident, he had two broken ankles and pins were inserted. His left ankle is fused with no mobility. Walking and standing cause pain in his back and legs. He cannot walk half a block without pain. Constant back pain keeps him from walking

or leaving his home as he needs to be able to sit down. Because of the fused ankle he ends up limping and needs to get to a chair or he will fall down. He cannot bend over to pick up something due to pain and cannot straighten up. Due to COPD he does not have the energy or breathing power to go far from a chair. He has a real bad cough and when he starts to cough he cannot get his breath, even after using a puffer he has a hard time getting air into his lungs. As a result of a problem with his colon he cannot be very far from a washroom. He has no energy and no strength and feels very sick.

In his NOA, the appellant writes that he has a real hard time breathing and back problems that shoot down his leg. He cannot stand more than 5 minutes and his back is so sore he takes T3s, which help a little.

At the hearing, the appellant confirmed that he does not use assistive devices for walking. He has never tried to lift 15 lbs. but stated that that is probably nearly all he could lift. The appellant's landlady stated that the appellant relies on walls, furniture and counter tops when moving about inside the home. Both the appellant and his landlady stated that due to severe back pain, the appellant is not able to work, with the appellant noting that he cannot even bend down to pat his cat and the landlady noting that the appellant, who she observes daily, can hardly sit even for a few minutes and is constantly having to adjust pillows. She also stated that the appellant's COPD is getting much worse and that the doctor says the appellant will require oxygen within a year.

Mental Impairment

The GP provides the following information in the PWD application.

- In the PR, significant deficits with cognitive and emotional function are identified in 2 of 11 specified areas – emotional disturbance (depression) and motivation; in the AR a major impact on daily functioning is reported for both areas. In the AR, a moderate impact on daily functioning is reported for bodily functions with no impact on daily functioning reported for the remaining 11 areas. The GP comments that “Lack of work and financial constraints made him over years socially withdrawn.” Due to physical issues, the appellant “is unable to work as much as he wanted.”
- No cognitive, motor, sensory, or other difficulties with communication are identified in the PR. In the AR, good ability with speaking, reading, writing, and hearing is reported.
- In the PR, social functioning is reported as being periodically restricted – lack of confidence and socially withdrawn.
- In the AR, four listed aspects of social functioning are reported to require periodic support/supervision: ability to develop and maintain relationships (“lack of confidence lately and stigma”); interact appropriately with others; ability to deal appropriately with unexpected demands; and, ability to secure assistance from others. The remaining aspect, appropriate social decisions, is managed independently.
- Help with social functioning is described as “Has used Psychotherapy.”
- Marginal functioning is reported for immediate and extended social networks.

The appellant's SR and NOA do not address mental impairment. At the hearing, the appellant stated that he didn't know that he had depression, his doctor said he did.

DLA

In the PR, the GP reports the following.

- No medications or treatments have been prescribed that interfere with the ability to perform DLA.
- The impairment directly restricts the appellant's ability to perform DLA.
 - Meal preparation, basic housework, daily shopping, mobility outside the home are periodically restricted. Periodic is described as "when having flare-up of pain and COPD."
 - Social functioning is periodically restricted. Comments in the PR and AR respecting social functioning are described above under Mental Impairment.
 - Personal self-care, management of medications, mobility inside the home, use of transportation, and management of finances are not restricted.

In the AR, the GP provides the following information respecting DLA.

Move about indoor/outdoors

- As described above under Physical Impairment.

Personal care

- All listed tasks are managed independently - dressing, grooming, bathing, toileting, feeding self, regulate diet, and transfers in/out of bed and on/off chair.

Basic Housekeeping

- All listed tasks require continuous assistance due to worsening COPD and back pain - laundry and basic housekeeping.

Shopping

- Going to and from stores, reading prices and labels, making appropriate choices, and paying for purchases are managed independently.
- Carrying purchases home requires continuous assistance from another person due to COPD and back pain.

Meals

- All listed tasks are managed independently - meal planning, food preparation, cooking, and safe storage of food.

Paying Rent and Bills

- All listed tasks are managed independently – banking, budgeting, and pay rent and bills.

Medications

- All listed tasks are managed independently - filling/refilling prescriptions taking as directed, and safe handling and storage.

Transportation

- Getting in and out of a vehicle is managed independently. Using public transit and using transit schedules/arranging transportation require periodic assistance from another person.

Social Functioning

- As described above under *Mental Impairment*.

