

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 30 November 2017 that denied the appellant designation as a person with disabilities (PWD). The ministry determined that the appellant did not meet all of the required criteria for PWD designation set out in the *Employment and Assistance for Persons with Disabilities Act*, section 2. Specifically, the ministry determined that the information provided did not establish that the appellant's severe physical or mental impairment, in the opinion of a prescribed professional,

(i) directly and significantly restricts his ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and,

(ii) as a result of those restrictions, he requires help to perform those activities.

The ministry determined that the appellant satisfied the other 3 criteria: he has a severe physical and mental impairment, he has reached 18 years of age; and his impairment in the opinion of a medical practitioner is likely to continue for at least 2 years.

PART D – RELEVANT LEGISLATION

Employment and Assistance for Persons with Disabilities Act (EAPWDA) – section 2
Employment and Assistance for Persons with Disabilities Regulation (EAPWDR) – sections 2 and 2.1

PART E – SUMMARY OF FACTS

The evidence before the ministry at reconsideration consisted of the following:

1. The appellant's PWD Designation Application dated 19 June 2017. The Application contained:
 - A Medical Report (MR) dated 04 July 2017 completed by a general practitioner (GP) who has known the appellant for 1 year has and seen him 2-10 times in the past 12 months.
 - An Assessor Report (AR) dated 04 July 2017, completed by the same GP .
 - A Self Report.
2. The appellant's Request for Reconsideration dated 16 November 2017, attached to which is a submission by an advocate.

In the MR, the GP diagnoses the medical conditions related to the appellant's impairment as polio (onset at age 18 months), depression, LBP [low back pain] due to polio/withered right calf, diabetes, and OA [osteoarthritis] ankle/knee.

The panel will first summarize the evidence from the MR and the AR as it relates to the PWD criteria at issue in this appeal.

General

MR:

Under Health History, the GP writes, "Episode polio right leg age 18/12. Now withered & weak right calf. Weak right ankle & knee osteoarthritis. Markedly depressed with recent hospitalization."

The GP indicates that the appellant has not been prescribed any medication and/or treatments that interfere with his ability to perform DLA.

Ability to perform DLA

Moving about indoors and outdoors

MR:

Under functional skills, the GP indicates that the appellant can walk less than 1 block unaided, can climb no steps unaided, can lift 5 to 15 lbs. and has no limitation remaining seated.

AR:

Under Mobility and Physical Ability, the GP assesses the appellant as requiring the following assistance (the GP's comments in parentheses):

- For all of walking indoors, walking outdoors, climbing stairs, standing, lifting and carrying and holding: periodic assistance from another person and taking significantly longer than typical.
- In addition:

- For walking indoors and walking outdoors: uses assistive device (weak right leg).
- Climbing stairs: (unable).
- Lifting: (LBP).
- Carrying and holding: (LBP/leg weakness).

Other DLA requiring physical effort

AR:

The GP provides the following assessments of the assistance the appellant requires in performing DLA (the GP's comments in parenthesis):

- Personal care – independent for dressing, grooming, bathing, toileting, feeding self, and regulating diet; periodic assistance from another person and takes significantly longer than typical for transfers in/out of bed, then transfers on/off chair (LBP).
- Basic housekeeping – periodic assistance from another person for laundry (pain) and basic housekeeping (pain/weakness).
- Shopping – independent for reading prices and labels, making appropriate choices, and paying for purchases; continuous assistance from another person, uses assistive device and takes significantly longer than typical for going to and from stores (uses cane); and continuous assistance from another person and take significantly longer than typical for carrying purchases home.
- Meals – independent for meal planning and safe storage of food; periodic assistance from another person for food preparation and cooking (unable to stand for long).
- Pay rent and bills – independent for all tasks: banking, budgeting, and paying rent and bills.
- Medications – independent for all tasks: filling/refilling prescriptions, taking as directed, and safe handling and storage.
- Transportation – periodic assistance from another person for getting in and out of a vehicle; continuous assistance from another person or unable and take significantly longer than typical for using public transit (pain/weakness); and independent for using transit schedules and arranging transportation.

Social functioning

AR:

The GP assesses the appellant as requiring periodic support/supervision for all listed areas of social functioning: making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others, dealing appropriately with unexpected demands, and securing assistance from others.

