

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the Ministry) reconsideration decision dated September 18, 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 that 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.

The ministry also found that the Appellant is not one of the prescribed classes of persons who may be eligible for PWD designation on the alternative grounds set out in Section 2.1 of the EAPWDA and the appellant did not appeal the decision on this basis.

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 PWD Application comprised of the applicant information and self report (SR) dated May 30, 2017, a medical report (MR) dated May 31, 2017 and completed by the Appellant's general practitioner (GP) who has known the Appellant for 4 years and who has seen the Appellant 2-10 times in the past year, and an assessor report (AR) dated June 1, 2017 completed by the GP.

The evidence also included the following documents:

- 1) Request for Reconsideration, signed on September 4, 2017, in which the Appellant states:
 - When he applied for the PWD designation he had not been active for a couple of months, and as a result, questions about walking without holding onto something were not relevant;
 - He has managed to work a couple of times in the past couple of months and each time he gets "knife stabbing" pain in his upper and lower back, his shoulder, etc., following which it is days before he can sleep and he has to put both hands on a handrail to get up;
 - He had an appointment with a neurosurgeon in early May 2017 at which he was told that his spinal column is compressing on itself which pinches nerves and without surgery he will become a paraplegic. The neurosurgeon indicated that the surgery would be required to replace his vertebrae and two discs, but he has not had the surgery because he has been busy trying to find a place to live. The neurosurgeon also told him that he would have bowel issues, which he has experienced in the past couple of months;
 - His mental issues are partly a result of him being a smoker for 35 years;
 - He gets overwhelmed thinking about his issues;
 - He has lost feeling in his left hand and his left knee often buckles; and
 - He has tried to engage an advocate but most of them are so busy he doesn't receive a call back for months.
- 2) Medical Imaging Report of a computerized tomography (CT) scan of the Appellant's cervical spine dated January 14, 2016, showing multi-level mild spinal stenosis and recommending magnetic resonance imaging (MRI) to confirm the diagnosis;
- 3) Medical Imaging Report of an MRI of the Appellant's cervical spine dated August 9, 2017, showing mild to moderate multi-level degenerative changes with areas of central and neural foraminal stenosis; and
- 4) X-Ray Report of the Appellant's left shoulder and left clavicle dated March 27, 2017, showing healed ununited fracture deformity of the left distal clavicle with sclerosis and remodeling of the margins, no acute fracture or malalignment of the left clavicle and shoulder, normal alignment of the acromioclavicular and glenohumeral joints and no focal soft tissue abnormalities.

Diagnoses

In the MR, the GP diagnosed the Appellant with arthritis of the lumbar, neck, and thoracic spine with an onset of 2013, and a mood disorder (depression), with an unknown onset. No additional diagnoses or comments are provided.

Physical Impairment

In the MR and the AR, the GP reported that:

- In terms of health history, the Appellant has spinal arthritis, which is experienced mostly in the Appellant's upper back, resulting in moderate pain which he experiences all day, every day. He also has a painful joint on his left shoulder, experiences "stiffness to move", can't sit for

very long, and can walk well, but only for 1/2 an hour at a time. In addition, he has intermittent moderate to severe depression, resulting in suicidal ideation twice a week;

- His physical disability is severe, ongoing and permanent;
- In terms of functional skills, he is independent with respect to all aspects of mobility and physical ability (walking indoors and outdoors, climbing stairs, standing, lifting, and carrying and holding: he can walk 4 or more blocks unaided (“1/2 hour at a time”), climb 5 or more steps unaided, lift 2 to 7 kg. (5 to 15 lbs.) with his left arm, which is 20% functional (he has no limitations in lifting with his right arm), and can remain seated for 2 to 3 hours;
- Regarding mobility and physical ability, he is independent, requiring no periodic or continuous assistance in all areas, including walking indoors and outdoors (“1/2 hour at a time”), climbing stairs (“no aids”), standing, and lifting, carrying and holding with his right arm (“left arm 10-15 lbs max.”);
- He experiences numbness in his left hand and his left arm is weak; and
- He has back and neck pains and stiffness, and restricted range of motion.

