

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (“ministry”) reconsideration decision dated March 6, 2017 in which the ministry found the appellant was not eligible for designation as a Person With Disabilities (“PWD”) because he did not meet all of the criteria in Section 2(2) of the *Employment and Assistance for Persons with Disabilities Act* (“EAPWDA”). The ministry was satisfied that the appellant has reached 18 years of age; that his impairment will continue for at least 2 years; and that he has a severe physical impairment. However, based on the information provided in the PWD Designation Application (“PWD application”) and Request for Reconsideration (“RFR”), the minister was not satisfied that the appellant has a severe mental impairment. The ministry further determined that the following legislative criteria were not met:

- The impairment, in the opinion of a prescribed professional, directly and significantly restricts the appellant’s ability to perform daily living activities (“DLA”) either continuously or periodically for extended periods; and
- as a result of these restrictions, he requires help to perform DLA through an assistive device, the significant help or supervision of another person, or the services of an assistance animal.

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 reconsideration consisted of the following:

1. A PWD application comprised of:

- The *Applicant Information and Self-report* (“SR”) signed by the appellant on July 28, 2016.
- A *Physician Report* (“PR”) completed by a general practitioner (“the physician”) on July 30, 2016. The physician has known the appellant for more than 2 years and has seen him 2-10 times in the past 12 months.
- An *Assessor Report* (“AR”) also completed by the physician on October 7, 2016. The physician completed the report via an office interview with the appellant; file/chart records [including previous MD notes and an MRI]; and information from the appellant’s ex-wife who is also the physician’s patient.

The PWD application included the following information:

Diagnoses

PR

The appellant is diagnosed with COPD [date of onset, 2005]; left knee PCL and meniscal tear, awaiting surgery with left knee replacement [date of onset, 2005]; and IBS/functional dyspepsia with colonic polyposis [date of onset 2013]. Under *Health History*, the physician indicated that the appellant has mild COPD, and weight loss of unknown origin, “likely due to suppressed appetite with IBS and stress response.”

Functional Skills

The physician provided the following information regarding any functional limitations:

PR

Under *Health History*, the physician stated that the appellant suffers from chronic fatigue and shortness of breath on even mild exertion. In addition, an MRI of his knee in 2013 showed a PCL tear and severe degenerative changes impacting his walking and climbing stairs, even short distances.

In assessing the appellant’s functional skills per Part D of the report, the physician indicated that:

- the appellant can walk 1 to 2 blocks unaided on a flat surface;
- climb 2-5 steps unaided;
- lift 15 to 35 pounds [7-16 kg];
- remain seated for 2 to 3 hours;
- he has no difficulties with communication;
- he has significant deficits with 2 out of the 12 areas of cognitive and emotional function: Emotional disturbance, and Motivation [comment, “multiple health problems have created more stressors on background of anxiety and depression”].

AR

The physician provided the following information for Part B, *Mental or Physical Impairment*:

Ability to Communicate

- The appellant has a good ability in all of the listed areas: Speaking, Reading, Writing, and Hearing.

Mobility and Physical Ability

- He is independent with 2 of the 6 functions: Walking indoors, and Standing.
- He requires continuous assistance with 4 functions [or is unable]: Walking outdoors [comment: “needs frequent rests”]; Climbing stairs [comment, “cannot carry load up the stairs alone”]; Lifting; and Carrying/holding [comment, “less than 10 kg lifting and carrying”].
- Under *Comments*, the physician wrote, “needing help continuously with lifting and carrying as well as walking outdoors long distances.”

Cognitive and Emotional Functioning

- In indicating whether a mental impairment impacts the appellant’s cognitive/ emotional functioning, the physician wrote “N/A”; and under *Additional Information* [Part E] regarding the extent of the appellant’s impairment, the physician stated, “the persistence of SOB, IBS, and knee pain has affected him emotionally to the point of weight loss due to decreased intake.”

