

## 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 July 4, 2017, which held that the appellant did not meet 2 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 and duration requirements and that he had a severe impairment, but was not satisfied that:

- 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, the appellant requires an assistive device, the significant help or supervision of another person 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

On March 22, 2017 the ministry received the appellant's PWD application comprised of a Medical Report (MR) and an Assessor Report (AR) completed by the appellant's general practitioner (the "Physician") on March 8, 2017, and the appellant's Self-report (SR) dated March 7, 2017.

The appellant's request for PWD designation was denied on May 3, 2017. On May 15, 2017 the appellant requested a reconsideration. On June 5, 2017 the appellant submitted his completed Request for Reconsideration (RFR) dated June 3, 2017 and letter dated June 4, 2017. The appellant also provided the following:

- Report re X-Ray Lumbosacral Spine dated February 25, 2015
- Radiology Report re Computed Tomography of Lumbar Spine dated June 5, 2015
- Radiology Report re MRI Cervical Spine dated September 27, 2015
- Radiology Report re MRI Thoracic Spine dated October 27, 2015
- Radiology Report re Thoracic Spine dated February 22, 2016
- Letter from an Occupational Therapist (OT) dated May 25, 2017
- Portion of Consult Report of a Neurosurgeon dated June 6, 2017

On July 14, 2017, the tribunal received the appellant's Notice of Appeal.

### Summary of relevant evidence

#### Diagnoses

In the MR, the Physician indicates that the appellant has been diagnosed with Schwannoma of the spine T9-T11 with left leg paralysis and right leg weakness and loss of sensation in his left hip, date of onset February 2015. Under Health History the Physician indicates that the appellant has constant pain that fluctuates with severity to left leg and marked atrophy and weakness. The Physician indicates that the appellant is able to walk but cannot carry any heavy objects. He indicates that the appellant is not able to run, has difficulty with stairs and his walking is limited to DLA's.

The OT states that in October 2015, the appellant had a Schwannoma resected from his spinal cord at the T10 level.

#### Physical Impairment

In the MR for Functional Skills, the Physician indicates that the appellant is able to walk less than one block unaided on a flat surface, can climb 2 to 5 steps unaided, is limited to lifting 5 to 15 pounds and can remain seated less than one hour.

In the AR, the Physician indicates that the appellant is independent with standing but requires periodic assistance with walking indoors, walking outdoors, climbing stairs, lifting, and carrying and holding.

The OT indicates that the appellant experiences weakness in his left leg, foot drop, roving numbness, poor perception of his left foot in space, and shooting electrical leg pains. His balance is at poor and he is at high risk for falls, using aids to help him maintain his safety during functional activities such as showering. The OT states that the appellant uses a Dictus Band ankle orthosis, which helps him with his gait, but he remains unable to walk a full city block without increasing pain, walk safely on uneven terrain, or sit or stand for extended periods of time without debilitating pain.

### Mental Impairment

In the MR, the Physician indicates that the appellant has significant deficits with cognitive and emotional function in the area of emotional disturbance. The Physician comments that the appellant has frequent anxiety attacks related to cancer of the spine and related sequelae.

In the AR, the Physician indicates that the appellant's ability to communicate with speaking, reading, writing, and hearing is good. For Section B, question 4 Cognitive and Emotional Functioning the Physician indicates that the appellant has major impact in the areas of bodily functions and emotion, minimal impact to attention/concentration and memory and no impact to the other listed aspects of daily functioning. The Physician comments that the appellant has chronic pain, poor balance and left sided strength with anxiety attacks affecting DLA's. The Physician indicates that the appellant takes a lot longer to bath, shower and use facilities. The Physician also indicates that the appellant still has trouble concentrating due to anxiety and pain.

In the SR, the appellant states that after many (10-12+) years of chronic pain and loss of bodily functions, he developed quite severe anxiety and some depression, not knowing what was wrong with him. He states that he still deals with this daily and is on medication, which does help to some degree.

