

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 January 3, 2018, which held that the appellant did not meet 4 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 requirement. However, the ministry was not satisfied that:

- a medical or nurse practitioner has confirmed that the appellant has an impairment that is likely to continue for at least 2 years;
- 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 those restrictions, in the opinion of a prescribed professional, the appellant requires an assistive device, the significant help or supervision of another person, or the services of an assistance animal to perform DLA.

Additionally, the ministry determined that it has not been demonstrated that the appellant is one of the prescribed classes of persons who may be eligible for PWD designation on alternative grounds set out in section 2.1 of the EAPWDR.

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

On September 26, 2017, the ministry received the appellant's PWD application comprised of the appellant's self-report (SR) dated August 13, 2017, as well as a Medical Report (MR) dated August 21, 2017 and an Assessor Report (AR) dated September 19, 2017, which were both completed by a general practitioner (GP) who is a clinic colleague of the appellant's regular general practitioner.

The appellant's request for PWD designation was denied on November 10, 2017. The appellant submitted his request for reconsideration on December 15, 2017, to which he attached:

- A 2013 Emergency Department Consultation report;
- A May 17, 2017, report respecting MRIs of both elbows;
- The signature page of an employment plan signed by the appellant on August 11, 2017;
- A November 28, 2017, letter from the GP;
- A December 12, 2017, letter from the appellant's brother; and
- A December 14, 2017, letter from the appellant's mother.

On January 3, 2018, the ministry issued its reconsideration decision, which again denied the appellant's request for PWD designation.

The appellant's Notice of Appeal (NOA), which did not include additional evidence, was received by the tribunal on January 11, 2018.

Neither party provided additional evidence on appeal.

The arguments of both parties are set out in Part F of this decision.

Summary of relevant evidence

Diagnoses

In the MR, where asked to provide a specific diagnosis and provide health history, the GP writes:

- Tendinopathy – both elbows – see MRI report from 17 May 2017
- Crohn's Disease (diagnoses also confirmed in the 2013 Emergency Department Consultation report)
- Hearing Impaired – wears bilateral hearing aides

Additionally, the GP writes that the appellant's regular general practitioner had the appellant complete a form suggesting Attention Deficit Hyperactivity Disorder.

Degree and Course of Impairment

Where asked “Is the impairment likely to continue for two years or more from today” and to tick “Yes” or “No” boxes in response, the GP drew a line through both boxes and notes that the appellant has complained of right and left elbow pains since 12 Sept 2016 and “It is unknown how long this will persist.”

In his November 28, 2017, letter, the GP writes “It is unknown how long his restriction will last. He reports that he has not gotten any better in last 1.5 years. He has shown no signs of improving over the time I have known him.”

Physical Impairment

In the MR, the GP reports as follows:

- Able to walk 4+ blocks unaided on a flat surface, climb 5+ stairs unaided.
- No limitations in the ability to lift or remain seated.
- Has pain with use of right and left hands/arms.
- Has difficulty on some days due to abdominal pain and diarrhea.
- By telephone conversation, the appellant says he has pain if he does housework, carries groceries, or prepares meals. “He told me that driving a car or truck causes (sic) worse elbow pain.”

In the AR, the GP reports as follows:

- Walking indoors and outdoors, climbing stairs, and standing are managed independently.
- Lifting and carrying/holding require continuous assistance from another person.

In his subsequent letter, the GP writes that the appellant has pain in arms when he does activities with his arms, even “easy tasks” such as computer use.

Information provided in the “Impression” section of the MRI report includes the following. Bilateral very faint posterior olecranon process marrow edema deep to the triceps enthesis and trace bursal signal change deep and adjacent to the triceps tendon on the left side, which correspond with described acute injury or provided clinical history. Also mild heterogeneity of the common extensor tendon could be related to mild tendinopathy or overuse. No additional tendon or joint abnormality; normal for age.

In his SR, the appellant writes that due to his hearing disability and development of ADHD, having difficulty concentrating to hear people became a problem more and more as he got older and causes him to be unable to sit still for periods of time. But, the disability problem that prevents him from doing anything is his bilateral elbow injury. The resulting muscle pain and inflammation gets in the way of everything in his life. He must take breaks to write and can’t drive, bring in grocery bags or do any light to heavy lifting, which he gets his family to do. All he can do is some activity like computer for a while; using a computer mouse even aggravates his arms. Aggravation results in pain and the need to rest immediately. At this point, we don’t know if it will get better. He also notes that he has had Crohn’s Disease for several years.

