

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the ministry) reconsideration decision dated August 14, 2017 that found that the appellant did not meet two 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 he has a severe physical impairment, though not a severe mental impairment, which, in the opinion of a medical practitioner, is likely to continue for at least two years.

However, the ministry was not satisfied that the evidence establishes 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 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 appellant did not attend the hearing. After confirming that the appellant was notified of the date, time, and location of the hearing, the hearing proceeded under Section 86(b) of the Employment and Assistance Regulation.

The evidence before the ministry at the time of the reconsideration decision included the Person With Disabilities (PWD) Application comprised of the applicant information dated August 25, 2016, with no self-report completed by the appellant, a physician report (PR) and an assessor report (AR) both dated September 21, 2016 and completed by a general practitioner (GP) who has known the appellant for 3 years and has seen him 2 to 10 times in the last year.

The evidence also included the following documents:

- 1) A copy of the AR with changes made to the assessment and initialed by the GP but not dated, as well as additional comments added (the “supplemental AR”);
- 2) Letter dated August 9, 2017 from an advocate on the appellant’s behalf; and,
- 3) Request for Reconsideration dated July 17, 2017.

### ***Diagnoses***

In the PR, the appellant was diagnosed by the GP with hernia repair and perforated bowel in 2016, carpal tunnel syndrome with an onset in 2015, osteoarthritis/ low back pain with an onset in 2015, and anxiety/ ADHD with an onset around 2010. In the AR, when asked to describe the mental or physical impairments that impact the appellant’s ability to manage daily living activities, the GP wrote: “chronic pain/ discomfort/ lack of concentration and anxiety.”

### ***Mental Impairment***

In the PR and the AR, the GP reported:

- In the health history, the GP wrote that the appellant is “not on any treatments for ADHD.”
- The appellant has cognitive difficulties with communication. The GP wrote that the appellant has “untreated ADHD. He does not want medications for ADHD.”
- The appellant has significant deficits with cognitive and emotional functioning in the areas of consciousness, emotional disturbance, motivation, and attention or sustained concentration. The GP provided no comments.
- The appellant has a satisfactory ability to communicate in the areas of speaking, writing, and hearing, and a poor ability with reading. The GP wrote: “struggles with concentration.”
- With respect to daily impacts to the appellant’s cognitive and emotional functioning, the GP reported that the appellant has one major impact in the area of motor activity. He has moderate impacts in bodily functions, consciousness, attention/concentration, executive, memory, and other neuropsychological problems. There are minimal impacts in emotion, impulse control, motivation, and other emotional or mental problems. All other list areas of functioning are reported as no impact, and the GP did not provide any comments.
- Regarding the section of the AR assessing impacts to the appellant’s social functioning, the GP indicated that the appellant is independent in all areas, specifically: making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others, dealing appropriately with unexpected demands, and securing assistance from others.
- The appellant has good functioning in his immediate social network and marginal functioning in his extended social network. When asked to describe the support/supervision required to help maintain the appellant in the community, the GP did not comment.

In the supplemental AR, the GP indicated:

- For the assessment of the impacts to cognitive and emotional functioning, the GP added the comment that he “discussed medical management with him but he does not want to start pharmaceuticals at the moment to assist with his anxiety and ADHD.”

- For the assessment of social functioning, the appellant requires continuous support/supervision with one aspect, specifically dealing appropriately with unexpected demands. The GP wrote that the appellant “struggles with management due to anxiety.”

### **Daily Living Activities (DLA)**

In the PR and the AR, the GP reported:

- The appellant has not been prescribed any medication and/or treatments that interfere with his ability to perform DLA.
- The appellant takes significantly longer than typical with walking indoors and for walking outdoors. The GP wrote: “ankle surgery and osteoarthritis” and “takes longer due to pain flare-ups.” There is no indication of the need for assistance from another person or the use of an assistive device for mobility.
- The appellant is independently able to perform every task of the pay rent and bills DLA.
- For the personal care DLA, the appellant is independent with the tasks of toileting, feeding self, and regulate diet, and takes significantly longer with the tasks of dressing, grooming, bathing, transfers in/out of bed and transfers on/off chair. The GP wrote: “chronic ankle pain, osteoarthritis.”
- For the basic housekeeping DLA, the appellant takes longer than typical with laundry and requires continuous assistance from another person with basic housekeeping.
- Regarding the shopping DLA, the appellant is independent with the tasks of going to and from stores, reading prices and labels, making appropriate choices and paying for purchases. He requires continuous assistance from another person with the task of carrying purchases home.
- For the tasks of both the basic housekeeping and the shopping DLA, the GP wrote “chronic ankle pain, osteoarthritis and previous surgery.”
- For the meals DLA, the appellant is independent with the tasks of meal planning and safe storage of food, and takes significantly longer than typical with the tasks of food preparation and cooking. The GP did not add an explanation or description.
- Regarding the medication DLA, the GP crossed off the list of tasks and wrote “not on any medication.”
- For the transportation DLA, the appellant takes significantly longer with all tasks, specifically getting in and out of a vehicle, using public transit and using transit schedules and arranging transportation. The GP did not add comments.