In the RFR the appellant states that after many years of before his condition was diagnosed, he developed severe anxiety, frequent panic attacks, and insomnia. He states that although he has been put on medication for this, which helps, his anxiety has left him with an inability to go out in public or interact with others during these anxiety and panic attacks.

### DLA

In the MR the Physician indicates that the appellant has been prescribed medications for anxiety that interfere with his ability to perform DLA. The Physician indicates that the anticipated duration of the medication/treatments is 2 to 3 years. Under part F – Additional Comments, the Physician indicates that the appellant has severe nerve damage to his spine related to Schwannoma. He indicates that surgery stopped the process, but recovery is very unlikely. The Physician indicates that the appellant is not able to return to his former occupation, that retraining could be possible in 2-4 years but that he is not able to do any occupation at this time.

In the AR, the Physician indicates that the appellant is independent with all aspects of DLA except carrying purchases home, for which he requires periodic assistance. The Physician indicates that it takes the appellant two times longer than typical to perform dressing, grooming, bathing, laundry and basic housekeeping. The Physician indicates that the appellant's brother helps him occasionally and that the appellant needs help with groceries. The Physician also indicates that it takes the appellant longer to get in and out of a vehicle.

The Physician indicates that the appellant is independent with all aspects of social functioning and that he has marginal functioning with respect to his immediate and extended social networks.

In the SR, the appellant states that he is constantly tripping or stumbling during DLA due to the severe nerve damage and spatial awareness of his left leg and foot. The appellant states that most if not all of his DLA have been severely affected and the loss of balance and weakness in his lower body and extremities makes even regular household chores and essential tasks difficult. He states

that shopping, banking, and other errands that need to be done prove to be difficult as he is always worrying about losing balance or tripping. The appellant states that he used to have a very active lifestyle and was an avid outdoorsman but is now quite limited.

The OT states that the appellant has been working hard on managing his severe chronic pain. She states that at home, he is able to manage many of the demands of DLA by taking frequent breaks, changing his activity frequently, resting, pacing himself, moving slowly, and stopping as dictated by his pain. She states that at home this is successful because he is in control of the schedule, but he is not able to meet demands of a workplace at this time.

### Need for Help

In the MR, the Physician indicates that the appellant does require prosthesis or aids for his impairment, being a left leg prosthesis to assist with walking and climbing stairs to reduce incidences of falling.

In the AR, the Physician indicates that the appellant requires help with groceries, routine upkeep with home and garden, and shopping. The Physician indicates that the appellant's family and friends provide the help required for DLA. The Physician indicates that the appellant uses a cane, splints, toileting aids and bathing aids to reduce incidences of falling. The Physician indicates that no equipment is needed. The appellant does not have an Assistance Animal.

In the SR, the appellant states that he has had to ask for help from family and friends many times over the past couple of years when the pain was unbearable.

In the RFR the appellant states that he must have assistance with carrying firewood, groceries or any other objects into his home. He has to wait for assistance until family, friends, or volunteers are available.

### **Additional information provided**

In his Notice of Appeal dated July 14, 2017, the appellant states that his situation is severe and he is unable to work. He needs constant assistance from family and friends or he would not be able to function.

At the hearing, the appellant submitted the following new information:

- Letter from the Physician dated July 26, 2017 providing additional information regarding the appellant's functional limitations. The Physician states that the appellant continues to suffer from a generalized anxiety disorder as related to cancer of the spine, which is difficult to manage and interferes with the appellant's daily routine and ability to connect. The Physician states that it takes the appellant 2 to 3 times longer than the average person with his daily ablutions. It can take him up to 2 days to mow the lawn for which the average person would have taken 20 minutes. The Physician indicates that due to chronic pain and requirement for opiate medication use to manage his pain, the appellant's concentration and memory are affected. The Physician states that the appellant does not have the ability to lift repetitively and any strain on his back causes marked pain that can last for days before returning to baseline. The Physician states that the appellant cannot perform any manual labor of any sort and cannot drive when he has taken his opiate medications.

