

PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Poverty Reduction (the ministry) dated July 25, 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 May 10, 2017, the ministry received the appellant's PWD application comprised of a Medical Report (MR) and an Assessor Report (AR), both completed by the appellant's general practitioner (GP) on April 25, 2017, and the Self-report (SR) section signed by the appellant on May 2, 2017.

The appellant's request for PWD designation was denied on May 19, 2017. On June 27, 2017, the ministry received the appellant's Request for Reconsideration and subsequently on July 10, 2017, received:

- a 2-page advocate's submission dated July 10, 2017;
- a 1-page letter dated May 6, 2017, from the appellant's daughter; and
- a June 28, 2017, letter from the appellant's urologist.

On July 25, 2017, the ministry issued its reconsideration decision, which again denied the appellant's request for PWD designation.

No additional evidence was provided on appeal. The arguments of both parties, including that in the advocate's reconsideration submission and the appellant's August 3, 2017 Notice of Appeal (NOA), are set out in Part F of this decision.

Summary of relevant evidence

Diagnoses

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

- Osteoarthritis knees.
- Chronic back pain.
- Bladder cancer. The appellant will have more chemo and a radical cystoprostatectomy soon. He will not have a bladder and an ileal conduit will have to be formed.
- Depression.
- Alcoholism. He used to drink heavily but now rarely drinks.

Symptoms are progressively getting worse over the last year. He feels very down, depressed and frustrated that he cannot do what he used to do.

Physical Impairment

The GP provides the following information in the PWD application.

- A walking stick or cane is required.
- Multiple joint aches and severe pain in knees.
- Bladder cancer seriously impacts his ability to work and he will no longer be employable. It has had a tremendous impact on his life. He is much weaker and tires easily.
- Severely impaired by bladder cancer, chronic back pain, osteoarthritis.
- In the MR, the GP writes that the appellant is able to walk no longer than 1 block, is very slow and has to stop due to pain. Additionally, the appellant is reported as able to walk less than 1 block unaided on a flat surface, climb 2 to 5 steps (hold onto railing), lift no more than 10 lbs., and remain seated with no limitation.

- In the AR, the GP reports that walking indoors and outdoors require the use of a cane and take significantly longer than typical (very slow). Climbing stairs require an assistive device and take significantly longer than typical (++) trouble with stairs). Standing is managed independently. Lifting and carrying/holding require periodic assistance from another person (daughter or other family helps).

In his SR, the appellant writes that he had been dealing with cancer of the bladder for the past two years, is currently undergoing chemotherapy prior to surgery to remove his bladder, and will have to wear a bag for the rest of his life. Additionally, he has severe pain in his knees and back due to arthritis. He also has had gout several times, which immobilizes him. He used to be a very energetic and outgoing person; now he is just a shell of a man trying to survive.

The appellant's daughter writes that the appellant will require extra care following his surgery, will never be able to work, and requires disability in order to sustain a healthy and stable home.

The urologist writes that the appellant's upcoming procedure is a significant surgery that does have a significant recovery associated with it and high risk of complication. Postoperative recovery will be a challenge in regard to learning how to manage his new urinary diversion as well as a significant recovery in regards to return to his functional status. This generally takes in the order of 3+ months to be able to return to a sedentary job and in all likelihood up to 6 months for any significant physical labour. "I can only speak for his upcoming urologic intervention and just wanted to provide update in regards to the expected postoperative care and recovery process/timeframe."

Mental Impairment

The GP provides the following information in the PWD application.

- In the MR, a significant deficit with cognitive and emotional function is identified in 1 of 11 specified areas – emotional disturbance. In the AR a major impact on daily functioning is not reported for any area; a moderate impact on daily functioning is reported for bodily functions (very hard to go to toilet due to knee/joint pain), emotion (feels down & depressed most days), and memory. Minimal or no impact on daily functioning is reported for the remaining 12 listed areas.
- No cognitive, motor, sensory, or other difficulties with communication are identified in the MR. In the AR, the appellant is reported to have good ability with speaking, reading, writing, and hearing.
- In the AR, all 5 listed aspects of social functioning are reported to be managed independently: appropriate social decisions; ability to develop and maintain relationships; interact appropriately with others; ability to deal appropriately with unexpected demands; and, ability to secure assistance from others.
- Good functioning with immediate social network and marginal functioning with extended social networks.

