

### **PART C – DECISION UNDER APPEAL**

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the ministry) reconsideration decision dated October 5, 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 she 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.

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 *Employment and Assistance for Persons with Disabilities Act* and the appellant did not appeal the decision on that 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**

With the oral consent of the appellant, both a ministry observer and an observer with the advocate's office attended, but did not participate in the hearing.

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 June 21, 2017, with no self-report included, a medical report (MR) and an assessor report (AR) both dated June 9, 2017 completed by a general practitioner (GP) who has known the appellant for 35 years and has seen her 2 to 10 times in the last year.

The evidence also included the following documents:

- 1) Letter dated August 28, 2017 from an orthopedic surgeon; and,
- 2) Request for Reconsideration dated September 7, 2017 with attached handwritten letter from the appellant dated September 5, 2017.

### ***Diagnoses***

In the MR, the appellant was diagnosed by the GP with osteoarthritis in the left hip, with an onset in 2011, osteoarthritis in her left hand and post-fracture arthritis in her right wrist, with an onset in 2016, and depression with an onset in 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 depression, discouragement and pain have led to poor motivation, follow through."

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

In the MR and the AR, the GP reported:

- The appellant has not been prescribed any medication and/or treatment that interfere with her ability to perform DLA.
- For functional skills, the appellant is able to walk less than 1 block unaided on a flat surface (note: "pain left hip"), climb 2 to 5 steps unaided (note: "requires rest; railing"), lift under 2 kg. (under 5 lbs.) (note: "wrist and hand pain"), and remain seated for less than one hour (note: "pain left hip").
- Asked if the appellant requires any prostheses or aids for her impairment, the GP wrote that the appellant "...has cane for walking and uses at times. Would benefit from grab bars in bath and shower, would benefit from splinting left wrist."
- The appellant takes significantly longer than typical and uses an assistive device for walking indoors (note: "uses furniture as support") and walking outdoors. The appellant takes longer and uses "hand rails" as an assistive device for climbing stairs, is "limited" with standing, and requires continuous assistance from another person with lifting more than 5 lbs., and "pain and stiffness limits all mobility."
- The appellant is independently able to perform every task of the pay rent and bills DLA (including banking and budgeting) and the medications DLA, including filling/refilling prescriptions, taking as directed, and safe handling and storage.
- The appellant is independent with the tasks of toileting and feeding self as part of the personal care DLA. She takes significantly longer than typical with dressing, grooming, and bathing, described as "takes two times as long as normal." The appellant also takes significantly longer than typical with the tasks of regulate diet (note: "needs to sit for meal preparation"), transfers in/out of bed and transfers on/off of chair (note: "mobility causes delay").

- For the basic housekeeping DLA, the appellant takes significantly longer than typical with both doing laundry and housekeeping, with the explanation by the GP that “all takes two times as long.”
- Regarding the shopping DLA, the appellant is independent with the task of making appropriate choices. She requires continuous assistance from another person with going to and from stores, with the comment by the GP that “assistance from a friend,” and also with carrying purchases home, for which she also uses an assistive device, with the comment by the GP that: “friend helps/cart on wheels.” The appellant uses an assistive device for reading prices and labels (note: “eyeglasses”) and for paying for purchases (note: “leans on counter”).
- For the meals DLA, the appellant is independent with meal planning and safe storage of food, and takes significantly longer than typical with food preparation and cooking, with the explanation from the GP that she “sits while chopping” and “needs to sit and rest.”
- Regarding the transportation DLA, the appellant is independent with using transit schedules and arranging transportation and requires continuous assistance from another person with using public transit (note: “anxious about a fall”) and requires continuous assistance and uses an assistive device and takes significantly longer than typical with getting in and out of a vehicle, described as “uses car door for support.”
- For additional information to the AR that may be relevant to understanding the nature and extent of the appellant’s impairment and its effect on DLA, the GP wrote: “chronic pain; chronic depression and anxiety have lead to a restricted, lonely, limited life with few social supports.”

In her Request for Reconsideration, the appellant wrote that:

- She definitely needs assistance in her day-to-day activity, more than ever, as her left hip has significantly deteriorated in the last 6 months. At some point each day, her hip will “lock up” and she will not be able to stand or walk.
- She has developed severe and painful osteoarthritis in her left hand in the thumb area, which greatly affects everything she does on a day-to-day basis.
- She is in chronic pain and the more she tries to do, the worse it becomes.
- She has a good friend who lives nearby who assists her with everything, including: dressing, walking, carrying laundry, driving her, helping her in and out of the car and into stores, carrying everything, cooking, cleaning, running errands, and helps her get in and out of the shower.

In the letter dated August 28, 2017, the orthopedic surgeon wrote:

- The appellant has had several years of progressive left hip pain, with radiating pain towards the knee. This is now to the point that she can only walk approximately one block.
- The appellant presented end-stage osteoarthritis of the left hip. Range of motion is still quite well maintained. Nonetheless, her only realist option to obtain pain relief would be total hip replacement.

