

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 20, 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 January 3, 2017, the ministry received the appellant's PWD application. The PWD application is comprised of a Physician Report (PR) dated December 29, 2016 and an undated Assessor Report (AR), both completed by the appellant's general practitioner as well as the appellant's self report.

The appellant's request for PWD designation was denied on April 12, 2017. On June 6, 2017, the ministry received the appellant's Request for Reconsideration and completed its review of the Request for Reconsideration on June 20, 2017 denying the application for the PWD designation.

Additional information provided on appeal comprised the appellant's Notice of Appeal (NOA), received by the tribunal on June 26, 2017. At the appeal hearing, the appellant submitted a new four-page letter and oral testimony provided through an interpreter. The four page letter consisted of a letter from his physician listing current medications and a single paragraph describing the appellant's medical issues, a list of previous appointments with the physiotherapist, a requisition for physiotherapy treatments. In his NOA, the appellant stated he is a person with a disability and he is not able to earn or care for himself, he always requires someone to assist him and that he cannot work either full time or part time.

At the hearing, the appellant stated his medical issues preclude him from working and he does not have any other source of income to carry on his life. He stated his left arm is now worse than it was prior to his application and assessment for PWD. He attributes this to greater use of his left arm to compensate for his inability to use his right arm. He said he can not touch his right hand to his mouth and can barely be raised to his shoulder. His left arm too is now limited in its use. He also stated he has trouble sleeping at night due to pain in his arms and shoulder. He finished by talking about problems with his right leg and restating some of the evidence from his application to the ministry.

As the additional information corroborates the information available at reconsideration, it was admitted as supporting information in accordance with section 22(4) of the Employment and Assistance Act.

The ministry did not attend the hearing. After confirming that the ministry was notified of the hearing, the hearing proceeded in accordance with section 86(b) of the Employment and Assistance Regulation.

Summary of relevant evidence

Diagnoses

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

- MSK – Other – R (Right) Arm compound fracture disability
- MSK – Reinjury to R Arm
- Mood Disorders – Depression
- Injury – Bus accident
- Diabetes

The GP comments: R Arm major accident in bus that was improving then in 2014 had dizziness (likely related to diabetes) fell down and refracture [sic] and hurt R arm again.

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 4 or more blocks unaided on a flat surface, climb 5 or more steps unaided, lift under 2 kilograms with his right arm and is unrestricted with his left arm, and that he is able to remain seated with no limitation.
- In the AR, the GP reports that walking indoors and outdoors are managed independently. Climbing stairs and standing require periodic assistance from another person. He notes that the applicant can not stand longer than 10 minutes without assistance and experiences pain.

In his application for PWD, the appellant writes he has severe restrictions with his right hand and constant pain in his right knee and ankle which severely effects his movement and ability to lift any weight. His disability has robbed him of the ability to participate in the workforce and earn a wage that can support him and his family. This means he has no choice but to rely on his wife to assist him in everyday tasks so that he can get through life.

Mental Impairment

The GP provides the following information in the PWD application.

- In the PR, no significant deficits with cognitive and emotional function are identified despite an indication of a diagnosis of mood disorders – depression.
- In the AR, the physician indicates a moderate impact on daily functioning for bodily functions and motivation as well as a major impact in the areas of; consciousness, emotion, attention/concentration, executive, memory and motor activity. No impact on daily functioning is reported for language, psychotic symptoms or other emotional or mental problems. The GP comments that the appellant “feels like constantly getting weaker, meds has side effect such as forgetfulness. Along with his depression he feels less motivated especially when depression aggravated.” He indicates the appellant generally stays at home and his wife is able to help with things around the house but recently has been experiencing illness as well which is aggravating his condition/depression.
- No cognitive, motor, sensory, or other difficulties with communication other than a lack of fluency in English are identified in the PR. In the AR, good ability with speaking and hearing are indicated under “ability to communicate” however poor ability is indicated for reading and writing with an explanation that the appellant can read and write Punjabi but not English.
- In the PR, social functioning is reported as being periodically restricted when interacting with others or dealing appropriately with unexpected demands. The GP describes the appellant as very often getting angry and never seems to be in a good mood. Continuous support is deemed needed when securing assistance from others as no assistance is available other than the appellant’s wife and it is getting harder for both of them. The areas related to the ability to develop and maintain relationships and the area related to making appropriate social decisions are rated as independent.
- Marginal functioning is reported for immediate and extended social networks.

The appellant’s NOA did not address mental impairment.