SR

The appellant described the following impacts to his function:

- He has found it hard to breathe for a long time, making walking and going upstairs difficult.
- His left leg, which he broke in an accident years ago, used to bother him from time to time “but now it really bothers me, especially the knee” which is swollen with increased pain most of the time. The appellant stated that “sometimes the pain is so unbearable, I don’t feel like going outside or doing anything, just walking is difficult and even going up and down the stairs is really hard. Not even taking strong medicine for the pain works most of the time.”

Daily Living Activities (DLA)

PR

- The physician checked *No*, the appellant has not been prescribed medication/ treatments that interfere with his ability to perform DLA.
- For Part E, *Daily Living Activities*, the physician indicated no restrictions for 8 of the 10 DLA: Personal self-care, Meal preparation, Management of medications, Basic housework, Mobility inside the home, Use of transportation, and Management of finances.

- The physician also indicated that the appellant has continuous restrictions with 2 DLA:
 - **Daily shopping**; and
 - **Mobility outside the home**
[comment “as mentioned, limited in walking more than one block at a time, creating difficulty with outside mobility/ shopping”].
- Under *Additional Comments* [Part F of the report], the physician stated that the appellant’s health conditions, as a whole, “have restricted his daily activities due to mobility within home.”

AR

The physician provided the following information for DLA:

- The appellant’s DLA are impacted by his shortness of breath; fatigue with short distance walking; decreased ability to walk; and “all of this now compounded by left knee pain” [Part B, *Mental or Physical Impairment*].

For Part C, *Daily Living Activities*, the appellant was assessed as follows:

- He is independent with all areas for 5 of the 8 DLA: Meals, Pay rent and bills, Medications, Transportation [comment “no executive function impairment”]; and Social Functioning: has good functioning with his immediate and extended social networks; requires no significant help [comment, “doing well socially”]; and has no identified safety issues.
- He has restrictions in specified areas of the following DLA:
 - **Personal Care**: He is independent with all listed areas except Feeding self and Regulate diet [comment, “shopping heavy items for preparation, needs help”].
 - **Basic housekeeping**: He requires periodic assistance from another person for all areas: Laundry and Basic housekeeping [comment, “ex-wife helps with carrying loads, ex-wife does most of the cleaning”].
 - **Shopping**: He is independent with 3 areas of Shopping: Reading prices and labels, Making appropriate choices, and Paying for purchases. He requires continuous assistance from another person for 2 areas: Going to and from stores [comment, “carrying loads, greater than 10 kg”]; and Carrying purchases home [comment, “greater than 10 kg needs help”]. Under *Additional comments* the physician wrote, “shortness of breath, fatigue and left knee pain make carrying loads difficult”.

SR

- The appellant stated that for many years he has had difficulties with most day to day activities due to his problems with breathing and walking.
- He reported that “many times it is difficult just standing at the stove to make something to eat or drink” and it is “even more difficult to do the laundry” as he lives on the third floor and the laundry room is on the ground floor.

Need for Help

PR

- The physician check marked *No*, the appellant does not require any prostheses or aids for his impairment.
- Under restrictions to DLA, in describing what assistance the appellant needs, the physician wrote, “without the occasional help of his ex-wife, any outside interaction will be severely impacted. He needs continuous assistance and is now only receiving periodic.”

AR

- For the reported restrictions with Shopping, the physician wrote, “he needs constant help from ex-wife.”
- For assistance with DLA in general, the physician indicated the appellant’s ex-wife “is providing almost all required help.”
- When asked what help would be necessary if none is available, the physician wrote, “patient cannot indefinitely rely on the help of ex-wife who is now helping with all aforementioned activities.”
- The physician wrote “N/A” for the section on *Assistance provided through the use of assistive devices*.
- He also wrote “N/A” when asked to indicate if the appellant has an assistance animal.