In the supplemental AR, the GP reported:

- The appellant also requires continuous assistance from another person with the task of laundry.
- Additional comments that the appellant “needs intermittent assistance with groceries. Depends on volume of groceries” and “able to prepare and cook independently but takes longer time to complete.”
- For additional information, the GP wrote that the appellant “struggles with daily activities and is taking longer time to complete as compared to his peers.”

### **Need for Help**

In the AR, the GP indicated that the help required for DLA is provided by family. For assistance required where none is available, the GP wrote: “assistance with housekeeping/ cleaning. Daily activities.” Regarding the equipment or devices routinely used by the appellant, the GP crossed out the list, which includes braces. The GP reported in the PR that the appellant requires an aid for his impairment, specifically “braces and hernia belt.”

***Additional Information***

In his Notice of Appeal dated August 22, 2017, the appellant expressed his disagreement with the ministry's reconsideration decision and wrote that his ailments do directly and significantly restrict daily living and he does need assistance daily due to his medical issues.

The ministry relied on its reconsideration decision as summarized at the hearing.

The panel considered that there was no additional information for which a determination of admissibility was required under Section 22(4)(b) of the *Employment and Assistance Act*. The arguments on the appellant's behalf, in the letter dated August 9, 2017 from an advocate, will be addressed in Part F- Reasons for Panel Decision, below.

## PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry's reconsideration decision, which found that the appellant is not eligible for PWD designation, 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 appellant has a severe physical impairment, though not a severe mental impairment, but his DLA are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods and that it could not be determined, as a result of those restrictions, 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).

At reconsideration, the ministry was satisfied that the information provided is sufficient evidence of a severe physical impairment. The panel considers it relevant to consider the severity of the appellant's mental impairment to determine how this impairment needs to be factored in when addressing the "Direct and significant restrictions in the ability to perform DLA" criterion discussed below.

### **Severe Mental Impairment**

In the reconsideration decision, the ministry was not satisfied that the information provided was sufficient evidence to establish that the appellant has a severe mental impairment. The ministry considered that the GP diagnosed anxiety/ ADHD with an onset around 2010 and reported that the appellant is not on any treatment for ADHD. The ministry also considered that the GP indicated that the appellant has significant deficits with cognitive and emotional functioning in the areas of consciousness, emotional disturbance, motivation, and attention or sustained concentration, with no comments added. The ministry pointed out that, when considering the daily impacts to the appellant's cognitive and emotional functioning, the GP reported there are moderate impacts on consciousness and attention/concentration, and minimal impacts on emotion and motivation.

The one major impact assessed by the GP is in the area of motor activity, which was not identified as an area of deficit in the PR, and for which the GP has provided no explanation. There are also moderate impacts assessed by the GP in the area of bodily functions, executive, memory, and other neuropsychological problems, as well as minimal impacts in impulse control and other emotional or mental problems. When afforded an opportunity in the supplemental AR to change or clarify the assessment, the GP did not alter his assessment and referred only to the appellant's reluctance to accept treatment as he wrote "discussed medical management with him but he does not want to start pharmaceuticals at the moment to assist with his anxiety and ADHD."

Considering the two "social functioning" DLA that are specific to mental impairment – make decisions about personal activities, care, or finances (*decision making*), and relate to, communicate or interact with others effectively (*relate effectively*), the panel finds that the ministry reasonably concluded that there is insufficient evidence to establish that the appellant is significantly restricted. Regarding the 'decision making' DLA, the GP reported in the AR that the appellant independently manages most decision-making components of DLA, specifically: personal care (regulate diet), shopping (making appropriate choices and paying for purchases), meals (meal planning and safe storage of food), and pay rent and bills (including budgeting). For the medications DLA (taking as directed and safe handling and storage), the GP indicated these tasks are not applicable as the appellant is not on any medication. Regarding the transportation DLA (using transit schedules and arranging transportation), the appellant takes significantly longer than typical; however, the GP did not indicate how much longer it takes the appellant to allow the ministry to determine that this restriction is significant. The GP reported in the AR that the appellant is independent with making appropriate social decisions, and this assessment was not changed in the supplemental AR.