In his SR, the appellant writes that he needs help with his groceries and cannot lift heavy objects. He has a hard time with a shower because of balance problems, so he takes a bath and needs someone there in case he needs help getting out of the tub due to his COPD. He gets very bad dizzy spells.

At the hearing, the appellant's landlady stated that she makes sure she is home when the appellant takes a bath in case he needs help getting out of the bathtub. She is looking into getting a bath chair so that the appellant can sit while showering. She also stated that the appellant has trouble getting in and out of a vehicle. She stated that the appellant does light cleaning up and makes supper for both of them and that vacuuming a 5' x 7' rug takes the appellant an hour due to his stopping and starting. The appellant confirmed that he drives his own vehicle and that he gets in and out of the vehicle independently, noting that he has no choice but to do so. Noting that he can go to the bathroom himself, and does not need a babysitter for everything, the appellant stated that he has such severe back problems he can't do anything. He doesn't know anyone who would hire him.

Need for Help

The GP reports that when doing groceries or walking long distances, the appellant needs help to carry bags. Additionally, assistance is provided by the appellant's family physician and a primary care team (nurse, mental health nurse and social worker). The appellant's landlady described the assistance she provides as being available to assist when the appellant takes a bath and as making sure the path outside is not slippery if it has snowed. She also confirmed that the appellant does not use a cane.

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. That is, was the ministry reasonable when determining that the appellant is not a person described in section 2.1 of the EAPWDR and that the requirements of section 2(2) of the EAPWDA were not met because:

- a severe physical or mental impairment was not established;
- the appellant's DLA are not, 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 does not require an assistive device, the significant help or supervision of another person, or the services of an assistance animal 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

As the appellant has not provided any information or argument respecting eligibility for PWD designation under section 2.1 of the EAPWDR, the panel finds that the ministry reasonably determined that it has not been established that the appellant falls within the prescribed classes of persons under that section. The panel's discussion below is limited to eligibility for PWD designation under section 2 of the EAPWDA and section 2 of the EAPWDR.

Severe Physical or Mental Impairment

The legislation provides that the determination of severity of 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 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 is diagnosed with COPD, secondary polycythemia, chronic back pain, and diverticulosis. While the appellant describes the need to be near a washroom due to a bowel problem, presumably the diverticulosis, both the appellant and his GP attribute impairment of physical

functioning primarily to the COPD and back pain. The appellant's position is that his medical conditions leave him feeling very sick, without energy and strength, and unable to work. However, as the ministry notes, the ability to work or maintain employment is not the basis upon which eligibility for PWD designation is assessed. As described above, the legislation assesses functioning in terms of the ability to manage everyday routine functioning, physically and mentally, and while there is almost certainly some overlap in terms of how a person functions during the day in a work and non-work environment, the legislative language does not address employability or the more prolonged functional capacities reasonably associated with employment. Accordingly, the panel finds that the ministry reasonably concluded that the ability to work is not considered when assessing eligibility for PWD designation.

When looking at the appellant's physical functioning, the ministry acknowledges limitations due to COPD and back pain but finds that the medical practitioner's assessments of basic physical functioning and ability to manage activities requiring mobility and physical ability do not establish the presence of a severe physical impairment. The panel finds this conclusion to be reasonable. As the ministry notes, the reported need for continuous assistance with lifting, carrying and holding identified in the AR is not supported by the assessment in the PR that the appellant can lift between 5 and 15 lbs. While it is unclear where in the range of 5 to 15 lbs. the appellant's lifting ability falls, information from the appellant and the physician's comment that the appellant is not able to carry heavy weights support the ministry's conclusion that the appellant independently manages some lifting. Accordingly, the panel finds the ministry was reasonable to conclude that continuous assistance is only required with "heavy" lifting, which is not indicative of a severe physical impairment. Additionally, as the ministry notes, no information is provided about the assistance required to walk outdoors or climb stairs, though it is clear that assistive devices or aids are not used. Furthermore, the GP describes limitations to the appellant's physical functioning as relating to times when the appellant's COPD and back pain "flare-up" but, as the ministry notes, does not give any indication as to how often the flare-ups occur or how long they last. Finally, while the GP assesses the appellant as being limited to walking less than one block unaided and the appellant describes physical limitations as being continuous, rather than associated with periods of flare-up, the panel finds that the ministry reasonably determined that the GP's assessment of the appellant's ability to manage activities requiring mobility and physical ability, discussed below in greater detail under DLA Restrictions, does not reflect a severe degree of physical impairment.

Based on the above analysis, the panel finds that the ministry reasonably determined that a severe physical impairment has not been established.