2. A Request for Reconsideration (“RFR”) signed by the appellant on February 20, 2017 in which he reported that his condition has worsened since last year and he has visited a medical clinic a few times, and also the hospital Emergency Room where he was admitted the second time. He stated that he has been diagnosed with COPD and now when he walks, he has to sit down and rest after only about half a block and he can only go up a few stairs before he has to stop and take a moment to rest. He added that it is much harder to breathe and now he feels even more depressed as he struggles more than before. A few times a day he has to use an inhaler and take more medication and he will have to do so for the rest of his life.

The appellant provided copies of the following documents with his RFR:

- A hospital *My Discharge Plan* dated January 4, 2017 that indicated the appellant was admitted to hospital for shortness of breath from newly diagnosed COPD. The Plan lists tests/ examinations performed; medications prescribed; and follow-up appointments as well. His health care team recommended that he quit smoking and “resume regular activity.”
- A *Pulmonary Function Requisition* dated January 6, 2017, referring the appellant for lung function testing for newly diagnosed COPD.
- Two *Radiological Consultation* reports with the following information on the appellant’s conditions:
 - October 4, 2013, indicating complex tears in specified knee anatomy, with observations related to previous surgery and a previous injury.
 - March 22, 2008, indicating extensive emphysema and hyper-inflation of the lungs; other observations regarding the appellant’s lungs and esophagus, and a diagnosis of Enevic [illegible] granulomatous disease [a lung disease].

3. The ministry's denial letters of March 6, 2017; and January 24, 2017 with *Persons with Disabilities Designation Denial Decision Summary*. The ministry indicated the appellant applied for PWD designation on October 14, 2016.

Additional submissions

Subsequent to the reconsideration decision, the appellant filed his *Notice of Appeal* dated March 11, 2017 in which he stated that he is "extremely depressed and seriously ill" as his knees are always in extreme pain from arthritis as he awaits knee replacement surgery. He wrote that he struggles to breathe and always has to use his inhaler. He wrote that "breathing, walking, and doing daily chores are a real struggle" and he has COPD for the rest of his life.

At the hearing, the appellant referred to the following documents and provided copies of the first two items:

- A prescription dated April 24, 2017 for 7 medications, with hand-written notations from a Registered Respiratory Therapist ("RRT") requesting refills for 3 medications.
- A *COPD Flare-up Action Plan* dated February 8, 2017 and signed by the RRT with information on flare-up symptoms, and instructions for taking medications.
- A prescription dated June 25, 2017 for a COPD medication; and
- A patient information booklet showing diagrams of lungs with COPD.

The ministry had no objections to the documents and the panel finds that they corroborate the information in the appellant's self-report and RFR as they provide greater detail about his medications and COPD symptoms. The panel therefore admits the documents under section 22(4)(b) of the *Employment and Assistance Act* ("EAA") as evidence in support of the information and records that were before the minister at the time the decision being appealed was made.

Oral submissions

At the hearing, the appellant stated that he has been to a walk-in clinic and the hospital Emergency Room 3 times (each) for his chronic COPD which has gotten worse. He said it started as chronic bronchitis and progressed to COPD "for life" and he also has a broken knee. He previously applied for PWD but was refused and advised to bring his pills and files back to the doctor to get more information. It took him 3 appointments to get the form filled out but his doctor "has no time and rushed through it." He stated that he is frustrated and upset as to why he "does not deserve disability". He emphasized that he is "in bad shape", thinks he deserves it, and wants to get his health back.

In response to questions from the panel, the appellant stated that he can walk a maximum of half a block and then he has to stop and use his inhaler as he is so out of breath. Regarding his weight loss, he estimated losing 15 pounds in the past 2.5 to 3 months as he "coughs, has no appetite, and is sick or ill for life." When asked about the physician's indication that he is independent with most DLA, the appellant explained that his condition "is getting worse and worse in the last month"; his "health is going downhill" and his ex-wife who lives nearby, does everything for him now, arriving at his place every morning and staying all day to assist him with DLA. While he used to prepare meals a couple of months ago, his ex-wife "prepares every meal now". He said that he used to go to stores,

but now his ex-wife does all of the shopping and he cannot carry laundry at all. With regard to showering, he said that he does that himself.