The GP assesses how the appellant's mental impairment impacts the appellant's relationship with his immediate and extended social networks as marginal functioning.

The GP describes the support/supervision required to help the appellant maintained in the community as "Encouragement/counselling."

Help required

MR:

The GP does not indicate whether the appellant requires any prostheses or aids for his impairment, writing, “He will see OT re ankle & knee braces + special footwear.”

AR:

The GP indicates that help required for DLA is provided by friends, noting, “Family doesn't help.”

The GP indicates that the appellant routinely uses the following to help compensate for his impairment: a cane, splints, and braces.

Self Report

In his SR, the appellant writes that he was diagnosed with polio at age 17 months. His right leg is three quarters of an inch shorter than his left leg, and his right foot is shorter than his left and has lumps. Even slight movements can be painful. He cannot walk on left hand sidewalks – he always has to be on the right side. He can't go on grass or uneven pavement, as his balance is unsteady. He cannot make left turns with his body. It is very easy for him to twist/injure his right ankle and he is extremely cautious about that. It is slow for him to heal compared to the average person. His spine is crooked as a result of his shorter leg.

He writes that he wakes up feeling drained. It takes him 10 to 15 minutes to collect strength. He needs to hold onto his bed and wait to get out of bed. He feels his best during the first two hours of the day and then his strength decreases. He has to hold onto the wall and railing when using stairs.

When he is tired, he starts to drag his leg but then it is very easy for him to trip and hurt himself. By the end of the day he is exhausted. He has noticed a decrease in muscle mass in his right leg. Recently he suffered an infection and is still recovering from the effects of treatment.

After describing his difficulties securing employment, the appellant writes that mentally, he has anxiety over his finances and his disability. He has to be constantly aware of his movements to avoid injury. He feels scared and that he has no control. He does not feel comfortable telling others his problems and has withdrawn recently. He is less social than he used to be and makes excuses not to see people. It takes longer to keep up with daily chores and he doesn't feel comfortable having people over. Because he is exhausted, he is less motivated to do daily activities. He feels significantly weaker than he used to. He is waiting to have surgery on his shoulder – an injury he acquired when he fell, so that will limit his ability to look for work.

Request for reconsideration

In her submission, dated 15 November 2017, the appellant's advocate reviewed the information provided in the PWD Application. The submission then went to argument, citing *Hudson* (2009 BCSC 1361). Attached to the submission is a letter from the GP dated 16 November 2017 listing the medications prescribed for the appellant's multiple medical diagnoses.

Notice of Appeal

The appellant's Notice of Appeal is dated 13 December 2017. Under Reasons for Appeal, he writes:

“My condition is getting worse. My walking is a lot less. My mental health is not good. I would like to be heard on this matter.”

The Hearing

With the consent of the appellant, a ministry worker attended the hearing as an observer.

At the hearing, the appellant stated that he was very hurt by the ministry's decision to deny his application for PWD designation. He has been independent all his life and has never asked for help until an injury to his right ankle two years ago resulted in his current condition that led to his current application. Due to having polio a young age, the ankle was slow to heal and his leg lost a lot of muscle mass. He described how the bone is now visible and his leg is getting worse. He realizes that if he injures that leg again, it could take several years to heal and so he lives in fear that any sudden movement or fall on that side will have serious consequences. This is why he always walks on the left side of a sidewalk. Because he places most of his weight on his left leg, he also experiences pain and cramps in that leg and it is therefore getting harder for him to walk, always using his cane and avoiding carrying anything.

The appellant stated that he was struggling with his mental health – he is “doubly depressed” and “an emotional wreck,” both by his physical situation and by the need for assistance that would not be available without PWD designation (e.g. he will eventually need a wheelchair).

In answer to questions, he stated that he uses his cane as well as railings when using stairs. He also explained that one of his brothers helps him with shopping if he has to buy anything of any weight, and will carry it up the stairs to his apartment for him.

The interventions by the appellant's advocates went to argument, reviewing the assessments provided by the GP in the AR (see Part F, Reasons for Panel Decision, below).

The ministry stood by its position at reconsideration.