In the SR, the Appellant wrote that:

- He has extreme back and shoulder pain, which, over the past 5 or 6 years, has gone from throbbing to constant pain;
- He feels worn out most of the time;
- He broke his left clavicle in 2014 and since then he has re-injured it 3 times and on each occasion he was bed-ridden for at least 6 weeks, during which time he was not able to get in or out of bed or to sleep for more than one hour without pain for the first 3 or more weeks;
- He used to go for long walks but now he tires after half an hour; and,
- It hurts when he bends, kneels or goes up more than one flight of stairs.

Mental Impairment

In the MR and the AR, the GP reported that:

- The Appellant suffers from moderate to severe depression at times and has suicidal ideation twice a week;
- He has significant deficits with cognitive and emotional function in the areas of emotional disturbance (depression and anxiety) and motivation;
- He used to take medications for his depression but does not currently;
- He has a good ability to speak and hear and a satisfactory ability to read and write;
- With respect to cognitive and emotional functioning, there are major impacts to the Appellant’s emotional functioning (anxiety and depression), there are moderate impacts to motivation, there were minimal impacts to bodily functions, impulse control, insight and judgement, attention and concentration, executive functioning and memory, and no impact to consciousness, motor activity, language, psychotic symptoms or other emotional or mental problems, or other neuropsychological problems;
- For social functioning, the Appellant is independent in all areas (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 marginal functioning in both his immediate and extended social networks, adding that he “*isolates a bit*”; and
- He could use a counsellor for his depression.

In the SR the Appellant states that:

- He suffers from depression and anxiety;
- Since he had a stroke in 2010, he gets overwhelmed, frustrated and light-headed all the time, with feelings of embarrassment, guilt and remorse for things he knows he should be doing, which results in anxiety and panic attacks;
- He lacks the motivation to make regular meals;
- He has difficulty interacting with friends and family, especially with his children, due to panic and stress attacks; and,
- He gets embarrassed and ashamed talking about his mental health issues.

Restrictions in the Ability to Perform DLA

In the MR and the AR, the GP reported that:

- The Appellant has not been prescribed any medication and/or treatments that interfere with his ability to perform DLA;
- He cannot do any heavy housework and is limited in what physical activities he can perform outside the house; and
- He is independent with respect to all DLA, noting that it takes him significantly longer to perform basic housekeeping, laundry and getting in and out of a vehicle, that he only cooks one proper meal a week, and that he cannot carry purchases home (“*car only*”).

In the SR, the Appellant wrote that:

- He is not motivated to perform personal care DLA such as taking a shower every day, shaving or brushing his teeth, and that lifting, getting out of bed and dressing sometimes give him neck and back pain;
- It is sometimes difficult to move food from the shelves to the stove and opening cans when preparing food;
- Half of the time he finds it tiring to clean the bathroom, clean the floors, to do his laundry and other household chores;
- Sometimes carrying groceries is painful; and
- He gets himself into trouble not paying his bills on time, budgeting for groceries, etc.

Need for Help

In the MR and the AR, the GP indicated that:

- The Appellant does not have an assistance animal or require any prosthesis or aids for his impairment;
- Where asked to provide any additional information that the GP considered relevant in understanding the impact of the Appellant’s impairment on his daily functioning, the GP wrote that the Appellant lives with a roommate who does quite a bit of the housekeeping and cooking;
- Where asked for a description of the type and amount of assistance required, the GP wrote that the Appellant “*could live independently*” and is “*independent mostly for everything*”;
- Where asked to describe the support/supervision required to help maintain the Appellant in the community, the GP wrote “*two or three friends help him*”; and
- Help required for DLA is provided by friends, but the Appellant could live by himself if the rent wasn’t so expensive.

In the SR, the Appellant did not provide any information about the help provided by his friends or his roommate.

Additional Information submitted after reconsideration

In his Notice of Appeal dated October 3, 2017, the Appellant stated that he disagreed with the Ministry's reconsideration decision because he feels like he has 30 to 40 lbs on his back and that if he does any physical work he cannot sleep and he can barely move.