The appellant does not expressly address his depression or cognitive functioning in his SR.

The advocate's reconsideration submission does not address mental impairment.

The appellant's daughter writes that the appellant needs to be reminded to eat and perform simple daily hygiene tasks. Given her experience in the health care field, she believes that the appellant is of sound mind most of the time but that his physical state requires monitoring of activities for safety.

DLA

The GP reports the following.

- No medications or treatments have been prescribed that interfere with the ability to perform DLA.
- Multiple joint aches, chronic back pain, OA knees, and bladder cancer are the impairments that impact the ability to manage DLA.

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

Move about indoor/outdoors

- As described above under Physical Impairment.

Personal care

- Dressing (takes 10 minutes), feeding self, regulate diet, and transfers in/out of bed (sometimes cannot get out) and on/off chair are managed independently. All transfers take significantly longer than typical.
- No information is provided for grooming.
- Bathing and toileting require the use of grab bars.

Basic Housekeeping

- Both tasks, laundry and basic housekeeping, require periodic assistance from another person (daughter).

Shopping

- Going to and from stores (needs a ride) and carrying purchases home (does not carry much) require continuous assistance from another person. "Unable to carry things or walk far due to fatigue and multiple joint aches."
- Reading prices and labels, making appropriate choices, and paying for purchases are managed independently.

Meals

- Meal planning and safe storage of food are managed independently.
- Food preparation and cooking require periodic assistance from another person (cannot stand for long).

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 takes 2x as long as average person.
- No information is provided respecting using public transit and using transit schedules/arranging transportation.

Social Functioning

- As described above under *Mental Impairment*.

The appellant does not describe his ability to perform DLA in his SR.

The appellant's daughter writes that the appellant needs constant supervision while he does minor house chores because, as an example, he can cough and faint with no notice. It takes the appellant an hour to do one load of dishes because he has to take 10 sitting breaks to do one load of dishes. He can put his laundry in but cannot take it out and walk the stairs to hang it on the line. He has to take at least 5 naps within half an hour to hour in order to keep going.

Need for Help

The GP reports the need for a cane or walking stick and grab bars as well as assistance, as described above under *DLA*, from another person (the appellant's daughter).

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 osteoarthritis of both knees, chronic back pain, and bladder cancer. On appeal, the appellant argues that the ministry's decision is not justified based on the information he provided. At reconsideration, the appellant's advocate took issue with the ministry's comment in its original decision that a cane is not considered to be a device that supports a severe and significant limitation in the appellant's mobility in regards to the performance of daily living tasks the same way a wheelchair would. The advocate points to the legislated definition of "assistive device" – 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. The advocate argues that just because the appellant is able to move around without a wheelchair does not mean that he is not severely physically impaired. That he is only able to walk one block on a flat surface, must stop due to joint soreness and exhaustion, and requires a cane, indicates that he is indeed severely physically impaired. The advocate also points to the lifting limit of no more than 10 lbs., the need to hold onto a railing to climb 2 to 5 steps, and the need for continuous or periodic assistance with 8 areas of DLA and taking significantly longer in 9 areas of DLA.

Acknowledging the information provided about the appellant's inability to work, the ministry notes that 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.

The ministry also comments that the urologist does not speak to limitations/restrictions in physical functioning, ability to perform DLA or assistance needed with DLA, and that recovery in regards to functional status is not expected to continue for at least 2 years in duration. Additionally, the ministry comments that the information from the appellant's daughter is not confirmed by a medical practitioner or prescribed professional. At reconsideration, the ministry does not take the same position as in the original decision respecting the use of a cane as opposed to a wheelchair. At reconsideration, the ministry acknowledges the need for a walking stick or cane and grab bars and argues that while the appellant experiences limitations to physical functioning due to soreness in joints and fatigue, the information respecting functioning, which does not include a description of how much longer mobility activities take, speaks to a moderate rather than severe impairment.