DLA

In the PR, the GP reports the following:

- The appellant has been prescribed pain medications like Tylenol 3 which interfere with his ability to perform daily living activities (DLA).
- The impairment directly restricts the appellant's ability to perform DLA.
 - Personal self care, meal preparation, and basic housework are continuously restricted. The restriction is described as "very hard to work and not use right arm, pain gets aggravated on top of chronic pain".
 - Social functioning is periodically restricted. Comments in the PR and AR respecting social functioning are described above under Mental Impairment.
 - Management of medications, daily shopping, mobility inside and outside 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

- Independent

Personal care

- Grooming, toileting, feeding self, regulate diet, and transfers in/out of bed and on/off chair are managed independently.
- Bathing requires assistance periodically, specifically his wife assists with bathing his back and then he manages the rest with his left hand.
- Dressing requires continuous assistance from someone else (wife).

Basic Housekeeping

- Laundry requires periodic assistance.
- Basic Housekeeping requires continuous assistance.

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 because he is unable to lift groceries.

Meals

- Meal planning and safe storage of food are managed independently.
- Cooking is managed with periodic assistance as his wife prepares the food and he is able to reheat it.
- Food preparation is rated as needing continuous assistance and described as "unable to do with one hand".

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 are described as not applicable.

Social Functioning

- As described above under *Mental Impairment*.

In his PWD Application, the appellant writes that he constantly feels like he is getting weaker and very depressed. His medications have side effects which make him forget things. He indicates he is always tired and unmotivated and when he feels depressed he just wants to be left alone. He lacks motivation and usually stays home and does nothing. He hates that his body is constantly in pain and that he can't do anything about it. He indicates his disability and particularly his right arm limits what he can do and he is unable to participate in the workforce leaving him reliant on his wife to assist with everyday tasks.

At the hearing, the appellant stated his right arm is not likely to improve and he worries about that it may stop working completely. He stated when he showers he has to use his left arm which he can barely lift up to his shoulder. He stated that he relies on his wife to help him.

Need for Help

The GP reports that help with DLA is provided by family and did not indicate any assistive devices are routinely used to help compensate for the appellant's impairment. He indicated that no assistance animal is used to provide help to the appellant.

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 ultimate discretion on whether or not to grant the designation for PWD rests with the ministry provided they have acted reasonably in arriving at that decision. To be reasonable the ministry has to consider all evidence it was provided including the appellant's submissions, the AR and PR but cannot rely solely on one piece of evidence and must consider and evaluate all the evidence to reach a reasonable decision consistent with the legislation. A key part of that evidence is the report of the prescribed professional, in this case it is the appellant's GP.

The MR and AR completed by the GP provide a guide to determine the extent of the impairment and its severity in restricting the appellant's ability to function physically and mentally as it pertains to accomplishing required DLA.

Physical Impairment

The appellant's right arm was injured in a bus accident and then reinjured which clearly impacts some areas of DLA. The impairment to his ability to perform DLA has also led to mood disorders such as depression. His conditions make him want to stay at home and according to the appellant his injury precludes him from part-time or full-time employment. However, 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 a person's 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 functional capacities reasonably associated with employment. Accordingly, the panel finds that the ministry reasonably concluded that vocational abilities are not considered relevant when assessing eligibility for PWD designation.

When looking at the appellant's physical functioning, the ministry acknowledges limitations to physical functioning due to right arm injuries but finds the information provided by the medical practitioner assessing basic physical functioning and ability to manage activities requiring mobility and physical ability does not establish the presence of a *severe* physical impairment. The panel finds this conclusion to be reasonable in light of the evidence before the ministry. As the ministry notes, the appellant does not require any prostheses or aids for his impairment, is able to walk 4+ blocks unaided on a flat surface; climb 5+ steps unaided and has no limitation on how long he can remain seated. The ministry also notes that the GP indicates the right arm is limited to weights of less than five pounds but that there are no weight limitations with the left arm such that continuous assistance is required with lifting, carrying and holding. The ministry also considered the letter provided by the appellant's GP at the time of reconsideration which indicated that the appellant was also complaining of pain in the left arm due to overuse. However, noting that in the GP originally described "no restrictions" for lifting with the left arm and that the letter did not indicate that this had significantly changed the appellant's ability to lift, carry and hold with the left arm, the minister was reasonable to rely more on the assessments already submitted about the basic physical functioning and activities requiring mobility and physical ability in the Application.

The ministry concluded that the appellant's report that he was experiencing knee and ankle pain was not supported by the diagnoses indicated in the PR, and while the panel notes that the GP says "likely osteoarthritis", the GP reports that the appellant remains able to walk 4+ blocks and remain standing for 10 minutes.

