

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the ministry) reconsideration decision dated August 10, 2017 which found that the appellant did not meet three of the five statutory requirements of Section 2 of the *Employment and Assistance for Persons with Disabilities Act* for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that his impairment is likely to continue for at least two years. However, the ministry was not satisfied the evidence establishes that:

- the appellant has a severe physical or mental impairment;
- the appellant's daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and,
- as a result of these restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act (EAPWDA), Section 2

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), Section 2

PART E – Summary of Facts

The evidence before the ministry at the time of the reconsideration decision included the appellant's Persons With Disabilities (PWD) Application comprised of the appellant's information and self-report dated May 10, 2017, a medical report (MR) dated February 7, 2017 which was completed by the appellant's general practitioner (GP), who has known the appellant for 1-2 months and saw the appellant 2-10 times in the past 12 months prior to completing the PWD application. Included in the application was also an assessor report (AR) dated May 10, 2017 which was completed by a social worker (SW) who saw the appellant on the day of completing the PWD application.

The evidence included the appellant's Request for Reconsideration dated July 27, 2017, in which the appellant stated that he experiences occasional muscle spasms, pain in his leg and hip and that this is a danger to him and others. He also stated that he can control the pain with medication but the spasms are uncontrollable and unpredictable.

The evidence also included mental health and substance services client discharge information dated October 29, 2016, and which recommends substance use services.

Diagnoses

In the PR, the GP diagnosed the appellant with left gastrocnemius tear (onset 2014), left hip pain (onset 2015) and depression (onset 2015). In the AR the SW indicated that the mental and physical impairments that impact the appellant's ability to manage DLA are severe chronic pain in left leg and hip, and severe chronic depression and substance abuse disorder.

Physical Impairment

In the MR the GP reported:

- "Chronic left leg and hip pain since injury in 2014. Since then has not been able to get regular work. He is a mechanic and work is quite physical and so not able to be employed. He has developed depression as a result".
- The appellant can walk unaided 4+ blocks, unaided climb 5+ steps, lift 15-35lbs, and remain seated for less than 1 hour.
- The appellant "is able to do his [DLA] but not able to be employed".

In the AR, the SW reported:

- Takes significantly longer with walking indoors (3-4 times longer) and standing (10 minutes maximum).
- Takes significantly longer and uses an assistive device (cane and handrails for stairs) with walking indoor (3-4 times longer) and climbing stairs (5-10 steps maximum).
- Takes significantly longer and requires periodic assistance with lifting (25 lbs maximum) and carrying and holding (25 lbs maximum for short periods only).

In his self-report, the appellant stated:

- Severe muscular deformity and lack of muscular strength.
- Constant pain in leg and hip.
- Random muscular spasms that render left leg useless for a couple of seconds.

Mental Impairment

In the MR, the GP reported:

- The appellant has no difficulties with communication.
- The appellant has significant deficits with cognitive and emotional function in the area of emotion and stated “suffers from depression”.
- Under impacts to DLA, it is indicated that there is no restriction to social functioning.

In the AR, the SW reported:

- Speaking, reading, writing and hearing are satisfactory.
- Under cognitive and emotional function there are major impacts to bodily functions, emotion, and motivation. There are moderate impacts to attention/concentration and all other listed areas under cognitive and emotional function are indicated as no impact.
- Under social functioning, continuous assistance is required with ‘appropriate social decision’ (with the comment: “recent suicide attempt”), ‘able to develop and maintain relationships’ (with the comment: “depressed and withdrawn”), ‘able to deal appropriately with unexpected demands’ (with the comment: “low stress tolerance”) and ‘able to secure assistance from others’ (with the comment: “needs help getting appropriate help”).
- Under social functioning, periodic assistance is required with ‘interacts appropriately with others’.
- Immediate and extended social networks are indicated as being ‘very disrupted’ with the comments: “very withdrawn and isolated” and “social isolation – needs help but has no one due to his isolation”.
- On-going counselling and treatment for mental health is required.
- Under additional comments: “recent suicide attempt and ongoing suicide ideation”.