Mental Impairment

The appellant is diagnosed with depression by his GP, though the appellant's own written and oral submissions do not describe a mental impairment. The ministry acknowledges the pressure financial difficulties can place on the appellant's well-being, but finds that the medical practitioner's assessment of cognitive and emotional functioning in terms of deficits and impact on daily functioning is not reflective of a severe impairment of mental functioning. The panel finds the ministry's conclusion reasonable, noting that while the GP reports a major impact on daily functioning in two areas, emotion and motivation, neither the GP nor the appellant identifies any related impact on the appellant's ability to manage his DLA, such as problems related to motivation or decision-making. Also, for most areas of cognitive and emotional functioning, no impact on daily functioning is reported and there are no difficulties with communication. Respecting social functioning, the ministry finds the assessment of the need for periodic assistance with four areas of function to be notable, but reasonably concludes that it is difficult to assess the severity of impairment and significant of restrictions as there is no description of the support or supervision required, or of how often and what

period of time the assistance is required. Additionally, the panel notes that the appellant did not describe difficulties with social functioning related to his diagnosis of depression.

Based on the available information, the panel finds that the ministry reasonably determined that while the information establishes that the appellant is impacted by the situational depression he experiences, the information provided 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, 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 the frequency. 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 PR 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 argues that while he doesn't need a babysitter for everything, due to his severe back problems he can't do anything. The ministry's position is that considering the appellant's history, it is reasonable to expect some restrictions in his ability to manage DLA but that based on the information from the GP, the only prescribed profession who provided information, there is not enough evidence to confirm that the appellant's impairment *significantly* restricts his ability to perform DLA either continuously or periodically for extended periods.

In the PR, periodic restrictions are identified for meal preparation, basic housework, daily shopping and mobility outside the home. The GP's narrative relates these restrictions to times when the appellant is having a flare-up of back pain and COPD. As the ministry notes, there is no indication how often the flare-ups occur or how long they last, leaving the ministry unable to determine that these restrictions are both significant and for extended periods of time.

The information in the AR is somewhat different. In particular, while periodic restrictions were identified for meals in the PR, in the AR, the appellant is reported as independently managing all listed tasks with no noted limitation, and at the hearing, the appellant's landlady confirmed that the appellant makes supper for both of them. Another difference is that in the AR lifting/carrying/holding, basic housekeeping, and one task of shopping (carrying purchases home) are reported as requiring continuous assistance from another person, when only periodic restrictions are identified in the PR. Given the reported ability to lift somewhere between 5 to 15 lbs. and the ability to walk indoors without assistance, the panel finds the ministry reasonable to conclude that the continuous assistance is for heavier household chores and lifting. This conclusion is further supported by the

information from the appellant's landlady that the appellant does some light cleaning up.

In the PR, the GP reported transportation as not being restricted but in the AR, periodic restrictions are identified with using public transit and transit schedules; the remaining task, getting in and out of a vehicle, is reported as being managed independently. The appellant confirms that he is able to get in and out of his vehicle, as he has no choice, suggesting it is managed with some difficulty. As the ministry finds, there is no direct correlation between the assessment of the appellant's cognitive abilities and the reported need for assistance with public transit schedules.

Finally, as the ministry notes, the appellant is independent with all other areas of DLA including all other activities related to personal care (the GP does not support the appellant's assertion that assistance is required for bathing), shopping, meals, paying rent and bills, and managing medications.

Respecting one of the two DLA specific to mental impairment, "make decisions about personal activities, care or finances", no restrictions are identified by the GP. The second DLA specific to mental impairment is defined in the legislation as "relate to, communicate or interact with others effectively" and is reflected in the PWD application as "social functioning" and "communication." The GP reports that the appellant has no problems with communication and as previously noted in the panel's discussion of mental impairment, the GP does not describe or indicate how often the appellant requires periodic support/supervision with social functioning.

Based on the assessments by the GP, the panel finds that the ministry was reasonable in determining that the information does not establish direct and significant restrictions in the appellant's ability to manage DLA that are either continuous or periodic for extended periods.

Help to perform DLA

The appellant reports the need for assistance when bathing but does not specifically address assistance required with other DLA. The ministry's position is that because it has not been established that DLA are significantly restricted, it cannot be determined that help is required.

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 establishment of direct and significant restrictions with DLA is a precondition of the need for help criterion. 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 a reasonable application of the applicable enactment, and therefore confirms the decision. The appellant is not successful on appeal.