The appellant’s mother writes that the appellant’s hearing loss is significant enough that he qualified to attend a school for the deaf. Due to his perseverance, the appellant is able to speak, though people will not see or understand how much daily effort it takes. The appellant has had pain, surgery and ill health from Crohn’s. Being hard of hearing and having Crohn’s Disease has made working difficult. The appellant needs, but cannot afford, physiotherapy. He has not been able to lift anything with any weight at all as it hurts his elbows, which have not healed from injury.

Mental Impairment

In the MR, the GP reports:

- Significant deficit with cognitive and emotional function in 1 of 11 specified areas: executive.
- The appellant has difficulties with communication are indicated. "I suspect this young man has mild mental retardation, but find no supporting evidence for this."
- Suggest a neurocognitive assessment be done.
- Social functioning is continuously restricted. "He avoids new people."

In the AR, the GP reports:

- Satisfactory ability to communicate in the areas of speaking and reading. Poor ability to communicate in the areas of writing and hearing.
- Major impact on daily functioning for emotion and attention/concentration. No impact in the other 12 specified areas, which includes executive function. No additional commentary is provided.
- All listed areas of social functioning are managed independently: appropriate social decisions, developing and maintaining relationships, interacting appropriately with others, dealing appropriately with unexpected demands, and ability to secure assistance from others.
- Marginal functioning with immediate social network and good functioning with extended social networks.

DLA

In the MR, the GP reports the following:

- The appellant has not been prescribed any medication and/or treatments that interfere with the ability to perform DLA.
- Noting that he has met the appellant "only a few times", the GP suggests assessment of abilities of daily living by an occupational therapist and notes that he has not seen the appellant at home. The GP also comments that during a telephone conversation, the appellant stated that he has pain if he does housework, carries groceries, or prepares meals, and that driving causes worse elbow pain.
- The ability to manage the DLA personal self-care, management of medications, mobility inside and outside the home, and management of finances is not restricted.
- The ability to manage the DLA meal preparation, basic housework, daily shopping, use of transportation, and social functioning is continuously restricted. Where asked to explain the impact on social functioning, the GP writes "He avoids new people." Where asked to comment regarding the degree of restriction, the GP writes "His family (mother and brother) help him."

In the AR, the GP reports the following:

- Attention Deficit Disorder is the physical or mental impairment that impacts the appellant's ability to manage DLA.
- All listed tasks of the DLA personal care, paying rent and bills, medications, and social functioning are managed independently, as are walking indoors and outdoors and climbing stairs (relate to the DLA move about indoors and outdoors). For the DLA transportation, the GP does not provide information respecting the appellant's ability to use public transit or use transit schedules, noting that the appellant does not use the bus; the remaining task, getting in and out of a vehicle, is managed independently.
- Both listed tasks of the DLA basic housekeeping require continuous assistance from another person, with the GP commenting "carrying and lifting is difficulty (sic)."
- For the DLA shopping, going to and from stores, reading prices and labels, making appropriate choices, and paying for purchases are managed independently. Carrying purchases home requires continuous assistance from another person.

- For the DLA meals, meal planning and safe storage of food are managed independently, while food preparation and cooking require periodic assistance from another person.

In his subsequent letter, the GP writes that the appellant "...can not (sic) live independently. He gets assistance from his family."

The appellant's brother reports that the appellant is unable to do simple lifting, like dishes and groceries, or heavy activities like yard work, without help and assistance. He has been responsible for the appellant's household chores for the last year and a half. The appellant's mother also reports that carrying groceries, laundry, taking out garbage, cleaning, doing dishes or any task with lifting has been too hard as it causes pain, and that the appellant needs someone to drive him, as twisting and turning the steering wheel aggravates and worsens his elbows.

Need for Help

The GP reports that assistance is provided by family, commenting "Family help: carry, lift, transportation, meal prep, housework." The use of assistive devices (hearing aids) is also reported by the GP.

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. That is, was the ministry reasonable when determining that the requirements of 2(2) of the EAPWDA were not met because:

- a medical or nurse practitioner has not confirmed that the appellant's impairment is likely to continue for at least two years;
- a severe physical or mental impairment was not established;
- the appellant's DLA are not, 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 does not require an assistive device, the significant help or supervision of another person, or the services of an assistance animal to perform DLA?

Additionally, was the ministry reasonable when determining that the appellant did not meet the alternative eligibility criteria of section 2.1 of the EAPWDR?

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 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.