In his self-report, the appellant stated:

- “not be[ing] able to function on my job properly led me to chronic depression and substance abuse”.

Daily Living Activities (DLA)

In the MR, the GP reported:

- The appellant’s impairment does not restrict his ability to perform DLA.
- Prescribed medication interferes with the appellant’s ability to perform his DLA. This is a ‘short course with acute flares 1-2 weeks’.

In the AR, the SW reported:

- The appellant is independent with ‘feeding self’, ‘budgeting’, ‘pay rent and bills’, ‘taking medication as directed’, ‘safe handling and storing medication’, and ‘using transit schedules and arranging transportation’.
- All other listed tasks under DLA are listed as taking significantly longer and/or requiring periodic assistance and/or requiring the use of an assistive device largely due to pain, fatigue and poor motivation. Tasks that are indicated as taking significantly longer are indicated to take 3-4 times longer.

In his self-report, the appellant stated:

- That he is unable to find work but did not comment on how his impairment impacts his DLA.

Need for Help

With respect to the assistance provided by other people, the GP did not report that the appellant receives help. The GP indicated that the appellant occasionally uses a cane.

In the AR, the SW reported that the appellant uses a cane for outdoor mobility and on bad days. The SW also indicated that additional help is provided by health authority professional. Due to his depression and social isolation, the appellant does not have anyone to help him and therefore his household DLA are not getting done on a regular basis.

Evidence on Appeal

In his Notice of Appeal (NOA), which is undated and not signed, the appellant stated that he is always in pain and therefore his impairment is severe, the muscle spasms are unpredictable and incapacitating, he has suffered a burn and falls as a result of his medical condition, he is unable to function on a daily basis and his depression is chronic.

Evidence at the Hearing

At the hearing the appellant presented the following:

- His muscle spasms are a symptom of his left leg muscle tear and his GP stated that there is no diagnosis for this symptom.
- The spasms are random and come without warning thus interrupting whatever he may be doing.
- They last 40-50 seconds in duration and are followed by 10-15 minutes of pain, during which time the appellant cannot function.
- The spasms do not occur consistently, for example, the spasms can occur twice per week, twice per month or not occur for 2 months.
- Due to their unpredictable nature he is afraid for his safety and the safety of others, he is afraid to bath or drive a vehicle, he is afraid to reach for high objects and must put his shoes on while bending.
- His medical condition has led to the inability to perform his job, which in turn has led to drinking and depression.
- He uses a cane when it is very cold weather or when climbing more than 3 flights of stairs.
- He has seen 3 different specialists and each agree that he suffers from spasms and that the condition is inoperable as his leg muscle grew on top of another muscle in the leg.

Note: At the hearing the appellant also stated that he wanted an oral, in-person hearing to be able to show the panel the deformity of his left leg calf muscle. He showed the ministry representative and the panel his leg.

At the hearing the ministry relied on its reconsideration decision and emphasized that severity of the impairment was not established.

PART F – Reasons for Panel Decision

The issue on appeal is whether the ministry's reconsideration decision, which found that the appellant is not eligible for designation as a PWD, was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. The ministry found that the evidence does not establish that the appellant has a severe mental or physical impairment and that his DLA are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods. Also, as a result of those restrictions, it could not be determined that the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

The criteria for being designated as a PWD are set out in Section 2 of the EAPWDA as follows:

Persons with disabilities

2 (1) In this section:

"assistive device" means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform;

"daily living activity" has the prescribed meaning;

"prescribed professional" has the prescribed meaning.

(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person is in a prescribed class of persons or that the person has a severe mental or physical impairment that

(a) in the opinion of a medical practitioner or nurse practitioner is likely to continue for at least 2 years, and

(b) in the opinion of a prescribed professional

(i) directly and significantly restricts the person's ability to perform daily living activities either

(A) continuously, or

(B) periodically for extended periods, and

(ii) as a result of those restrictions, the person requires help to perform those activities.