At the hearing, the Appellant summarized the information provided in his self reports and said that his emotional problems started in 2010 after the economic recession and his marriage broke up. He had bought a condominium in 2008 just before the recession and when he had to sell the condominium he "lost his shirt". In addition, he had to change jobs and his take home pay went down by about 25%. He also suffered a stroke in 2010 and lost his memory for 2 weeks. He became severely depressed as a result of all of this and began seeing a psychologist for a time. Since then, the Appellant has been able to recover from his depression and anxiety for a while, but "*it's like one step forward and two steps back*". He also explained that the broken clavicle he suffered in 2014 was as a result of a mountain biking accident.

The Appellant stated that he saw a neurologist on a referral from his GP in May 2017, and he found out that the 30 to 49 lb weight that he thought was from depression was actually spinal compression. The Appellant explained that he hasn't tried to arrange for the surgery that the neurologist said was necessary because he often feels overwhelmed, particularly with tasks requiring paperwork, as he has a learning disability.

The Appellant stated that he used to manage a retail outlet in another community, but was unable to continue in the job because of the pain from his arthritis, and he moved to his present community and took up residence with a friend in March 2017. He explained that he did not question his GP's assessments of his independence in his DLA as reported in the MR and the AR because he was not aware of his limitations at the time and that he was living with a friend in the ground floor of an apartment building at the time and didn't realize that he was unable to climb stairs without using a handrail.

He has tried to work, including taking a job which involved sorting light boxes, but when he works for two days in a row he is in so much pain that he is unable to find a comfortable position which allows him to sleep. He realizes that sleeping on his friend's couch is bad for his back, but he cannot afford to rent an apartment on his own. In another job that he has tried recently he was required to stand for 6 or 7 consecutive hours which, while he was able to do it at the time, caused him great pain afterwards.

In terms of treatment for his impairments, the Appellant explained that he had taken sleeping pills for a few months because the pain caused by his arthritis and compressed disc did not allow him to sleep unaided. He also took painkillers for a while but has since stopped because he was concerned about becoming dependent on them. Four years ago he tried to quit smoking using a smoke cessation drug but stopped because he got panic attacks. Approximately one year ago he began taking anti-depressants but also stopped taking them after 6 months because he got panic attacks, and he said that he did not explore alternative brands or types of anti-depressants with his GP. He acknowledged that his GP had recommended counselling for his depression but stated that he hadn't sought counselling because he has been focussing on trying to find accommodation, both having the surgery and not having the surgery involve risks, and he feels overwhelmed.

The Appellant said that the Ministry originally suggested that he apply for a PWD designation in October of November 2016 when he told staff at the Ministry about his back pain. At the time, he was living in another community, but he did not apply then because he felt overwhelmed every time he looked at the application forms and because his GP, who had been his family doctor when he was married, lived in a different community, so it was difficult for him to arrange for a visit to the GP to have the MR and the AR completed. He applied for the PWD designation after he moved to his current location because the Ministry told him that he would no longer qualify for income assistance unless he found work. He said that he was also told he should apply for a Canada Pension Plan disability pension, and would have to apply for it if he received his PWD designation.

At the hearing, the Ministry summarized the information in the reconsideration decision. The Ministry also stated that there are other Ministry programs for which the Appellant might qualify, including receiving mental health liaison services, and that he should contact the local Ministry office for more information.

Admissibility of Additional Information

Section 22(4) of the *Employment and Assistance Act* (EAA) provides that panels may admit as evidence (i.e. take into account in making its decision) the information and records that were before the Ministry when the decision being appealed was made and “oral and written testimony in support of the information and records” before the Ministry when the decision being appealed was made – i.e. information that substantiates or corroborates the information that was before the Ministry at reconsideration. These limitations reflect the jurisdiction of the panel established under section 24 of the EAA: to determine whether the Ministry’s reconsideration decision is reasonably supported by the evidence or a reasonable application of the enactment in the circumstances of an Appellant. That is, panels are limited to determining if the Ministry’s decision is reasonable and are not to assume the role of decision-makers of the first instance. Accordingly, panels cannot admit information that would place them in that role.