- Letter from the appellant's brother dated September 7, 2017 indicating that he assists the appellant with household activities including lawn maintenance, housekeeping, household repairs, driving, grocery shopping, gardening and firewood. The appellant's brother states that the appellant's activities are getting hard for him to perform as time goes by. The appellant's brother states that the appellant has suffered financially due to his physical condition.

At the hearing the appellant stated that he needs constant help as he can barely walk most days. He uses his assistive aids continuously, although as part of his therapy he tries to walk a bit without his cane, on good days. Cleaning, yard work, washing dishes and all DLA are extremely difficult for him to complete. He states that as he lives in a small community it is not easy to find community resources. His brother helps tremendously and without his help the appellant would have to move in with family. The appellant states that his brother helps with laundry, cleaning, getting groceries and chopping and carrying firewood. The appellant's mother will also help with grocery shopping and some meal preparation. The appellant states that his condition went undiagnosed for years until the Physician sent him to a specialist. As a result of the delay in obtaining a diagnosis and surgery, he experienced significant anxiety and stress. While it is a bit better now, it still takes its toll and he requires medications for pain and to sleep. He suffers from ongoing anxiety, which impacts his ability to interact socially. The appellant states that as his left leg is pretty well paralyzed, people often look at him funny or treat him differently which contributes to his anxiety. The appellant stated that he has gone for 1 or 2 counseling sessions and the OT does a combination of physical therapy and counseling as she knows that he has trouble accessing counseling in his community. The appellant stated that he was used to being independent and it is extremely hard for him to ask for help but he has no choice at this time.

#### **Admissibility of New Information**

The ministry did not object to the new evidence.

The panel has admitted the appellant's oral testimony, the information in the Notice of Appeal, the letter from the Physician and the letter from the appellant's brother as they are evidence in support of information and records that were before the ministry at the time of reconsideration, in accordance with section 22(4) of the *Employment and Assistance Act*. In particular, the information corroborates the information provided in the PWD application and the Physician's information provides further explanation about the appellant's ability to perform DLA.

## 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. In particular, was the ministry reasonable when concluding it was not satisfied that

- 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 help, as it is defined in the legislation, 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**

### **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 that the legislative criteria are met, 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 how frequently the activity is restricted. 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 MR and the AR sections of the PWD application with the opportunity for the prescribed professional to check marked boxes and provide additional narrative. DLA, as defined in the legislation, do not include the ability to work.

The appellant's position is that he has a severe physical impairment, is in constant pain and requires help with DLA. The appellant's position is that the information provided demonstrates that he has a severe impairment that directly and significantly restricts his DLA continuously or periodically for extended periods.

The ministry's position is that although the appellant has a severe physical impairment, the Physician does not describe how much longer than typical the appellant takes with showering/bathing and toileting. The ministry also states that while the Physician indicates that the appellant takes two times longer than typical with personal care, he is noted to be independent with the majority of DLA, and that taking twice as long as typical in performing DLA is not considered indicative of significant restrictions to DLA. The ministry also states that the Physician does not describe the frequency or duration of periodic assistance from another person required for carrying purchases home.

The ministry also notes that the OT states that the appellant is able to manage many of the DLA by taking frequent breaks, changing his activity frequently, resting, pacing himself, moving slowly, and stopping as dictated by his pain; at home this is successful because he is in control of the schedule. The ministry notes that while the OT indicates that the appellant takes longer than typical with DLA, she does not describe how much longer than typical the appellant takes to perform DLA.



The ministry's position is that based on all of the information provided, there is not enough evidence to confirm that the appellant has a severe impairment that significantly restricts his ability to perform DLA continuously or periodically for extended periods, so the legislative criteria has not been met.