(3) For the purposes of subsection (2),

(a) a person who has a severe mental impairment includes a person with a mental disorder, and

(b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires

(i) an assistive device,

(ii) the significant help or supervision of another person, or

(iii) the services of an assistance animal.

(4) The minister may rescind a designation under subsection (2).

The EAPWDR provides as follows:

Definitions for Act

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

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

(i) prepare own meals;

(ii) manage personal finances;

(iii) shop for personal needs;

(iv) use public or personal transportation facilities;

(v) perform housework to maintain the person's place of residence in acceptable sanitary condition;

- (vi) move about indoors and outdoors;
 - (vii) perform personal hygiene and self care;
 - (viii) manage personal medication, and
- (b) in relation to a person who has a severe mental impairment, includes the following activities:
- (i) make decisions about personal activities, care or finances;
 - (ii) relate to, communicate or interact with others effectively.

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

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

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

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

- (i) an authority, as that term is defined in section 1 (1) of the Independent School Act, or
- (ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the School Act,

if qualifications in psychology are a condition of such employment.

Part 1.1 — Persons with Disabilities

Alternative grounds for designation under section 2 of Act

2.1 The following classes of persons are prescribed for the purposes of section 2 (2) [persons with disabilities] of the Act:

- (a) a person who is enrolled in Plan P (Palliative Care) under the Drug Plans Regulation, B.C. Reg. 73/2015;
- (b) a person who has at any time been determined to be eligible to be the subject of payments made through the Ministry of Children and Family Development's At Home Program;
- (c) a person who has at any time been determined by Community Living British Columbia to be eligible to receive community living support under the Community Living Authority Act;
- (d) a person whose family has at any time been determined by Community Living British Columbia to be eligible to receive community living support under the Community Living Authority Act to assist that family in caring for the person;
- (e) a person who is considered to be disabled under section 42 (2) of the Canada Pension Plan (Canada).

Severe Impairment

In the reconsideration decision, the ministry was not satisfied that the information provided establishes a severe physical or mental impairment. Determining a severe physical or mental impairment requires weighing the evidence provided against the nature of the impairment and its reported functional skill limitations. A diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment. An "impairment" is a medical condition that results in restrictions to a person's ability to function independently or effectively or for a reasonable duration. To assess the severity of an impairment, the ministry must consider the nature of the impairment and the extent of its impact on daily functioning.

Severe Physical Impairment

In the PWD application, self-reports and at the hearing, the GP and the appellant have emphasized the appellant's inability to work. Employability is not a consideration for eligibility for PWD designation because employability is not a criterion in section 2(2) of the EAPWDA nor is it listed among the prescribed daily living activities in section 2 of the EAPWDR.

In the reconsideration decision the ministry noted that in the MR, the GP diagnosed the appellant with left [leg] gastrocnemius tear, left hip pain and depression. The MR indicated the appellant can walk unaided 4+ blocks, unaided climb 5+ steps, lift 15-35lbs, and remain seated for less than 1 hour. The GP also indicated that the appellant's medical condition does not restrict his ability to perform his DLA and that he occasionally uses a cane. The AR indicated that the appellant takes 3-4 times longer to perform all listed tasks under mobility and physical ability, uses an assistive device for walking outdoors and climbing stairs, and needs periodic assistance with lifting, carrying/holding more than 25 lbs. The appellant's own testimony is that he is able to function once the muscle spasm is over and the pain has subsided, and that the muscle spasms are not a consistent occurrence.

In the reconsideration decision the ministry noted that the GP has not confirmed that the appellant suffers from muscle spasm or how often they occur to determine if they represent a significant restriction to his overall level of physical functioning. The ministry concluded that the information provided speaks to a moderate impairment rather than a severe impairment as the legislation requires.

Section 2(2) of the *EAPWDA* requires that the minister must be satisfied that a person has a severe physical impairment that results in restrictions to a person's ability to function independently or effectively. Given the assessments of the appellant's physical ability provided at the time of the reconsideration decision and with no revised assessments provided at appeal, the panel finds that the ministry reasonably determined that there is insufficient evidence to establish that the appellant has a severe physical under Section 2(2) of the *EAPWDA*.

