

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the ministry) reconsideration decision dated September 12, 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 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 EAPWDR 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 appellant's Persons With Disabilities (PWD) Application comprised of the appellant's information and self-report dated April 24, 2017, a physician report (PR) dated March 16, 2017 and an undated assessor report (AR) both completed by a general practitioner (GP) who has known the appellant since February 2104 and has seen him 11 or more times in the last year.

The evidence also included the appellant's Request for Reconsideration dated August 29, 2017 along with the appellant's handwritten letter dated September 7, 2017.

### ***Diagnoses***

In the PR, the GP diagnosed the appellant with COPD [Chronic Obstructive Pulmonary Disease] with reversible component, with an onset in May 2014, and chronic persistent low back pain also with an onset in May 2014. There was no diagnosis of a condition within the mental disorders diagnostic category of the PR. Asked to describe the mental or physical impairments that impact the appellant's ability to manage daily living activities (DLA), the GP wrote in the AR: "No."

### ***Physical Impairment***

In the PR and the AR, the GP reported:

- With respect to the health history, "...works in [trade] and exposure to environmental pollution plus nature of work causes aggravations of low back pain and exacerbating of COPD."
- The appellant does not require any prostheses or aids for his impairment.
- In terms of functional skills, the appellant can walk 1 to 2 blocks unaided on a flat surface, climb 2 to 5 steps unaided, lift 2 to 7 kg. (5 to 15 lbs), and remain seated 1 to 2 hours.
- In the additional comments to the PR, the GP wrote: "chronic back pain and COPD limits his ability to work and perform in his current work environment."
- The appellant is assessed as being independent with walking indoors, requiring periodic assistance with walking outdoors, climbing stairs, and standing, and requiring continuous assistance from another person with lifting, and carrying and holding. The GP commented that "chronic low back pain and COPD limits his above-described abilities."
- In the section of the AR relating to assistance provided, the GP did not identify any of the listed assistive devices, which includes breathing devices, as being required by the appellant.
- In the additional information, the GP wrote: "Suffering from chronic and persistent low back pain, which gets aggravated at work. Also suffers from COPD, which gets exacerbated due to work environmental pollutants."

In his self-report, the appellant wrote:

- Ever since he got the steel mesh put in, he cannot function. He cannot work full-time or at all.
- The pain is constant in his testicle.
- His back is "out of wack" and he cannot work.
- He is homeless now. He was once good in [his trade].

In his Request for Reconsideration, the appellant wrote:

- He has worked in [his trade] for 18 years and has contributed to society.
- Now he has a severe lung condition from asbestos exposure. His work has made him sick.

### ***Mental Impairment***

In the PR and the AR, the GP reported:

- There are no difficulties with communication.
- The appellant has significant deficits with cognitive and emotional function in the area of emotional disturbance and motivation. The GP commented: “gets into phases of de-motivation and loss of interest.”
- The appellant has a good ability to communicate in all areas, specifically with speaking, reading, writing and hearing.
- With respect to daily impacts to the appellant’s cognitive and emotional functioning, the GP did not assess any major impacts. There are moderate impacts to emotion, impulse control, and motivation. There are minimal impacts to insight and judgment and attention/concentration, and no impact in the remaining areas. The GP wrote that “health condition leads to phases of low mood, decreased motivation and loss of interest.”
- The appellant is independent in most aspects of his social functioning, specifically: with making appropriate social decisions, interacting appropriately with others, dealing appropriately with unexpected demands, and securing assistance from others. The appellant requires periodic support/supervision with developing and maintaining relationships, with comments added by the GP.
- The appellant has marginal functioning in both his immediate social network and his extended social network.
- Asked to describe the support/supervision required to help maintain the appellant in the community, the GP wrote: “family and social support” and “no safety issues.”

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

In the PR and the AR, the GP reported:

- The appellant has not been prescribed medication that interferes with his ability to perform DLA; however, the GP commented that medications/treatments will be “continuous/permanent.”
- When asked in the PR whether the impairment directly restricts the appellant’s ability to perform DLA, the GP responded “No.”
- In the additional comments to the PR, the GP wrote: “chronic back pain and COPD limits his ability to work and perform in his current work environment.”
- The appellant is independent with all of the tasks of the personal care DLA, the meals DLA, the pay rent and bills DLA, the medications DLA, and the transportation DLA.
- Regarding the basic housekeeping DLA, the appellant requires periodic assistance from another person with doing laundry and basic housekeeping. No explanation or description is provided by the GP.
- For the shopping DLA, the appellant is independent with the tasks of reading prices and labels, making appropriate choices and paying for purchases. He requires periodic assistance from another person with going to and from stores and continuous assistance carrying purchases home. The GP commented that “continuous low back pain limits his ability to carry purchases home.”

In his self-report, the appellant wrote that he cannot work.