Admissibility of additional information

The panel finds that the information provided by the appellant in the Notice of Appeal and in his testimony at the hearing, is in support of the information and records before the ministry at reconsideration, as it tends to substantiate the information provided by the appellant in his SR and by the GP in the MR and AR. The panel therefore admits this information as evidence pursuant to section 22(4) of the *Employment and Assistance Act*.

PART F – REASONS FOR PANEL DECISION

The issue in this appeal is whether the ministry decision that determined that the appellant did not meet three of the five statutory requirements of Section 2 of the *EAPWDA* for designation as a person with disabilities (PWD) is reasonably supported by the evidence or is a reasonable application of the legislation in the circumstances of the appellant. Specifically, the ministry determined that the information provided did not establish that the appellant's severe physical or mental impairment, in the opinion of a prescribed professional,

(i) directly and significantly restricts his ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and,

(ii) as a result of those restrictions, he requires help to perform those activities.

The ministry determined that the appellant satisfied the other 2 criteria: he has a severe physical and mental impairment; he has reached 18 years of age; and his impairment in the opinion of a medical practitioner is likely to continue for at least 2 years.

The following section of the *EAPWDA* applies to this appeal:

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 following section of the EAPWDR applies to this appeal:

- 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.

Analysis

Direct and significant restrictions in the ability to perform DLA

The position of the appellant, as explained by his advocates at the hearing, is that the assessments provided by the GP in the AR meet the burden of proof required to establish that the appellant's severe impairments directly and significantly restrict his ability to perform DLA on a continuous basis.

As set out in the reconsideration decision, the position of the ministry is that, as the majority of DLA are performed independently, or the assistance that the appellant requires from others or the amount of time he takes to manage his DLA remains unclear, the information from his prescribed professional does not establish that impairment significantly restricts DLA either continuously or periodically for extended periods and that therefore this legislative criterion has not been met.

In reaching this decision, the ministry acknowledged that while the legislation does not specifically require the frequency and duration of restrictions to be explained, the ministry finds this information valuable in determining the significance of the restrictions. The panel notes that 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. As an example, 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, the panel considers reasonable that the ministry expect evidence from the prescribed professional of the duration and frequency of the periodic restriction in order to be "satisfied" that this legislative criterion is met.

In the reconsideration decision, in its analysis of the appellant's ability to manage DLA, the ministry did not address restrictions reported by the GP in the appellant's ability to perform the DLA of moving about indoors and outdoors. In the MR, the GP assesses the appellant as able to walk less than 1 block unaided and climb no steps unaided. In the AR, he assesses the appellant as using an assistive device for walking indoors and outdoors and unable for climbing stairs, but also requiring the periodic assistance from another person and taking significantly longer than typical. While no information is provided regarding the frequency of any periodic assistance or anything pointing to the episodic nature of the appellant's impairment relating to mobility, the ministry has found that this information (and similar information regarding standing and lifting and carrying and holding) is sufficient to establish a severe physical impairment. Accordingly, the panel is of the view that there is sufficient evidence from a prescribed professional to consider the appellant significantly restricted in his ability to perform the DLA of moving about indoors and outdoors.

In reviewing the assessments of the appellant's ability to manage the other DLA listed in EAPWDR section 2(1)(a), the ministry noted that the GP reports that the appellant requires continuous assistance and takes significantly longer with going to and from stores ("uses cane"), and continuous assistance with carrying purchases home. In commenting on these assessments, the ministry noted that no information is provided to explain the type of assistance that the appellant requires or how much longer it takes to manage these DLA.

The panel notes that the heading under which the GP indicated "continuous assistance" reads "Continuous assistance from another person or unable." Regarding these assessments for the DLA of shopping for personal needs, the ministry did not explain why, considering the appellant's severe physical impairment – a withered calf and LBP – and that shopping necessarily requires personal mobility, the ministry determined that the appellant was not significantly restricted in these two aspects of the DLA of shopping for personal needs. Given the continuous assistance required or unable assessments by the GP and the evidence from the GP that the appellant requires the use of a cane, as well as a braces and splint, for mobility, including for going to and from stores – he is able to walk less than 1 block without them – and without such help he would be "unable," the panel finds that the ministry was not reasonable in determining that the appellant's ability to perform these 2 aspects of the DLA of shopping for

personal needs is significantly restricted on a continuous basis. While the ministry lists in the AR other aspects of the shopping (reading prices and labels, making appropriate choices and paying for purchases), these aspects are more likely to be restricted by a mental, rather than a physical, impairment. Accordingly, the panel finds that the ministry was not reasonable in determining that, in the opinion of a prescribed professional, the appellant's severe physical impairment directly and significantly restricts his ability to perform the DLA of shopping for personal needs on a continuous basis.

