

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

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Poverty Reduction (the ministry) dated December 1, 2017, which held that the appellant did not meet 2 of the 5 statutory requirements of section 2 of the *Employment and Assistance for Persons with Disabilities Act* for designation as a person with disabilities (PWD). The ministry found that the appellant met the age and duration requirements, and that he had a severe impairment, but was not satisfied that:

- the appellant's daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and
- as a result of those restrictions, the appellant requires an assistive device, the significant help or supervision of another person, or the services of an assistance animal to perform DLA.

### **PART D – RELEVANT LEGISLATION**

*Employment and Assistance for Persons with Disabilities Act* (EAPWDA), section 2

*Employment and Assistance for Persons with Disabilities Regulation* (EAPWDR), section 2

## **PART E – SUMMARY OF FACTS**

The information before the ministry at the time of reconsideration included the appellant's PWD application comprised of a Medical Report (MR) and an Assessor Report (AR) both completed by the appellant's general practitioner (the "Physician") dated July 14, 2017, and the appellant's Self-Report (SR) dated June 19, 2017.

The information at the time of reconsideration also included the following:

- Angiographic Report dated December 9, 2015
- Consultation report from the appellant's cardiologist (the "Cardiologist") dated February 10, 2016
- Consultation report from the Cardiologist dated April 26, 2016
- Cardiac MRI report by a diagnostic physician dated August 24, 2016
- Medical Imaging Doppler report dated May 13, 2017
- Consultation report from the Cardiologist dated May 29, 2017

### Summary of relevant evidence

#### Diagnoses

In the MR, the Physician indicates that the appellant has been diagnosed with ischaemic cardiomyopathy, diabetes and atrial fibrillation, date of onset 2013 and 2014. In the AR, the Physician indicates that the appellant's mental or physical impairments that impact his ability to manage DLA are heart disease, degenerative change, ankles/knees/back and hip replacement.

In the Health History portion of the MR, the Physician indicates that the appellant has ischaemic cardiomyopathy severe heart failure and was started on a medication by the Cardiologist.

The Physician indicates that the appellant has been his patient since December 23, 2015 and that he has seen him 2-10 times in the past 12 months.

The Cardiac MRI dated August 24, 2016 indicates that the appellant's left ventricle was mildly dilated with severe global impairment of systolic function. The report indicates that the right ventricle appears normal in size with mild to moderate overall systolic impairment.

The Medical Imaging Doppler report dated May 13, 2017 indicates that the appellant had mild left ventricular systolic dysfunction with LVEF 40-45%, that his left ventricle is enlarged but no significant valvular disease.

In the consult report dated May 29, 2017, the Cardiologist indicates that the appellant has ACCC AHA stage B, NYHA class II nonischemic cardiomyopathy. The Cardiologist indicates that the appellant is doing reasonably well. The Cardiologist indicates that the Echo results from May 2017 indicate a LVEF of 40-45%. The Cardiologist indicates that the appellant will be started on a new medication.

In the SR, the appellant states that he has been diagnosed with arthritis in his ankle, knees and back, gallstone that causes him severe pain on a daily basis and that his heart is only functioning at 40%. He states that he had a full right hip replacement 8 years ago and has to rely on his cane to do anything that causes him to mobilize.

#### DLA

In the MR the Physician indicates that the appellant has not been prescribed medications that interfere with his ability to perform DLA.

In the AR, the Physician indicates that with respect to personal care the appellant is independent with grooming, toileting, feeding self, and regulating diet, but uses an assistive device and takes significantly longer than typical with dressing (has to sit to dress/uses cane, 2x longer), transfers (in/out of bed) and transfers (on/off chair) explaining that he uses the furniture for support and takes 2x longer. For bathing the Physician indicates that it takes the appellant significant longer than typical describing 2 x longer.

The Physician indicates that the appellant is independent with laundry but requires continuous assistance with

basic housekeeping explaining that the appellant is unable to do cleaning needing bending and that someone does the cleaning.

With respect to shopping the Physician indicates that the appellant is independent with reading prices and labels, making appropriate choices and paying for purchases, but uses an assistive device and takes significantly longer than typical with going to and from stores (2x longer, uses cane and shopping cart for support). The Physician indicates that the appellant requires continuous assistance for carrying purchases home explaining that he is unable to lift more than 15 pounds.