No additional written information was submitted by either party at the hearing.

The panel considered the information in the Notice of Appeal to be argument. In addition, the panel considered the additional oral evidence provided by the Appellant at the hearing to be admissible as it is further elaboration of information previously provided by him before the reconsideration decision was made, and is therefore in support of information before the Ministry at reconsideration.

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 that, in the opinion of a prescribed professional, is likely to continue for at least 2 years, and that his DLA are not, 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 ...

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).

Severity of Impairment

In the section of the reconsideration decision dealing with severity of impairment, the Ministry states “*It is important to note (that) a diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a **severe** impairment*”. Therefore the Ministry implicitly acknowledges that the GP has described a diagnosis of a serious medical condition, but argues in its reconsideration decision that the information provided by the Appellant’s GP does not establish that the Appellant has a severe mental or physical impairment.

The panel notes that Section 2(2) of the EAPWDA does indeed require that in determining whether a person may be designated as a PWD the Ministry must be satisfied that the individual has a severe physical or mental impairment. An “impairment” is a medical condition which results in restrictions to a person’s ability to function independently or effectively. With respect to assessing the severity of an impairment, Section 2(2)(b)(i) of the EAPWDR requires that a mental or physical impairment *directly and significantly* restrict the person’s ability to perform DLA either *continuously, or periodically for extended periods*. Therefore, to assess the severity of an impairment, the Ministry must consider both the nature of the impairment and the extent to which it impacts daily functioning as evidenced by functional skill limitations and the degree to which the ability to perform DLA is restricted. In making its determination the Ministry must consider all the relevant evidence, including that of the Appellant. However, the legislation is clear that the fundamental basis for the analysis is the evidence from a prescribed professional – in this case the Appellant’s GP.

Physical Functioning

In its reconsideration decision, the Ministry determined that the Medical Imaging Report and the X-ray Report do not address limitations or restrictions in the Appellant’s ability to perform DLA, and that the information provided by the Appellant’s GP does not establish that he has a *severe* physical impairment. The Appellant’s position is that he has extreme back and shoulder pain, which, over the past 5 or 6 years, has gotten much worse. He argues that he gave his GP the impression that he had few limitations with most aspects of his physical functioning when the GP completed the MR and the AR because he was not aware that he had difficulty climbing stairs at the time, and that he overestimated his other abilities because he did not want to admit that he had physical limitations.

Panel Decision

As the Ministry must be satisfied that the individual has a severe physical or mental impairment, it must rely on information provided in the application, including the MR, the AR, the SR and any other information, and that the fundamental basis for the Ministry’s analysis and assessment is the evidence from a prescribed professional. The panel notes that the GP, who is the prescribed professional, has indicated in the MR that the Appellant is able to walk more than 4 blocks unaided, climb more than 5 stairs unaided, remain seated for 2 to 3 hours, has no limitation to lifting with his right arm, and can lift 5 to 15 lbs with his left arm, and in the AR that he is independent with respect to all aspects of mobility and physical ability. In addition, in the AR, the GP indicates that the Appellant is independent, requiring no periodic or continuous assistance in walking indoors and outdoors, climbing stairs, standing, and lifting, carrying and holding with his right arm (although the GP does write that Appellant can lift, carry and hold a maximum of 10-15 lbs with his left arm).

Therefore, the panel finds that the Ministry’s determination that there is not sufficient evidence to establish that the Appellant has a severe physical impairment which directly and significantly restricts

the Appellant's ability to perform DLA either *continuously or periodically for extended periods* pursuant to Section 2(2) of the EAPWDA, was reasonably supported by the evidence before the Ministry at reconsideration.