The appellant indicated that on a typical day he stays home, walks inside his apartment, and might go to the balcony. When he has to go to the doctor's or to the drug store to pick up his prescriptions, "a five minute walk, or a store that is 3 blocks away, takes an hour to get there"; and the doctor called the ambulance a couple of times to take him to the hospital for oxygen treatment. When asked about his health care team's recommendation [*My Discharge Plan* from January 2017] that he quit smoking and "resume regular activity", he stated that he has quit smoking but he could not do his regular activities and he told the doctor that he could not do them.

The panel finds that the oral submissions provide additional background information on the appellant's conditions and self-reported function, in particular, with regard to his position that his condition is getting worse [as stated in the RFR that was before the minister at reconsideration]. The panel accepts the oral testimony as argument in support of the information and records that were before the minister at the time of the reconsideration decision. At the hearing, the ministry provided its argument on appeal and did not submit any new evidence. The panel will consider the arguments of both parties in the next section, Part F.

PART F – Reasons for Panel Decision

The issue on appeal is whether the ministry's reconsideration decision of March 6, 2017 in which the ministry found the appellant was not eligible for designation as a PWD because he did not meet all of the criteria in Section 2(2) of the EAPWDA was reasonably supported by the evidence or was a reasonable application of the legislation in the circumstances of the appellant. The ministry was satisfied that the appellant has reached 18 years of age; that his impairment will continue for at least 2 years; and that he has a severe physical impairment. However, based on the information provided in the PWD application and RFR, the minister was not satisfied that the appellant has a severe mental impairment. The ministry further determined that the following legislative criteria were not met: The impairment, in the opinion of a prescribed professional, directly and significantly restricts the appellant's ability to perform "DLA either continuously or periodically for extended periods; and as a result of these restrictions, he requires help to perform DLA through an assistive device, the significant help or supervision of another person, or the services of an assistance animal.

The eligibility criteria for PWD designation are set out in section 2(2) of the EAPWDA as follows:

- 2(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.

The "daily living activities" referred to in EAPWDA section 2(2)(b)(i) are defined in section 2 of the EAPWDR:

Definitions for Act

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;

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.

Analysis

The panel provides the following analysis and decision for the legislative criteria the ministry determined were not met.

Severe mental impairment

In his appeal submission, the appellant stated that he is “extremely depressed” due to the extreme pain in his knee and his struggles to breathe. In his RFR, he indicated that he feels “even more depressed” as his condition has worsened and it so much harder to breathe. Nonetheless, the ministry “was not satisfied that the information provided is evidence of a severe mental impairment.” The ministry noted that although the physician identified deficits with cognitive and emotional functioning in the areas of Emotional disturbance and Motivation, he did not provide any information regarding the impact of cognitive and emotional function on daily living and instead wrote, “N/A.” The ministry further noted that the physician indicated the appellant has no difficulties with communication.

Panel’s decision - Severe mental impairment

The panel finds that the ministry reasonably concluded that the information provided in the PWD application did not establish a severe mental impairment. Although the physician stated in the AR that the appellant’s multiple health problems “create more stressors against a background of anxiety and depression”, the appellant was not diagnosed with a mental impairment. Furthermore, despite 2 significant deficits with cognitive and emotional function [as reported by the physician in the PR], no restrictions or impacts to cognitive/ emotional functioning due to a mental impairment or brain injury were identified in the AR. In particular, as noted by the ministry, when asked about any impacts [Section B (4.) of the AR], the physician indicated “N/A.” As noted by the ministry as well, the appellant has no difficulties with communication and the panel notes that no restrictions were reported for social functioning either - in the AR, the physician wrote, “socially doing well.”