For meals the Physician indicates that the appellant is independent with meal planning, cooking and safe storage of food but uses an assistive device and takes significantly longer than typical as he has to sit to prepare food. The Physician indicates that the appellant is independent with all aspects of paying rent and bills and medications. For transportation, the Physician indicates that the appellant uses an assistive device and takes significantly longer than typical (takes twice as long to get out of car; uses seat/door for support). For using public transit and using transit schedules and arranging transportation the Physician indicates "N/A".

For social functioning, the Physician writes "N/A".

In the SR the appellant states that because of the combination of his medical conditions he has to rely on others to complete his DLA. He states that he has to use his cane to walk at all and that it takes him at least 3 times longer than typical to walk the same distance as before. He has to use his cane and handrail to climb any stairs and must go slowly, one step at a time. He states that he is only able to lift around 15 pounds and that causes severe pain with his gallstone. He states that he can only sit for 15 minutes and has to be constantly changing positions throughout the day. He states that he is only able to stand for up to 15 minutes at a time.

The appellant states that for personal care he has to sit to get dressed and uses his cane when he has to stand on his right leg to get his left leg into his pants. He states that he uses his dresser for support to get on his feet when getting in and out of bed. He states that he uses the chair arms for support to get on and off of a chair. For basic housekeeping the appellant states that he is unable to do cleaning that requires him to bend, due to his gallstone pain and mobility issues. For shopping, the appellant states that he has to use his cane and a pull cart/basket with wheels. He states that he can carry about 3 shopping bags at a time (15 pounds) and that it takes him at least 2 times longer than typical. For meals, he states that he has to sit to do any food preparation such as chopping and peeling.

For transportation, the appellant states that he has to use the seat and door for support when getting in and out of a vehicle and it takes him 2 times longer than typical.

#### Need for Help

In the MR, the Physician indicates that the appellant uses one walking cane.

In the AR, the Physician indicates that the appellant's friends help with cleaning, tidying, dusting and vacuuming. The Physician indicates that the appellant needs support with cleaning duties. The Physician indicates that the appellant uses one walking cane in his left hand. The Physician indicates that the appellant does not have an Assistance Animal.

In the SR, the appellant states that he has someone who comes in to do his cleaning for him due to his limitations.

#### **Additional information provided**

In his Notice of Appeal, undated, the appellant states that he disagrees with the reconsideration decision because there is no job that he "*can physically do due to a weak heart and arthritis, etc*".

At the hearing the appellant stated that his heart is only functioning at 40% so there is no work he can do. He states that because of his arthritis, if he bends over it is very painful and takes much longer than typical to stand up. He stated that he has arthritis in his hip, knee, back and ankles and is in constant pain. The appellant described that he can't stand on one foot so his personal care is hard to do. For shopping, he has to use a cart for support. He

states that his friend comes over approximately once a month to clean his house (dusts, mops floor, vacuums) and he usually lets it build up between her visits. The appellant is able to drive himself to and from stores but he is slow getting in and out of his vehicle. The appellant stated that he can perform his grocery shopping as he gets smaller amounts more often. He will stop at a bench by the checkout to take a rest before going to his vehicle. The appellant stated that for meals he usually buys items that he can microwave. His laundry is “no problem” and he can do his dishes if not too much at once.

At the hearing, in response to questions by the ministry representative, the appellant stated that he had a gall bladder ultrasound and is waiting to get the results and that he is going for another MRI. The appellant stated that he has constant foot pain on the soles of his feet. When asked if his condition has gotten worse since his PWD application was submitted the appellant stated that it has stayed the same and is something he has to live with.

### **Admissibility of New Information**

The panel has admitted the information in the appellant's Notice of Appeal and oral testimony regarding his medical conditions and ability to perform DLA as it is evidence that is in support of information and records that were before the ministry at the time of reconsideration, in accordance with section 22(4) of the *Employment and Assistance Act*.

## **PART F – REASONS FOR PANEL DECISION**

### **Issue on Appeal**

The issue on appeal is whether the ministry's decision to deny the appellant designation as a PWD was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. In particular, was the ministry reasonable when concluding it was not satisfied that

- the appellant's daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and
- as a result of those restrictions, in the opinion of a prescribed professional, the appellant requires help, as it is defined in the legislation, to perform DLA?

### **Relevant Legislation**

#### **EAPWDA**

2 (1) In this section:

**"assistive device"** means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform;

**"daily living activity"** has the prescribed meaning;

**"prescribed professional"** has the prescribed meaning.

(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person has a severe mental or physical impairment that

- (a) in the opinion of a medical practitioner or nurse practitioner is likely to continue for at least 2 years, and
- (b) in the opinion of a prescribed professional
  - (i) directly and significantly restricts the person's ability to perform daily living activities either
    - (A) continuously, or
    - (B) periodically for extended periods, and
  - (ii) as a result of those restrictions, the person requires help to perform those activities.