(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

Alternative Grounds for PWD Designation – section 2.1 of the EAPWDR

Finding that no evidence or argument has been provided to suggest or establish that the appellant falls within one of the classes of persons described in paragraphs (a) through (e) of section 2.1 of the EAPWDR, the panel concludes that the ministry reasonably determined that the appellant is not eligible for PWD designation under this section.

Eligibility for PWD Designation – section 2 of the EAPWDA

Duration of Impairment

The legislation requires that in the opinion of a medical or nurse practitioner, a severe mental or physical impairment is likely to continue for at least 2 years. In this case, the GP did not tick the "Yes" box, instead putting a line through both the "Yes" and "No" boxes. In both the MR and his subsequent letter, the GP comments that it

is unknown how long the restriction arising from the elbow impairment will last. The appellant argues that the failure to check the “Yes” box was just an error on the part of the GP and that the information provided by the GP in his subsequent letter, that there has been no improvement over the last 1.5 years and there is no sign of improvement, far surpasses the 2 year requirement. The panel notes that while the appellant is diagnosed with a number of medical conditions, the GP’s information respecting duration is limited to the impairment arising from the bilateral elbow tendinopathy. While, as both the appellant and the ministry note, the GP does report that there has been no improvement over the last 1.5 years, the panel finds that this is not confirmation of expected duration. Additionally, the panel notes that the MRI report does not address impairment in terms of duration or otherwise. Accordingly, based on the GP’s repeated assertion that it is unknown how long the appellant’s impairment will continue, the panel concludes that the ministry reasonably determined that his legislative criterion was not met.

Severe Physical or Mental Impairment

The legislation provides that the determination of severity of impairment is at the discretion of the minister, taking into account all of the evidence including that of the appellant. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a prescribed professional respecting the nature of the impairment and its impact on daily functioning. While the legislation does not define “impairment”, the MR and AR define “impairment” as a “loss or abnormality of psychological, anatomical or physiological structure or functioning causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration.” While this is not a legislative definition, and is therefore not binding on the panel, in the panel’s opinion, it reflects the legislative intent and provides an appropriate analytical framework for assessing the degree of impairment resulting from a medical condition.

When considering the evidence provided respecting the severity of impairment, the ministry must exercise its decision-making discretion reasonably by weighing and assessing all of the relevant evidence and cannot simply defer to the opinion of a prescribed professional as that would be an improper fettering of its decision-making authority.

Physical Impairment

The appellant is diagnosed with bilateral elbow tendinopathy, Crohn’s disease, and a hearing impairment for which he requires the use of bilateral hearing aids. The appellant argues that the ministry has made a “false decision” because due to his medical conditions, in particular the impairment arising from injury or disease of his elbows, he cannot live a normal daily life as he is unable to do the easiest activities, as evidenced by the information provided in the PWD application, the letters from family members and the GP, as well as the MRI results. Noting that the legislation requires the ministry to be satisfied that a severe impairment exists, and that the legislation does not require an applicant to have a long-standing relationship with a prescribed professional who completes the PWD application, the ministry argues that while the GPs information has been taken into account, it must question the accuracy of the GP’s assessments given the limited understanding he would “no doubt have after only a few visits.” For this reason, the ministry determined that that it is more likely that the information the GP provided is more so a reiteration of the impairments that appellant reported to the GP, rather than a direct reflection of his medical opinion. The ministry also argues that the information provided by the GP is further complicated by the GP’s comment that Attention Deficit Disorder is the sole condition that impacts the appellant’s ability to manage DLA and the fact that in the MR the GP indicates that lifting is not restricted, whereas difficulties lifting are the only cause described for restrictions in physical functioning and the ability to perform DLA in the AR.

While the information provided by the appellant and his family members is that the appellant is incapable of doing any simple lifting, information from an independent prescribed professional is the fundamental basis upon which PWD eligibility is established. In the circumstances of this case, the panel considers that the ministry was reasonable to assess both the inconsistencies in the GP's information and the GP's comments, including that he has only seen the appellant a few times and therefore suggests an Occupational Therapist's assessment of abilities of daily living and that some of the information was obtained by telephone from the appellant, which appear to reflect the GP's acknowledgement that he has a somewhat limited understanding of the appellant's physical functioning. It is reasonable for the ministry to require a clear and comprehensive assessment from a prescribed professional in order that the ministry may be satisfied that the legislated requirements are met. Additionally, the ministry has reasonably concluded that the ability to perform DLA tasks requiring at least some basic lifting abilities, such as personal care tasks, independently with no noted limitation and the normal or mild findings in the MRI report are not indicative of severe impairment. The panel also considers the ministry reasonable when concluding that the subsequent letter from the GP, stating that the appellant cannot live independently, does not, in and of itself, confirm significant restrictions, as there is insufficient detail describing the degree of pain experienced with even "easy" tasks such as computer use or whether the pain is immediate or follows a period of time performing a task. Such clarification is especially important given the inconsistencies within the PWD application.