### ***Need for Help***

The GP reported in the MR that the appellant has a cane for walking and uses it “at times,” she would benefit from grab bars in the bath and shower and would benefit from a wrist splint. In the AR, the GP indicated that the help required for DLA is provided by one friend. Regarding assistive devices, the GP indicated that the appellant routinely uses a cane, bathing aids (“shower grab bar”) and a wheeled cart. The appellant requires a wrist splint.

### ***Additional Information***

In her Notice of Appeal dated October 17, 2017, the appellant expressed her disagreement with the ministry's reconsideration decision and wrote that she feels she was treated unfairly.

At the hearing, the appellant's advocate stated:

- The GP is the most qualified to complete an assessment on the appellant's behalf and to explain the restrictions she has and how severe they are. He has extensive records, including many X-Ray reports, and also conducted an in-office interview of the appellant.
- The appellant's condition has deteriorated significantly in the last 4 months since the time of the PWD application.
- The letter from the orthopedic surgeon notes the pain in the appellant's left hip and that it radiates to her knee and that she cannot even walk 1 block. Her only option for pain relief is through total hip replacement.
- There are two medical professionals, the GP and the orthopedic surgeon, who have provided opinions about the appellant's condition.
- The GP has confirmed in the AR that the appellant has one friend who helps her.

At the hearing, the appellant stated:

- Her condition is degenerative and she is now in pain all the time.
- Her hip "locks" from time to time and she cannot walk or stand when that happens.
- Her hip replacement surgery has been scheduled for May 2018, but there are no guarantees that it will resolve her problem. Her arthritis is a long-term issue and there is a chance that arthritis will set into her hip again.
- There is no cartilage in her left hip and her left leg is shorter than her right.
- She is afraid of falling if her hip were to lock so she does not go out. She has lost muscle mass in her leg.
- Her arthritis has gotten "way worse" in the last 4 months and she uses her cane "constantly." She may end up needing some kind of home care while she waits for her hip surgery. She is concerned about her condition in another 4 months.
- She wished to conduct this hearing by telephone because she realized that if she was having a "bad day," she would not be able to walk to the hearing location. At home, she can lie down if she needs to.
- Her family physician completed the MR and the AR and she has been his patient for 35 years. The problem with her hip started about 10 years ago. She had an accident when she was a child and she has no "leverage" in her hip.
- She has arthritis in her left hand and she is left-hand dominant. Her right hand is also starting to bother her.
- She is using her cane much more than she was at the time of the PWD application. In the last 4 months she has had to use it all the time. She is afraid that if her hip "locks," she will "go down." It has locked when she was going down stairs and she almost fell. Her hip will typically lock about 2 to 3 times each day, usually after she has been sitting or standing too long. Sometimes it will last for an hour, and once it lasted all day.
- She is not connected with the community because she has no confidence to go out since she is afraid she is going to fall. If she goes out occasionally, she has to use her cane and be careful.
- When she is getting out of bed in the morning, or if she sits for any length of time in a chair, she becomes stiff and it takes much longer to get up.
- The pain in her hip radiates to her left knee and her feet are also currently in pain.
- Her friend who lives in her building is very good about helping her, even in the middle of the night. He helps her with "everything." He helps her to put her socks on, to stand up, to get into and out of the shower, to get to a doctor's appointment, and to do any

shopping she needs done. He has been helping since she broke her wrist last year. He currently drops in about 8 times each day to check on her and to help if needed.

- She does not even sit to prepare her own meals anymore. Toileting is not easy anymore because she has difficulty getting up.
- She has no quality of life and it is getting worse every day. She often does not even want to get out of bed in the morning.
- Her hip “clunks” with bone-on-bone and she has 7 months to wait for the hip surgery. There is no “meat” around her hip anymore.
- Although cortisone shots have been recommended for the pain, she is reluctant to get them because she has talked to a relative who said that sometimes they work and sometimes they do not work. All it does is mask the pain and she would rather feel the pain. She uses over-the-counter pain medication but she has been taking it for years and it is not working anymore.

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

***Admissibility of Additional Information***

The ministry did not raise an objection regarding the admissibility of the appellant’s oral testimony. The panel considered the oral testimony on behalf of the appellant as information that corroborates the extent of the appellant’s impairment as a result of a medical condition diagnosed in the MR, which was before the ministry at reconsideration. Therefore, the panel admitted this additional information as being in support of information and records that were before the ministry at the time of the reconsideration, in accordance with Section 22(4)(b) of the *Employment and Assistance Act*.

## 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 her 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.

#### **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 her ability to perform DLA, either continuously or periodically for extended periods.

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

In the reconsideration decision, the ministry reviewed the information provided in the MR and wrote that the GP indicated that the appellant has not been prescribed medication or treatment that interferes with her ability to perform DLA. In the AR, when asked to describe the mental or physical impairments that impact the appellant's ability to manage her DLA, the panel notes that the appellant's long-time GP did not emphasize the appellant's physical impairment as he wrote: "...chronic depression, discouragement and pain have led to poor motivation, follow through." The appellant is assessed by the GP as being independent with all of the tasks of the pay rent and bills DLA (including banking and budgeting) and all of the tasks of the medications DLA (filling/refilling prescriptions, taking as directed, and safe handling and storage).