(3) For the purposes of subsection (2),

- (a) a person who has a severe mental impairment includes a person with a mental disorder, and
- (b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires
  - (i) an assistive device,
  - (ii) the significant help or supervision of another person, or
  - (iii) the services of an assistance animal.

(4) The minister may rescind a designation under subsection (2).

#### **EAPWDR**

#### **Definitions for Act**

2 (1) For the purposes of the Act and this regulation, **"daily living activities"**,

(a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:

- (i) prepare own meals;
- (ii) manage personal finances;
- (iii) shop for personal needs;

- (iv) use public or personal transportation facilities;
- (v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
- (vi) move about indoors and outdoors;
- (vii) perform personal hygiene and self care;
- (viii) manage personal medication, and

(b) in relation to a person who has a severe mental impairment, includes the following activities:

- (i) make decisions about personal activities, care or finances;
- (ii) relate to, communicate or interact with others effectively.

(2) For the purposes of the Act, "**prescribed professional**" means a person who is

(a) authorized under an enactment to practice the profession of

- (i) medical practitioner,
- (ii) registered psychologist,
- (iii) registered nurse or registered psychiatric nurse,
- (iv) occupational therapist,
- (v) physical therapist,
- (vi) social worker,
- (vii) chiropractor, or
- (viii) nurse practitioner, or

(b) acting in the course of the person's employment as a school psychologist by

- (i) an authority, as that term is defined in section 1 (1) of the [Independent School Act](#), or
- (ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the [School Act](#),  
if qualifications in psychology are a condition of such employment.

(3) The definition of "parent" in section 1 (1) applies for the purposes of the definition of "dependent child" in section 1 (1) of the Act.

### **Alternative grounds for designation under section 2 of Act**

**2.1** The following classes of persons are prescribed for the purposes of section 2 (2) [*persons with disabilities*] of the Act:

- (a) a person who is enrolled in Plan P (Palliative Care) under the Drug Plans Regulation, B.C. Reg. 73/2015;
- (b) a person who has at any time been determined to be eligible to be the subject of payments made through the Ministry of Children and Family Development's At Home Program;
- (c) a person who has at any time been determined by Community Living British Columbia to be eligible to receive community living support under the [Community Living Authority Act](#);
- (d) a person whose family has at any time been determined by Community Living British Columbia to be eligible to receive community living support under the [Community Living Authority Act](#) to assist that family in caring for the person;
- (e) a person who is considered to be disabled under section 42 (2) of the [Canada Pension Plan](#) (Canada).

### **Panel Decision**

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

Section 2(2)(b)(i) of the EAPWDA requires that the minister be satisfied that in the opinion of a prescribed professional, a severe mental or physical impairment directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods. While other evidence may be considered for

clarification or support, the ministry's determination as to whether or not it is satisfied that the legislative criteria are met, is dependent upon the evidence from prescribed professionals. The term "directly" means that there must be a causal link between the severe impairment and the restriction. The direct restriction must also be significant. Finally, there is a component related to time or duration – the direct and significant restriction may be either continuous or periodic. If periodic, it must be for extended periods. Inherently, any analysis of periodicity must also include consideration of how frequently the activity is restricted. All other things being equal, a restriction that only arises once a year is less likely to be significant than one that occurs several times a week. Accordingly, in circumstances where the evidence indicates that a restriction arises periodically, it is appropriate for the ministry to require evidence of the duration and frequency of the restriction in order to be "satisfied" that this legislative criterion is met.

DLA are defined in section 2(1) of the EAPWDR and are listed in both the MR and the AR sections of the PWD application with the opportunity for the prescribed professional to check marked boxes and provide additional narrative. DLA, as defined in the legislation, do not include the ability to work.

The appellant's position is that the ministry should find that he qualifies for PWD designation as he has constant pain, arthritis in his ankle, knees, back and hip, pain in his feet and his heart is only functioning at 40%. The appellant's evidence is that he is severely limited with mobility and cannot sit or stand for more than 15 minutes and that any activities requiring mobilization, particularly bending are very painful. The appellant's evidence is that it takes him two or three times longer than typical to perform most tasks and that while he can shop and cook, he has to make smaller purchase and he buys microwaveable meals.