Based on the above, the panel concludes that while the information establishes that the appellant has some impairment to physical functioning due to bilateral elbow tendonitis that impacts his ability to lift and carry, the ministry reasonable determined that a severe physical impairment has not been established.

Mental Impairment

The appellant does not argue that he has a severe mental impairment. The GP does not provide a firm diagnoses of a mental condition. Rather, the GP reports that there is some documentation suggestive of Attention Deficit Hyperactivity Disorder. Additionally, the GP suspects mild mental retardation based his own observations, though he notes there is no supporting evidence, and he suggests that a neurocognitive assessment be conducted. The GP does identify a significant deficit for executive function and a major impact on daily functioning for emotion and attention/concentration; however, no problems are identified for the vast majority of listed aspects of cognitive and emotional function. Additionally, while a continuous restriction is identified in the MR for social functioning, the panel considers that the ministry reasonably viewed the explanatory comment "He avoids new people" and the reported independence with all listed aspects of social functioning in the AR as not implying a severe mental impairment.

Based on the above, the panel concludes that the ministry was reasonable in determining that when considering the information collectively, a severe mental impairment has not been established.

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, 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 the frequency. 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 combination of his medical conditions affects his employability and that his bilateral elbow injury prevents him from doing anything. The ministry again points to inconsistencies in the GP’s information respecting the ability to lift, the GP’s identification of Attention Deficit Disorder as the medical condition that impairs the appellant’s ability to perform DLA, and narrative from the GP that suggests that his information is more a reiteration of the appellant’s self-reported impairments rather than a direct reflection of his medical opinion. The ministry also notes that the appellant is reported as independently managing, with no limitations, some DLA tasks which the ministry argues would require at least some basic lifting abilities, including all personal care tasks and paying for purchases (shopping DLA), that the GP comments that carrying and lifting is “difficulty” (sic) when describing the need for continuous assistance with the DLA basic housekeeping, and that the subsequent letter from the GP does not provide sufficient detail respecting to what degree and for what duration the appellant is impacted.

As the ministry notes, there are a number of inconsistencies in the GP’s information. In particular, restrictions are assessed for lifting in the AR but not in the MR, and in the AR the GP identifies Attention Deficit Disorder as the only medical condition impacting the ability to manage DLA but then goes on to identify only DLA tasks involving carrying and lifting as requiring assistance. On balance though, as supported by the MRI report and the information provided by the appellant and his family members, there is sufficient information from the GP to establish that the appellant experiences restrictions in his ability to perform some DLA due to the diagnosed bilateral elbow tendinitis and the associated problems with lifting. However, the limitations identified by the GP do not impact the majority of DLA as the appellant is independently able to manage all listed aspects of the DLA moving about indoors and outdoors, personal care, paying rent and bills, medications, transportation, and social functioning, as well as most listed tasks of the DLA shopping. The GP’s subsequent letter does not provide specifics respecting the prescribed DLA, and in the AR when given the opportunity to indicate where assistance is required within each DLA, the GP reports that only one DLA, basic housekeeping, and one task of the DLA shopping, carrying purchases home, require continuous assistance from another person. The physical tasks of the DLA meals also require assistance from another person, but the assistance is identified as periodic rather than continuous with no further description by which to assess the significance or duration of the restriction. Additionally, as the ministry notes, the appellant is reported as being able to independently manage, without any restriction, all tasks of personal care, some of which involve use of the elbows and lifting and would reasonably be expected to be impacted if restrictions are significant.

Based on the above analysis, and again noting the legislative requirement that the ministry must be satisfied that, in the opinion of a prescribed professional, direct and significant restrictions in the ability to perform DLA exist, the panel concludes that the ministry was reasonable to determine that while the appellant has certain limitations as a result of his medical conditions, the information provided does not establish that an impairment directly and significantly restricts the appellant’s ability to perform DLA continuously or periodically for extended periods.

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 either continuously or periodically for extended periods, 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 establishment of direct and significant restrictions with DLA is a precondition to meeting the need for help criterion. The panel concluded that the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established; therefore, 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 therefore confirms the decision. The appellant is not successful on appeal.