The legislation requires evidence of a severe mental impairment that significantly impacts daily functioning. While the appellant argued that his physical conditions make him “extremely depressed” and the physician indicated significant deficits with Emotional disturbance and Motivation, this information falls short of establishing a severe mental impairment as the appellant was not diagnosed with a mental health condition and the evidence demonstrates that his mood deficits are associated with his severe physical impairment. Therefore, based on the information in its entirety, the panel finds that the ministry reasonably determined a severe mental impairment under section 2(2) of the EAPWDA was not established.

Restrictions in the ability to perform DLA

The appellant's position is that his impairments significantly restrict his daily activities because his conditions are getting worse. While he stated in the SR that he has had difficulties with most day to day activities for many years due to his problems with breathing and walking ["many times it is difficult just standing at the stove to make something to eat or drink" and it is "even more difficult to do the laundry"] he indicated at the hearing that his condition "is getting worse and worse", especially in the last month. He reported that he now requires continuous help from his ex-wife as he can no longer prepare meals, carry laundry, and go to stores ["even a 5 minute walk to the doctor's office will take an hour"].

While the ministry accepted that the appellant has some restrictions with DLA, particularly with Basic Housekeeping due to his limitations with lifting, it noted the physician's information that most DLA are performed independently "or require little help from others", arguing that the information from the prescribed professional therefore "does not establish that the impairment restricts daily living activities either continuously or periodically for extended periods." The ministry noted the physician's information in the PR regarding continuous restrictions with Daily shopping and Mobility outside the home but highlighted the physician's comment that only "occasional help" from the appellant's ex-wife for outside interactions is required.

Similarly, the ministry argued that while the need for continuous assistance was reported for 2 areas of Shopping and the appellant also requires periodic assistance with laundry and cleaning [Part C of the AR], the physician indicated that the appellant is independently able to manage most areas of Personal care and Shopping, and all areas of Meals, Pay rent and bills, Medications, Transportation, and Social Functioning.

Panel's decision - Restrictions to DLA

Subsection 2(2)(b)(i) of the EAPWDA requires the ministry to be satisfied that in the opinion of a prescribed professional a severe impairment directly and significantly restricts DLA either continuously, or periodically for extended periods. In this case, the prescribed professional is the physician that filled out the forms. DLA are defined in section 2(1) of the EAPWDR and are also listed in the PR, with additional details in the AR. Therefore, a prescribed professional completing these forms 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 analyzing the physician's information on restrictions to the DLA, the panel finds that the ministry was reasonable in concluding that the physician's evidence does not establish that the appellant's DLA are directly and significantly restricted either continuously, or periodically for extended periods.

DLA with no significant restrictions

For the DLA specified in section 2(1)(a) of the EAPWDR, the physician's information in the PR and AR indicated that the appellant can perform most activities independently as follows:

Prepare own meals

The appellant reported difficulties with meal preparation as he cannot stand at the stove for very long, and his ex-wife prepares all of his meals now that his condition has worsened. However, the physician's information does not corroborate these restrictions as no updated medical reports were provided to confirm that the appellant's condition has worsened. Notably, in both the PR and the AR, no restrictions were reported for the DLA of Meal preparation/ Meals.

Manage personal finances, Manage personal medication, and Use public or personal transportation facilities

As noted by the ministry, the physician indicated the appellant is independent with these DLA. Management of finances and Use of transportation were check-marked as unrestricted in the PR; and in the AR, the appellant was assessed as independent with all areas of Pay rent and bills, Medications, and Transportation with the comment "no executive function impairment."

Perform housework

As with *Prepare own meals*, the appellant reported that he needs continuous assistance with housework and he cannot do laundry at all anymore (his ex-wife performs these tasks). Nevertheless, in the PR, the physician indicated no restrictions with Basic housework; and as noted by the ministry, a need for only periodic assistance with Laundry and Basic housekeeping was reported in the AR.