As to the DLA of use of public or private transportation facilities, the GP assesses the appellant as requiring continuous assistance or unable for taking public transit, with the ministry noting that the GP provided no information on the nature of the help required. Considering the GP's assessment, the mobility dimension of this DLA (walking to a bus stop, standing to wait for a bus, climbing into the bus, finding a seat, exiting the bus, walking to destination), and the appellant's requirement for a cane to manage any mobility, the panel finds that the ministry was not reasonable in determining that the appellant's severe physical impairment does not directly and significantly restrict the appellant ability to perform the DLA of use of public or private transportation facilities on a continuous basis.

The ministry also reviewed those activities for which the GP assessed the appellant as requiring the periodic assistance from another person: transfers in/out of bed, on/off chair (both also taking significantly longer than typical), laundry and basic housekeeping, food preparation and cooking, noting the comment "can't stand for long" for food preparation and cooking. Regarding these assessments, the ministry noted that no information is provided to explain the type, the frequency, or the degree of the periodic assistance required or how much longer the appellant takes to manage these activities. The panel notes that in the MR and AR forms there are footnotes that state that periodic assistance "refers to the need for significant help for an activity some of the time as would be the case where a person required help due to the episodic nature of the impairment." However, by the nature of the appellant's severe physical impairment, the evidence points to his impairment being continuous, not episodic. Thus these periodic assistance assessments would indicate that the appellant requires some degree of occasional assistance from others. However, without an explanation of the type, frequency or duration of such assistance or a description of the circumstances under which the assistance is required, the panel finds that it would be difficult for the ministry to determine the degree to which the appellant's impairments restrict his ability to perform these activities.

The ministry next turned to social functioning, the term used by the ministry for the two DLA applicable to a person with a severe mental impairment – make decisions about personal activities, care or finances; and relate to, communicate or interact with others effectively. The ministry noted that the GP indicates that the appellant requires periodic support/supervision with managing all listed areas of social functioning. However, no information is provided to explain the degree or the duration of the assistance that he requires to manage these social functioning activities, as requested on the form.

The panel notes that the GP describes support/supervision required to maintain the appellant in the community as "encouragement/counselling." However, the GP does not explain whether such encouragement/counselling is needed on a temporary basis or on a longer lasting one, and whether through a support group, a more structured program under the guidance of mental

health professionals, or even psychiatric treatment. In the absence of such recommendations, or other information that would cast light on the restrictions in the ability of the appellant to manage these DLA, it would be difficult for the ministry to assess the degree of these restrictions and conclude that they were significant.

Based on the foregoing analysis of the ministry's decision, and noting in particular the panel's findings regarding direct and significant restrictions in the appellant's ability for the DLA of moving about indoors and outdoors, shopping for personal needs, and use public or personal transportation facilities, the panel finds that the ministry was unreasonable in not determining that the appellant's severe physical impairment, in the opinion of a prescribed professional, significantly restricts his ability to perform DLA on a continuous basis.

Help required

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.

The evidence is that the appellant relies on the use of a cane and other assistive devices for DLA requiring mobility. The panel therefore finds that the evidence establishes that the appellant requires assistive devices to perform DLA as required by EAPWDA Section 2(2) (b) (ii). The ministry did not make a determination on this final criterion because it did not find that that as a result of a severe impairment the appellant's DLA were, in the opinion of a prescribed professional, directly and significantly restricted continuously or periodically for extended periods.

Conclusion

The panel finds that the ministry's reconsideration decision, which determined that the appellant was not eligible for PWD designation, was not reasonably supported by the evidence. The panel therefore rescinds the ministry's decision. The appellant is thus successful on appeal.