Accordingly, the panel finds the ministry was reasonable to conclude that continuous assistance is only required to lift, carry and hold, which the ministry reasonably concluded is not indicative of a severe physical impairment. Additionally, as the ministry notes, the AR does not specify how often pain flare-ups occur or how long they last making it difficult to determine the severity of impairment. 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 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 Functioning

The appellant is diagnosed with mood disorders and depression by his GP. The ministry notes that the GP indicated the appellant's ability to read and write is poor and concludes this is not a mental impairment but a lack of proficiency in English.

The ministry notes that the medical practitioner indicates no significant deficits with cognitive or emotional functioning in the PR, including for consciousness, emotional disturbance (eg. depression), attention or sustained concentration, executive, memory, and motor activity. However, in the AR, major impacts on daily functioning are reported for all these areas of cognitive and emotional functioning. Additionally, the panel notes that the GP comments that "cognition is good" and, with the exception of social functioning, does not report any restrictions in the appellant's ability to manage the cognitive tasks of DLA (ex. regulating diet, making appropriate shopping choices, and budgeting).

In Section C of the AR the medical practitioner indicates the appellant requires continuous support/supervision to secure assistance from others and periodic support *to interact with others* and deal appropriately with unexpected demands. In contrast, in Section E of the PR, the practitioner indicates the appellant does not require assistance with making decisions about personal activities, care or finances; or relating to communicating *or interacting with others effectively*.

The panel finds, based on the above inconsistencies, that the ministry reasonably concluded it was difficult to determine conclusively which depiction was more reflective of the appellant's mental functioning and therefore, the information provided does not clearly establish a severe impairment in mental functioning.

The panel notes the ministry acknowledges that the appellant experiences difficulty functioning as a result of mood disorder and depression exacerbated by chronic pain which limits his physical functioning however; there is insufficient and unclear evidence to conclusively determine the appellant has severe impairment due to 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 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 and reasonable 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-mark boxes and provide additional details. DLA, as defined in the legislation, do not include the ability to work.

The appellant submits that the medications he has been prescribed (Tylenol 3) interfere with his ability to manage his DLA and make him forgetful. The ministry notes that no other information is provided to explain how the medication affects the appellant's ability to perform DLA and notes that the appellant is independent in areas which would be expected to be impacted by issues of memory such as management of finances and medications. Based on this the panel finds the ministry was reasonable in stating they were unable to determine how the medication impacts the appellant's ability to conduct DLA.

The ministry accepts the appellant's condition poses some limits to his DLA. The appellant's GP indicates that he requires continuous assistance from another person while:

- Dressing (needs assistance from wife)
- Completing basic housekeeping
- Carrying purchases home (unable to lift groceries)

- Preparing food (unable to do with one hand)

However, the ministry argues that the physician has indicated the appellant has basic physical functioning such as the ability to walk unassisted and has no limitations to his left arm indicating he could perform these DLA at some level. Therefore, the ministry submits these DLA would more appropriately be described as requiring periodic assistance. The panel finds that to be a reasonable conclusion given the evidence before the ministry.

The appellant's GP indicated he needed periodic assistance with:

- Bathing (helps wash my back – wife, rest done with left hand)
- Laundry
- Cooking (wife prepares food can reheat food)

The ministry concluded that occasional help with these activities was required but that insufficient information was provided to describe the frequency or duration of the assistance required and this made it difficult to determine the overall level of functioning as well as made it unclear if the restrictions experienced were both significant and periodic for extended periods as required by legislation.

The panel finds that the legislation contemplates some degree of difficulty or periodic inability to perform DLA is not necessarily sufficient to qualify for PWD designation. Only when the evidence confirms the DLA is restricted significantly and either continuously or periodically for extended periods can the ministry conclude that a PWD designation is warranted. In this case based on the information provided to the ministry, the panel finds the decision by the ministry that there was insufficient or unclear information to conclude the designation was warranted was reasonable given that the appellant was independent in other areas of DLA such as; grooming, toileting, feeding self, regulating diet, transfers in and out of bed, transfers on and off chair, going to and from stores, reading prices and labels,, making appropriate choices, paying for purchases, meal planning, safe storage of food, banking, budgeting and paying rent and bills, filling/refilling prescriptions, taking medication as directed, safe handling and storage of medication and getting in and out of a vehicle.

Based on the assessments by the GP and the other evidence available, 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 continuously or periodically restricted for extended periods.

Help to perform DLA

The appellant reports the need for assistance when bathing and with carrying, lifting and holding things particularly with his right arm. He also reports pain in his left arm because of more frequent use as a result of his condition.

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 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.