The ministry's position is that although a severe physical impairment has been established, this designation does not necessarily confirm that a person experiences significant restrictions as a result. The reconsideration decision indicates that the Physician indicates that the appellant requires the use of a cane to mobilize, however, needing the assistance of an assistive aid does not verify that the appellant experiences significant restrictions. The reconsideration decision notes that the appellant is capable of mobilizing with a cane (albeit 3 times longer), is capable of climbing stairs with the use of a cane and that he is able to stand for up to 15 minutes without support and lift and carry up to 15 pounds.

The reconsideration decision notes that the appellant is independent in most tasks despite them taking him sometimes twice as long to perform. The ministry is not satisfied that taking two times longer than the average person suggests a significant restriction.

The ministry notes that the information provided does not indicate that the appellant requires periodic assistance in any areas of DLA. The Physician indicates that the appellant requires continuous assistance with basic housekeeping but is independent with laundry. The ministry notes that the Physician indicates that the appellant is unable to do the areas of cleaning which require bending and explains that someone else does his cleaning for him. The reconsideration decision indicates that the ministry is not satisfied that this specific restriction suggests that the appellant is continuously restricted with overall basic housekeeping as he is capable of performing other housekeeping tasks that do not require bending. The ministry also takes into account that the appellant is independent with laundry which involves at least some bending. The ministry also notes that the Physician indicates that the appellant requires continuous assistance with carrying purchases home but explains that this restriction relates to items weighing over 15 pounds. The ministry's position is that as the appellant is capable of carrying items less than 15 lbs, the minister does not consider this to be a significant restriction.

The ministry acknowledges that the appellant has a severe physical impairment and that he experiences limitations as a result of his impairment. However, the ministry's position is that considering all the information collectively, it is not satisfied that the appellant's impairment, in the opinion of a prescribed professional, directly and significantly restricts the appellant's ability to perform DLA as set out in the legislation.

The panel finds that the ministry reasonably determined that there is not enough evidence to establish that the appellant's ability to manage DLA is significantly restricted either continuously or periodically for extended periods of time and that as a result, he requires significant assistance from others to complete them.

While the panel finds that the appellant has some restrictions to DLA, the information provided makes it difficult to determine whether the appellant has significant restrictions to DLA. In particular, while the Physician indicates

continuous restrictions to basic housework as he is unable to do the areas of cleaning which require bending, the panel finds that the ministry was reasonable in determining that the specific restrictions noted by the Physician are not sufficient to indicate a continuous restriction with overall basic housekeeping, particularly given that the appellant is independent with laundry which involves some bending.

While the Physician indicates that the appellant requires continuous assistance with carrying purchases home, he explains that the appellant's restriction relates to items weighing over 15 pounds. As the appellant is capable of carrying items under 15 pounds, which would include a number of household items and 2 or 3 grocery bags, the panel finds that the ministry was reasonable in determining that this restriction does not represent a significant restriction.

The panel also notes that the Physician indicates that the appellant is independent with 17 of 28 of the listed aspects of DLA and that for social functioning, the Physician indicates "N/A". Considering all the information together the panel finds that the ministry reasonably concluded that the ministry was reasonable in determining that the appellant's impairment does not, in the opinion of a prescribed professional, directly and significantly restrict the appellant's ability to perform DLA as required by the legislation.

#### Help to perform DLA

Section 2(2)(b)(ii) of the EAPWDA requires that, *as a result of direct and significant restrictions in the ability to perform DLA*, a person requires help to perform those activities. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform DLA.

The appellant's position is that he requires help with DLA because he has pain, arthritis, difficulty bending over with increased pain when trying to stand up, difficulty sitting or standing for more than 15 minutes and that he needs help with basic housework.

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

The panel notes that the Physician indicates that the appellant requires a cane for walking, that he uses a shopping cart for support, leans on his vehicle to get in and out, and requires support with cleaning duties. The panel also notes that the appellant indicates that he uses his dresser for support when getting out of bed and that he must use a railing when walking up stairs. However, the panel notes that a dresser and shopping cart are not assistive devices.

The panel finds that the information provided indicates that the appellant requires some help with some aspects of DLA. However, given that confirmation of direct and significant restrictions with DLA is a precondition of the need for help criterion and as the panel found that the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established, the panel also finds that the ministry reasonably concluded that it cannot be determined that the appellant requires help to perform DLA as required by section 2(2)(b)(ii) of the EAPWDA.

#### Conclusion

The panel finds that the ministry's reconsideration decision, which determined that the appellant was not eligible for PWD designation, was reasonably supported by the evidence and is a reasonable application of the applicable enactment, and therefore confirms the decision. The appellant is not successful on appeal.