While the ministry correctly indicates that how much longer than typical the appellant takes with mobility activities is not stated by the GP, the GP repeatedly indicates that due to pain and fatigue/exhaustion, the appellant is "very slow" and requires a cane or walking stick when walking both indoors and outdoors and "can walk no longer than 1 block." When asked to assess walking ability unaided, the GP indicates less than 1 block. The GP also reports that while the appellant can manage 2-5 steps, the appellant has "++ trouble" doing so. Lifting is also limited to a maximum weight of 10 lbs. and requires periodic assistance, with continuous assistance required for carrying purchases. The panel finds that based on the physical functional abilities reported by the GP, most notably the continual need for the use of a cane for walking both indoors and outdoors and being limited to walking very slowly and for distances no longer than 1 block, the ministry unreasonably determined that a severe physical impairment was not established.

Mental Impairment

The appellant is diagnosed with depression and alcoholism by his GP and the GP comments that the appellant feels down and depressed most days. The appellant's own written submissions do not describe a mental impairment and his daughter believes that the appellant is of sound mind most of the time, and requires reminders for eating. The ministry's position is that the information provided by the GP does not establish a severe mental impairment. As the ministry notes, a significant deficit with cognitive and emotional functioning is reported in one area, emotional disturbance, for which a moderate impact on daily functioning is reported. While moderate impacts on daily functioning are also reported for bodily functions and memory, the narrative from the GP identifies physical impairment as the cause of difficulties with bodily functions, toileting due to knee and joint pain, and there is no description of how memory is impacted. Further, no deficits are reported in any other areas besides emotion, and no major impact on daily functioning is reported in any area, most being either not or minimally impacted. No problems with communication are identified and the appellant is reported to independently manage social functioning. While marginal functioning is reported for extended social networks, there is no explanation from the GP and neither the appellant nor his daughter describe difficulties with social functioning.

Based on the available information, the panel finds that the ministry reasonably determined that 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 ministry's position is that given the appellant's medical history it is reasonable to expect that he would encounter some restrictions in his ability to perform DLA necessitating assistance, but that the GP's assessments are indicative of a moderate level of restriction. The ministry notes the DLA for which the appellant requires periodic assistance, both basic housekeeping tasks and both physical tasks of the DLA meals, and that a number of tasks for the DLA personal care take significantly longer. However, with the exception of indicating that the appellant takes 10 minutes with dressing and 2x longer getting in/out of vehicle, there is no description of how much longer. The appellant does not describe his ability to perform DLA in his writing submissions. In response to the original

denial, the appellant's advocate argues that the letter from the appellant's daughter, who provides constant supervision and assistance for her father, establishes that the assistance required is both significant and for extended periods of time.

The legislation requires that the restrictions with DLA be in the opinion of a prescribed professional and in this case the appellant's GP is the only prescribed professional who provided information respecting the appellant's ability to perform DLA. The urologist, who is also a prescribed professional, only addresses post-operative recovery, not DLA.

The panel finds that the information from the GP does not identify the need for continuous supervision and assistance from another person described by the appellant's daughter. Rather, the GP identifies the need for continuous assistance from another person only for the physical tasks of the DLA shopping. Continuous assistance from an assistive device is reported for the bathing and toileting tasks of the DLA personal care and for the DLA move about indoors and outdoors (walking is done very slowly and for distances of no more than 1 block). Despite the limitations on the appellant's ability to mobilize, which the panel found to be indicative of severe physical impairment, the GP assesses the appellant as requiring only periodic assistance from another person for the physical tasks of basic housekeeping and meals and, as the ministry noted, there is no explanation as to the frequency or duration of that assistance. Meal preparation is also reported to take significantly longer, but there is no description of how much longer. Transfers are also reported to take significantly longer than typical but again, there is no description of how much longer. The appellant is also reported as sometimes being unable to get out of bed but it is unclear how often this occurs. The panel considers that taking 10 minutes to dress oneself and 2x longer to get in/out of a vehicle are reasonably viewed by the ministry as indicating a moderate degree of restriction. The GP does not confirm the safety issues raised by the appellant's daughter or identify any difficulties with DLA related to mental impairment.

As the GP assesses the appellant as being restricted but still independent with most DLA, in the absence of additional information describing the periodic assistance required and how much longer some DLA tasks take to perform, information that would clarify the significance or degree of the reported restrictions, the panel finds that 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*.

Help to perform DLA

The appellant requires the use of assistive devices and assistance from another person as described in the summary of facts. 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.