Regarding the DLA of 'relating effectively' with others, the GP assessed the appellant as independent with developing and maintaining relationship and with interacting appropriately with others. In the supplemental AR, the GP did not change his assessment in these areas, but changed his assessment for the aspect of dealing appropriately with unexpected demands, from independent to a need for continuous support/supervision, and the GP wrote that the appellant "struggles with management due to anxiety." The ministry wrote that the GP did not describe the support/supervision required to help maintain the appellant in the community, there is no indication of a safety issue, and all other areas of social functioning are assessed as independent. The GP reported that the appellant has good functioning in his immediate social network and, while his functioning is assessed as marginal in his extended social networks, the ministry again considered that the GP did not provide an explanation and did not indicate any support/supervision required to maintain the appellant in the community. The GP reported that the appellant has cognitive difficulties with communication and referred to the appellant's reluctance to accept treatment as he wrote that the appellant has "untreated ADHD" and "he does not want medications for ADHD." In the AR, the GP assessed the appellant with a satisfactory ability to communicate in the areas of speaking, writing, and hearing, and a poor ability with reading as he: "struggles with concentration." The GP did not

add comments to the supplemental AR to clarify the impacts to the appellant's ability to relate effectively with others.

Given the absence of information from the GP of significant impacts to the appellant's cognitive and emotional functioning, and the insufficient evidence to establish that the appellant is significantly restricted with the two DLA specific to a severe mental impairment, the panel finds that the ministry reasonably determined that a severe mental impairment was not established under Section 2(2) of the EAPWDA.

**Direct and Significant Restrictions in the ability to perform DLA**

In the reconsideration decision, the ministry was satisfied that the appellant has a severe physical impairment. However, the determination that a person has a severe impairment does not itself determine eligibility for the PWD designation as Section 2(2)(b) of the EAPWDA requires that a prescribed professional provide an opinion that an applicant's severe impairment directly and significantly restricts his ability to perform DLA, either continuously or periodically for extended periods. In this case, the GP is the prescribed professional.

In the letter dated August 9, 2017, the advocate argued that the court decision in *Hudson v. Employment and Assistance Appeal Tribunal, 2009 BCSC 1461* established that the appellant is only required to show direct and significant restrictions on at least two DLA. According to Section 2(2)(b) of the EAPWDA, the ministry must assess direct and significant restrictions to the appellant's 'ability to perform 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 PR and considered that the GP indicated that the appellant has not been prescribed any medications or treatments that interfere with his ability to perform DLA. The ministry considered the information in the AR that the appellant takes longer with some tasks of DLA, specifically with walking indoors and outdoors, with several tasks of personal care, and tasks of meals and transportation. The ministry reasonably considered that the comments by the GP that the appellant "takes longer due to pain flare-ups" and that he has "chronic ankle pain, osteoarthritis" and, in the supplemental AR, that he is "able to prepare and cook independently but takes longer time to complete" do not describe how much longer than typical the appellant takes with these tasks. Given an opportunity to add a description in the supplemental AR, the GP wrote that the appellant "struggles with daily activities and is taking longer time to complete as compared to his peers," without specifying how much longer than typical it takes the appellant with specific tasks of DLA.

The ministry also considered that the GP indicated in the AR that the appellant requires continuous assistance from another person with the tasks of basic housekeeping and carrying purchases home when shopping and, in the supplemental AR, added continuous assistance required with the task of laundry. In the AR, in describing assistance required where none is available, the GP wrote: "assistance with housekeeping/ cleaning. Daily activities," providing an opinion that the basic housekeeping DLA is restricted. The ministry wrote that the additional comments by the GP in the supplemental AR that the appellant "needs intermittent assistance with groceries" and "depends on volume of groceries" indicate a periodic need as opposed to a continuous need, and that it is difficult to establish the significance of the restriction to the task of carrying purchases home without further



information. The panel notes that the GP referred to pain “flare-ups” when assessing the appellant’s mobility that may indicate further impacts to the appellant’s functioning during times of exacerbation of his pain, with no indication by the GP of how often these flare-ups occur. The ministry reasonably determined that without descriptive information from the GP, the evidence does not establish that the appellant’s ability to manage the task of carrying purchases home is significantly restricted for extended periods.

In the PR, the GP reported that the appellant requires an aid for his impairment, specifically braces and a hernia belt; however, in the AR, the GP crossed out the list of assistive devices, which includes braces, as being routinely used by the appellant. The panel notes that the GP did not indicate that the appellant uses an assistive device to perform any of his tasks of DLA, and there was no further information provided on the appeal to explain this discrepancy.

As previously discussed, the ministry reasonably determined that there is not sufficient evidence of significant restrictions in the two social functioning DLA specific to a severe mental impairment, and no further information regarding the appellant’s ability to perform DLA was provided from a prescribed professional on the appeal.

Given the GP’s report that the appellant is independent with many tasks of DLA, with no descriptive information from the GP regarding how much longer it takes the appellant with some tasks or how often there are exacerbations to his pain flare-ups, as well as the absence of evidence of significant restrictions to those DLA that relate to a person with a mental impairment, the panel finds that the ministry reasonably determined that the evidence is insufficient to show that the appellant’s overall ability to perform his DLA is significantly restricted either continuously or periodically for extended periods, pursuant to Section 2(2)(b)(i) 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 reported that the appellant receives help for DLA from family and he requires braces and a hernia belt as aids to his impairment, as 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.