Mental Functioning

In its reconsideration decision, the Ministry found that the GP's assessments in the MR provided evidence of significant deficits with respect to cognitive and emotional functioning in the areas of emotional disturbance and motivation, but no significant deficits for any of the other nine areas. In addition, the Ministry determined that the GP indicates that the Appellant is independent in all aspects of social functioning. The Ministry noted that the GP indicated major impacts to only one area, moderate impacts to only one area, minimal impacts to six areas, and no impact to six areas of cognitive and emotional functioning. On balance the Ministry found that, based on the GP's assessment, the cumulative impact on cognitive and emotional functioning was not indicative of a severe impairment to mental functioning. The Appellant's position is that he suffers from severe depression and anxiety to the point that he has difficulty interacting with friends and family, especially with his children, due to panic and stress attacks.

Panel Decision

The panel notes that the GP indicates in the MR that all but two of the cognitive and emotional functions are either not impacted or are minimally impacted by the Appellant's mental impairment, and that for functions where impacts are identified there is no additional information provided by the prescribed professional about the nature of the impairment (eg. whether it is episodic or varies over time), other than that the emotional impact is in the form of anxiety and depression. The panel further notes that the GP indicates in the AR that the Appellant is independent in all aspects of social functioning, and that while the Appellant is assessed as having marginal functioning with both his immediate and his extended social networks, he has the help of two or three friends and no current safety issues are identified.

The panel finds that the Ministry reasonably determined that a *severe* mental impairment was not established pursuant to Section 2(2) of the EAPWDA.

Restrictions in the ability to perform DLA

The Ministry is not satisfied that the Appellant has a severe impairment that, in the opinion of a prescribed professional, directly and significantly, restricts his ability to perform DLA because the Appellant's GP has indicated that he is able to manage all aspects of his DLA independently, while taking longer than normal to perform only three of them (laundry, basic housekeeping, and to getting in and out of a vehicle). The Appellant's position is that, while he is not motivated to perform personal care DLA, he is able to manage all of his DLA, including basic housekeeping (with the exception of scrubbing floors) about "half the time".

Panel Decision

Section 2(2)(b) of the EAPWDA requires that the Ministry be satisfied that a prescribed professional has provided an opinion that an applicant's severe impairment *directly* and *significantly* restricts his DLA, continuously or periodically for extended periods. In this case, the GP is the prescribed professional. DLA are defined in Section 2(1) of the EAPWDR and are also listed in the MR and, with

additional details, in the AR. Therefore, the prescribed professionals completing these forms have the opportunity to indicate which, if any, DLA are significantly restricted by the Appellant's impairments either continuously or periodically for extended periods, and to further elaborate so that the nature and extent of the restrictions to DLA are clear. The panel notes that the GP reported in the AR that the Appellant was independent and did not require any form of assistance with respect to all listed DLA (i.e. all aspects of personal care, basic housekeeping, shopping [except for carrying purchases home ("*car only*")], meals, paying rent and bills, medications and transportation), and reported that the Appellant "*could live independently*" and that he "*could live by himself but (its) too expensive*".

Therefore, the panel finds that the Ministry reasonably determined that the assessments provided by the Appellant's GP do not establish that the Appellant has a severe physical impairment which *significantly* restricts his DLA either continuously or periodically for extended periods, thereby not satisfying the legislative criterion of Section 2(2)(b)(i) of the EAPWDA.

Help with DLA

In its reconsideration decision, the Ministry states that it cannot be determined that significant help is required because it has not been established that DLA are significantly restricted. The Appellant's position is that he must rely on the friend with whom he lives to look after the strenuous housekeeping chores, such as washing the floors.

Panel Decision

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. 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.

The panel finds that the Ministry reasonably determined that, as direct and significant restrictions in the Appellant's ability to perform DLA have not been established, it cannot be determined that the Appellant requires help to perform DLA as a result of those restrictions, as defined by Section 2(3)(b) of the EAPWDA.

Conclusion

Having reviewed and considered all of the evidence and relevant legislation, the panel finds that the Ministry's reconsideration decision, which determined that the Appellant was not eligible for PWD designation under Section 2 of the EAPWDA, was reasonably supported by the evidence and was a reasonable application of the EAPWDA in the circumstances of the Appellant, and therefore confirms the decision. The Appellant's appeal, therefore, is not successful.