Severe Mental Impairment

In the reconsideration decision, the ministry could not determine that the appellant suffered from a severe mental impairment.

The MR and AR indicated that the appellant suffers from depression. In the reconsideration decision, the ministry noted that the GP indicated that the appellant experiences significant deficits in the area of emotional disturbances whereas the SW indicated that there are major impacts to bodily functions, emotion and motivation, and moderate impacts to motivation. The ministry also noted that the GP indicated no difficulties with communication whereas the SW reported that speaking, reading, writing and hearing were satisfactory. The ministry noted that the GP indicated that social functioning was not restricted whereas the SW indicated 4 tasks under social functioning require continuous assistance and the fifth tasks requires periodic assistance. The ministry concluded that there are inconsistencies in the MR and AR assessments provided and therefore the information provided does not establish a severe mental impairment.

Section 2(2) of the *EAPWDA* requires that the minister must be satisfied that a person has a severe physical impairment that results in restrictions to a person's ability to function independently or effectively. Given the fact that the evidence provided by the GP and SW is inconsistent, the panel finds that the ministry reasonably determined that there is insufficient evidence to establish that the appellant has a severe mental impairment under Section 2(2) of the *EAPWDA*.

Restrictions in the ability to perform DLA

In the reconsideration decision, the ministry was not satisfied that the appellant has a severe physical or mental impairment that, in the opinion of the prescribed professional, directly and significantly restricts DLA either continuously or periodically for extended periods of time.

According to the legislation, Section 2(2)(b) of the EAPWDA, the ministry must assess direct and significant restrictions to DLA in consideration of the opinion of a prescribed professional, in this case the appellant's GP. This does not mean that the other evidence is not factored in as required to provide clarification of the professional evidence, but the legislative language makes it clear that a prescribed professional's evidence is fundamental to the ministry's determination as to whether it is "satisfied." Therefore, the prescribed professional completing the assessments has the opportunity to indicate which, if any, DLA are significantly restricted by the appellant's impairments either continuously or periodically for extended periods.

In the reconsideration decision, the ministry reviewed the information provided in the MR and AR. The ministry noted that the GP indicated that the appellant's medical condition did not restrict his ability to perform his DLA, whereas the SW indicated that the appellant takes significantly longer to perform the majority of the listed tasks and requires periodic assistance with 11 listed tasks. The ministry concluded that there are inconsistencies in the MR and AR assessments provided and therefore the information provided does not clearly establish a restriction with the performance of DLA.

Section 2(2) of the *EAPWDA* requires that the minister must be satisfied that a person has a severe physical impairment that results in restrictions to a person's ability to function independently or effectively. Given the fact that the evidence provided by the GP and SW is inconsistent, the panel finds that the ministry reasonably determined that there is insufficient evidence to establish that the appellant has a severe impairment that significantly and directly restricts his ability to perform his DLA continuously or periodically for extended periods under Section 2(2) of the *EAPWDA*.

Help to perform DLA

In the reconsideration decision, the ministry held that, as it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required. Section 2(2)(b)(ii) of the *EAPWDA* requires that, as a result of being directly and significantly restricted in the ability to perform DLA either continuously or periodically for extended periods, a person must also require help to perform those activities. That is, the establishment of direct and significant restrictions under section 2(2)(b)(i) is a precondition of meeting the need for help criterion. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

While the GP and SW indicated that the appellant occasionally uses a cane the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established. The panel finds that the ministry also reasonably concluded that, under section 2(2)(b)(ii) of the *EAPWDA*, it cannot be determined that the appellant requires help to perform DLA.

Conclusion

The panel finds that the ministry's reconsideration decision, which determined that the appellant was not eligible for PWD designation pursuant to Section 2(2) of the *EAPWDA*, was reasonably supported by the evidence. The panel therefore confirms the ministry's decision. The appellant's appeal, therefore, is not successful.