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

With respect to the assistance needed, the GP reported in the AR that the appellant receives help from his family and friends. In the section of the AR for identifying assistance provided through the use of assistive devices, the GP did not indicate any of the items as being used or required by the appellant.

### ***Additional information***

In his Notice of Appeal dated September 25, 2017, the appellant expressed his disagreement with the ministry's reconsideration decision and wrote that his lung condition is a physical disability. The appellant wrote that his lung condition is so severe that he struggles to breathe. He cannot work and can hardly get out of bed sometimes.

At the hearing, the appellant stated:

- He has worked in [his trade] for 17 years and his work left him with a terrible lung condition. He has contributed to society and it is not right that society turns its back on him now.
- He had hoped to get more information from his doctor but his doctor has gone on vacation for a month.
- His doctor sent the ministry a request for an oxygen tank and a nebulizer and the ministry did not respond to the request. He needs these medical devices because he cannot function without them. These devices would greatly improve his quality of life.
- He has been sick for 4 or 5 years and he has to sleep much more than usual. He has to sleep 12 to 15 hours per day just to be able to breathe. Otherwise, he cannot function.
- There is no "reversible component" to his COPD as far as he knows. He wishes that were true.
- He had a hernia which required the insertion of a steel mesh that has caused severe testicular pain. He takes Tylenol 3 for the pain but it still feels like he has been kicked in that part of his body every day.
- He can lift up to 20 lbs., but that would be "with major pain."
- He had the steel mesh inserted 4 years ago and his doctor is aware of this condition. His doctor is a very busy man and did not include the information about his hernia in his reports.

The ministry relied on the reconsideration decision, as summarized at the hearing. At the hearing, the ministry stated that the appellant does not have the Persons with Persistent Multiple Barriers to employment (PPMB) status that relates to restrictions to employment.

### ***Admissibility of Additional Information***

The ministry did not raise an objection to the admissibility of the appellant's oral testimony. The panel considered the information from the appellant, for the most part, as being in support of, and tending to corroborate, the impact from medical conditions referred to in the PWD application, which was before the ministry at reconsideration. Therefore, the panel admitted this oral testimony in accordance with Section 22(4)(b) of the *Employment and Assistance Act*.

The panel did not admit the information that the appellant's request to the ministry for breathing devices, namely an oxygen tank and a nebulizer, was denied as this was not before the ministry at reconsideration and relates to a separate issue possibly subject to appeal.

## 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 and that his DLA are, 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, 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).

### **Severe Physical Impairment**

In the reconsideration decision, the ministry was not satisfied that the information provided establishes a severe physical impairment. The ministry acknowledged that the GP diagnosed COPD with a reversible component and chronic persistent low back pain. At the hearing, the appellant stated that he had a hernia which required the insertion of a steel mesh that has caused severe testicular pain and, although he takes Tylenol 3 for the pain, it still feels like he has been kicked in that part of his body every day. The appellant acknowledged that the GP had not included the impacts to his functioning as a result of this medical condition in the PWD reports, and stated that his

doctor is a busy man and must have missed this information. At the hearing, the appellant emphasized that he has worked for 17 years in his trade that caused his lung condition and now he is not able to work. The appellant stated that there is no “reversible component” to his COPD as far as he knows, although he wishes that were true. The panel notes that employability is not a criterion for determining PWD designation as it is not set out in section 2(2) of the EAPWDA nor is it listed among the prescribed DLA in section 2 of the EAPWDR. The ministry acknowledged that the appellant experiences limitations to his physical functioning due to back pain and COPD, but the ministry was not satisfied that the combination of his functional skills and mobility and physical abilities exhibits a severe physical impairment.

A diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment. An “impairment” is a medical condition that results in restrictions to a person’s ability to function independently or effectively or for a reasonable duration. To assess the severity of an impairment, the ministry must consider the nature of the impairment and the extent of its impact on daily functioning.

The ministry reasonably considered the impacts of the appellant’s diagnosed medical condition on his daily functioning, beginning with the assessments provided in the PR and in the AR. The ministry considered that the GP assessed the appellant’s functional skills as being able to walk 1 to 2 blocks unaided on a flat surface, climb 2 to 5 steps unaided, lift 5 to 15 lbs, and remain seated 1 to 2 hours. The ministry considered the GP’s assessment of independence with walking indoors, and his need for periodic assistance with walking outdoors, climbing stairs, and standing, as well as continuous assistance from another person with lifting, and carrying and holding, and wrote that the GP’s comment that “chronic low back pain and COPD limits his above-described abilities” does not explain the type or degree of assistance that the appellant requires. At the hearing, the appellant stated that while he can lift up to 20 lbs., there would be “major pain” if he lifted this much. The appellant stated that he has to sleep much more than usual, about 12 to 15 hours per day, just to be able to breathe and, otherwise, he cannot function. In the PR, the GP commented that the appellant “...works in [trade] and exposure to environmental pollution plus nature of work causes aggravations of low back pain and exacerbating of COPD”; however, the GP does not describe how often the appellant’s back pain is aggravated or how often or for how long he has exacerbations of his COPD. In his Notice of Appeal, the appellant wrote that his lung condition is so severe that he struggles to breathe, that he cannot work and can hardly get out of bed sometimes; however, the appellant does not explain how often or for how long he experiences these periods of being unable to get out of bed.