For the move about indoors and outdoors DLA, the GP indicated in the AR that the appellant takes significantly longer than typical and uses an assistive device with both walking indoors and outdoors, with the comment by the GP that the appellant "uses furniture as support" when walking indoors. When asked in the MR if the appellant requires any prostheses or aids for her impairment, the GP wrote that the appellant has a cane for walking, which she "uses at times." At the hearing, the appellant stated that she is using her cane much more than she was at the time of the PWD application in June 2017. The appellant stated that in the last 4 months she has had to use the cane all the time when she goes out because she is afraid that if her hip "locks," she will fall. In the MR, completed in June 2017, the GP reported that the appellant is able to walk less than 1 block unaided on a flat surface (note: "pain left hip"). While this assessment of functional ability was confirmed by the orthopedic surgeon in the letter dated August 28, 2017, who wrote that the appellant has had several years of progressive left hip pain with radiating pain towards the knee and she can only walk approximately one block, there was no mention by the orthopedic surgeon of the appellant's use of a cane at all times for her mobility.

The ministry notes that the GP also indicated that the appellant uses an assistive device for the tasks of reading prices and labels ("eyeglasses"), paying for purchases ("leans on counter"), and carrying purchases home ("cart on wheels") when shopping, as well as for getting in and out of a vehicle ("uses car door for support"), and the ministry determined that eyeglasses, counters and car doors are not an "assistive device" as defined in Section 2(1) of the EAPWDA. The panel finds that the ministry reasonably determined that none of these items fall within the definition of "assistive device," defined in the EAPWDA to mean "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," and that using furniture as support for walking indoors also does not fall within this definition.

In the reconsideration decision, the ministry considered that the GP reported that some tasks of the personal care DLA (dressing, grooming, bathing, regulating diet, transfers in/out of bed and on/off chair) take significantly longer than typical, with the comment by the GP that dressing, grooming, and bathing take 2 times as long as normal, the appellant needs to sit for meal



preparation and that her mobility causes delay. The appellant also takes 2 times as long with the tasks of the basic housekeeping DLA (including laundry) and takes longer with food preparation (“sits while chopping”) and cooking (“needs to sit to rest”). At the hearing, the appellant stated that toileting is problematic for her now as a result of difficulty getting up, and she can no longer sit to prepare her own meals. However, the orthopedic surgeon does not address the appellant’s ability to perform her DLA other than mobility in his August 28, 2017 letter, and there was no further information provided from the GP on the appeal to update his initial assessment.

The ministry also considered that GP reported in the AR that the appellant requires continuous assistance from another person with the tasks of going to and from stores (“assistance from a friend”) and carrying purchases home (“friend helps/ cart on wheels”) when shopping, as well as with getting in and out of a vehicle and using public transit (“anxious about a fall”), and noted that all other tasks of DLA are performed independently or take up to 2 times longer than typical. The panel finds that the ministry reasonably concluded that the GP’s assessment is indicative of a moderate level of restriction.

In her Request for Reconsideration completed in September 2017, the appellant wrote that she definitely needs assistance in her day-to-day activity, more than ever, as her left hip has significantly deteriorated in the last 6 months. The appellant wrote that at some point each day, her hip will “lock up” and she will not be able to stand or walk. At the hearing, she clarified that her hip can lock up 2 to 3 times per day and can last from an hour to a whole day. The appellant wrote that she is in chronic pain and the more she tries to do, the worse it becomes. The appellant wrote that she has a good friend who lives nearby who assists her with everything, including: dressing, walking, carrying laundry, driving her, helping her in and out of the car and into stores, carrying everything, cooking, cleaning, running errands, and helps her get in and out of the shower.

At the hearing, the appellant stated that her friend who lives in her building is very good about helping her, even in the middle of the night, and he helps her with “everything.” He helps her to put her socks on, to stand up, to get into and out of the shower, to get to a doctor’s appointment, and to do any shopping she needs done. He has been helping since she broke her wrist last year, and he currently stops by about 8 times each day to check on her and to help if needed. As pointed out by the appellant’s advocate, the appellant has been the GP’s patient for 35 years and is the most qualified to complete an assessment of the appellant’s restrictions and how severe they are. The advocate argued that the appellant’s condition has deteriorated significantly in the last 4 months since the time of the PWD application; however, there was no further information from the GP to update his initial assessment submitted on the appeal.

Given the GP reported that the appellant is independent with performing most tasks of DLA and the ministry determined that she does not require the use of an assistive device as defined in the legislation, with no further information from a prescribed profession submitted on appeal, the panel finds that the ministry reasonably determined that the evidence available at the time that the reconsideration decision was made is insufficient to show that the appellant’s overall ability to perform her 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 from one friend and uses a cane “at times,” shower grab bars, and a wheeled cart, and she requires a wrist splint, 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.