Perform personal hygiene and self-care

In the PR, Personal self-care was marked as unrestricted. In the AR, the only restriction reported for Personal Care was the need for periodic assistance in the areas of Feeding self and Regulate diet, and the physician noted that these restrictions are due to the appellant's limitations with shopping for heavy grocery items. In addition, the appellant confirmed at the hearing that he is independent with showering.

There was some information associating the appellant's weight loss ["likely due to...IBS and stress response"] to "sub-optimal ADL management (such as food prep)"; however, the physician represented any association as hypothetical ["could also be an indicator"] and all activities involving food and meal preparation [as noted earlier] were assessed as independent or requiring periodic assistance only. The panel notes that a need for periodic assistance does not equate to a periodic restriction for extended periods under the legislation as "extended periods" would need to be established with some evidence of how often the person performs an activity independently versus how often they require help.

Continuously restricted DLA

Shop for personal needs and Move about indoors and outdoors

The physician indicated in the PR that Daily shopping and Mobility outside the home are continuously restricted. In the AR, he reported that the appellant requires continuous assistance with Going to and from stores and Carrying purchases home due to his limitations with lifting and carrying. The appellant argued, as well, that he cannot go to stores as it takes him an hour to walk a short distance to a neighbourhood pharmacy that is only a few blocks away from his home.

While the ministry acknowledged the need for continuous assistance with these shopping/ outdoor mobility activities, it noted that the physician reported a need for only periodic assistance with Basic housekeeping [specifically with carrying laundry] and the appellant was assessed as independent with other areas of daily living.

Regarding the continuous assistance required for shopping, the physician stated that the appellant “needs constant help from ex-wife” and indicated that “she is now helping with all aforementioned activities.” While the physician did not specify which aforementioned activities he was referring to [as previously noted, most DLA were marked as independent], the evidence indicated the appellant is receiving help with shopping activities due to his limitations with lifting and carrying. Nevertheless, the panel finds that the ministry reasonably weighed the restrictions with shopping against the evidence as a whole and the continuous restrictions reported by the physician are not sufficient to make the ministry’s decision unreasonable. The BC Supreme Court decision in *Hudson v. British Columbia (Employment and Assistance Appeal Tribunal)*, 2009 BCSC 1641, requires direct and significant restrictions with at least 2 DLA and the decision did not dispense with the need to look at the information globally. As the physician indicated that the appellant is able to independently manage most DLA, the panel finds that the ministry reasonably determined the criteria in subsection 2(2)(b)(i) of the EAPWDA were not met.

Help to perform DLA

The appellant argued that he needs his ex-wife to help him with most DLA, especially now that his condition has gotten worse. The ministry’s position is that as it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required from other persons. The ministry noted that the information provided did not indicate that the appellant requires any assistive devices.

Panel's decision - Help to perform DLA

Subsection 2(2)(b)(ii) of the EAPWDA requires a prescribed professional to confirm that as a result of significant restrictions to DLA, the person requires help to perform an activity. Where another person is providing the help, the level of assistance or supervision required must be significant as set out in subsection 2(3)(b)(ii). The physician's evidence confirms that the appellant does not use any assistive devices or an assistance animal but he does receive help from his ex-wife. However, the panel found that the ministry reasonably determined the information provided does not confirm significant restrictions to DLA that are the result of a severe impairment. As restrictions to DLA are a precondition for needing help with DLA, and that precondition has not been met, the panel finds that the ministry reasonably determined the criterion under subsection 2(2)(b)(ii) of the EAPWDA was not met.

Conclusion

The panel finds that the ministry's reconsideration decision that determined the appellant is not eligible for PWD designation under section 2 of the EAPWDA was reasonably supported by the evidence. The panel confirms the decision pursuant to section 24 of the EAA and the appellant is not successful in his appeal.