For the ministry to be “satisfied” that an impairment is severe, the panel considers it reasonable for the ministry to expect that the information provided by the medical practitioner and prescribed professional presents a comprehensive overview of the nature and extent of the impacts of the medical conditions on daily functioning, including by providing the explanations, descriptions or examples in the spaces provided in the PR and in the AR forms.

The ministry considered that the GP reported that the appellant does not require the use of any prostheses or aids to manage his physical functioning. The panel notes that the GP did not identify any of the listed assistive devices, which includes breathing devices, as being required by the appellant.

Given the emphasis placed on the appellant’s inability to work, an assessment of functional skills within the moderate range and a lack of description of the exacerbations to his conditions and his need for periodic assistance with some aspects of his physical ability, the panel finds that the ministry reasonably determined that there is not sufficient evidence to establish that the appellant has a severe physical impairment under Section 2(2) of the EAPWDA.

### **Severe Mental Impairment**

In the reconsideration decision, the ministry was not satisfied that the information provided was sufficient evidence of a severe mental impairment. The ministry noted that there was no diagnosis of a condition within the mental disorders diagnostic category of the PR. The ministry considered that the GP reported significant deficits with cognitive and emotional functioning in the areas of emotional disturbance and motivation and noted that the GP wrote “gets into phases of de-motivation and loss of interest” without explaining how often he experiences these phases. The ministry considered that the GP reported that these deficits do not have a major impact to his daily functioning but, rather, there are moderate impacts in the areas of emotion, impulse control and motivation. The ministry also considered that the GP assessed no difficulties with communication and reported that the appellant has a good ability to communicate in all areas. The ministry considered that the GP indicated the appellant requires periodic support/supervision with developing and maintaining relationships and pointed out that the GP does not provide additional information to explain how often he requires support in this area, and that all other areas of social functioning are performed independently. The GP indicated that the appellant has marginal functioning in both his immediate and extended social networks and he requires family and social support, with no indication of how often the support is required.

Given the lack of evidence of significant impacts to the appellant’s cognitive, emotional and social functioning, the panel finds that the ministry reasonably determined that a severe mental impairment was not established under Section 2(2) of the EAPWDA.

### **Restrictions in the ability to perform DLA**

In the reconsideration decision, the ministry was not satisfied that the appellant has a severe physical or mental impairment that, in the opinion of the prescribed professional, directly and significantly restricts DLA either continuously or periodically for extended periods of time.

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. 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 AR and considered that the GP reported in the AR that the appellant is independent with performing all of the tasks of the personal care DLA, the meals DLA, the pay rent and bills DLA, the medications DLA, and the transportation DLA. The panel notes that in the AR, when asked to describe the mental or physical impairments that impact the appellant’s ability to manage DLA, the GP wrote: “No,” and in the PR, when asked whether the impairment directly restricts the appellant’s ability to perform DLA, the GP again responded “No.”

The ministry considered that the GP reported the appellant requires periodic assistance from another person with going to and from stores and continuous assistance carrying purchases home, described by the GP as: “continuous low back pain limits his ability to carry purchases home,” which does not explain the type of assistance required. The panel notes that the GP reported lifting capacity in the range of 5 to 15 lbs. and the appellant stated at the hearing that although he could lift up to 20 lbs., this would be “with major pain,” and it may be that assistance is required for these heavier weights.



The ministry considered that the GP reported that the appellant requires periodic assistance from another person with doing laundry and basic housekeeping, and pointed out that no explanation or description is provided by the GP to indicate the type, the frequency, or the degree of assistance required to manage these tasks.

Section 2(2) of the EAPWDA requires that a severe impairment directly and significantly restricts the appellant's ability to perform the prescribed DLA either continuously or periodically for extended periods. The direct and significant restriction may be either continuous or periodic. If the restriction is periodic, it must be for an extended time. Inherently, any analysis of periodicity must also include consideration of the frequency. All other things being equal, a restriction that only arises once a year is less likely to be significant than one which 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 from the prescribed professional of the duration and frequency of the restriction in order to be "satisfied" that this legislative criterion is met.

At the hearing, the appellant stated that he realized the doctor did not put everything in the PR and AR forms and he was not able to get further information from the GP for the appeal to update or clarify the assessments as in the PR and the AR.

Given the GP's report of the appellant's independence with most tasks of DLA and the lack of a description of the extent of periodic assistance required for some tasks of DLA, 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 indicated that the appellant receives help from his family and friends, 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.