While the appellant states that he is in chronic pain and needs significant help with DLA including cleaning, laundry, getting groceries, gardening, chopping and carrying firewood, the AR indicates that the appellant is independent with all listed aspects of DLA except carrying purchases home, for which he requires periodic assistance. The Physician indicates that the appellant takes twice as long as typical with dressing, grooming, bathing, laundry and basic housekeeping and describes that it takes the appellant longer to get in and out of a vehicle. However, the Physician does not indicate that the appellant needs continuous assistance with any aspects of DLA and for the periodic assistance needed with carrying groceries, the Physician indicates that the appellant's brother helps him occasionally.

The appellant stated that he was present when the Physician completed the MR and the AR but that the Physician did not ask him many questions about his DLA. The information provided by the appellant and the appellant's brother regarding the impact to his DLA and help needed indicates that the appellant's DLA are more significantly restricted than the information provided by the Physician. However, the information from the OT indicates that the appellant is able to manage many of the demands of DLA by taking frequent breaks, changing his activity frequently, resting, pacing himself, moving slowly, and stopping as dictated by his pain. The OT indicates that this is successful at home because the appellant is in control of the schedule. However, the information provided by the OT is generally consistent with the information of the Physician and this information indicates that the appellant is not as restricted with DLA as his evidence indicates.

While the Physician indicates that the appellant has marginal functioning with his immediate and extended social networks, the Physician indicates that the appellant is independent with all aspects of social functioning.

The consult from the neurosurgeon indicates that he recommended surgery for thoracic laminectomy to remove the tumor on the appellant's spine. The Radiological reports of the MRI's of the appellant's thoracic and cervical spine confirm that the appellant had a spinal cord tumor and was referred for neurosurgical consult, that he underwent surgery, and has lumbar spine osteoarthritis. While these documents confirm the appellant's medical condition they do not provide any additional information regarding the appellant's restrictions to DLA.

The additional information from the Physician in his letter dated July 26, 2017 indicates that it takes the appellant 2 to 3 times longer than the typical person with his daily ablutions and up to 2 days to mow the lawn. However, the Physician does not provide any other information indicating that the appellant requires continuous assistance from another person with any DLA or that he requires periodic assistance from another person with any other DLA. The Physician does not provide any information to clarify how much periodic assistance is needed with carrying purchases home or how much longer than typical it takes the appellant to get in and out of a vehicle.

It may be that the Physician and the OT do not have a full understanding of the appellant's restrictions to DLA and help needed but as noted above, the legislation requires that the ministry be satisfied that the evidence from a prescribed professional establishes that the appellant's impairment direction and significantly restricts a person's ability to perform DLA either continuously or periodically for extended periods.

While the OT and the Physician both indicate that the appellant is not able to work at this time, employability is not a criterion of PWD designation.

The information demonstrates that the appellant experiences some limitations resulting in his need for assistance with some DLA, but as the majority of DLA are performed independently or the degree of the assistance that he requires remains unclear, the panel finds that the ministry has reasonably determined that the independence with which the prescribed professionals report that the appellant manages his DLA does not confirm that the appellant has a severe impairment that significantly restricts his ability to perform DLA continuously or periodically for extended periods.

#### Help to perform DLA

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 appellant's position is that he requires help with DLA because of his severe physical impairment and ongoing chronic pain and limitations. The appellant's position is that he requires help with shopping, laundry, housework, and gardening and that he relies heavily on his brother for help, his mother to a lesser degree and uses his assistive aids daily.

The ministry argues that because it has not been established that DLA are significantly restricted, it cannot be determined that help is required.

In the MR, the Physician indicates that the appellant requires a left leg prosthesis to assist with walking and climbing stairs to reduce incidences of falling. In the AR, the Physician indicates that the appellant receives assistance from family and friends. The Physician indicates that the appellant needs help with gardening, basic house/home upkeep, routine home cleaning, shopping and carrying for groceries. The Physician also indicates that the appellant is provided assistance through the use of a cane, splints, toileting aids and bathing aids. The appellant does not have an Assistance Animal.

The letter from the appellant's brother confirms that he provides assistance to the appellant although he does not indicate the frequency or duration of assistance provided.

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