

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

The decision under appeal is the Ministry of Social Development and Poverty Reduction (ministry) reconsideration decision dated 18 July 2018, which determined that the appellant was not eligible for persons with disabilities designation (PWD) because he had not met all of the legislated criteria under section 2 the *Employment and Assistance for Persons with Disabilities Act*. The ministry determined that the appellant had demonstrated that he has reached 18 years of age. The ministry further determined that the appellant had not demonstrated: that his impairment, in the opinion of a medical practitioner or nurse practitioner, is likely to continue for at least 2 years; that he has a severe mental or physical impairment; that his severe mental or physical impairment, in the opinion of a prescribed professional, directly and significantly restricts his ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and as a result of direct and significant restrictions, he requires help to perform those activities.

### **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

Evidence before the ministry at reconsideration consisted of the following:

### 1. The appellant's PWD Application

The Application contained:

- A Medical Report (MR) dated 5 December 2017, completed by a general practitioner (GP) who has seen the appellant 11 or more times in the past 12 months and known the appellant for more than 10 years. Section 2, Part E – Daily Living Activities was not completed in the initial MR (dated 5 December 2018). A completed Section 2, Part E – Daily Living Activities, dated 20 April 2018, was before the ministry at the initial decision and at reconsideration.
- An Assessor Report (AR) dated 14 June 2017, completed by a registered nurse (RN) who has seen the appellant 1 time in the past 12 months and completed the AR at the first visit.
- A 2-page typewritten Self Report (SR) dated 17 August 2017, signed by the appellant.

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

#### Duration

In the MR, the GP does not tick either 'yes' or 'no' in response to the question "Is the impairment likely to continue for two years or more from today?". The GP does not provide any comment in response to the question "What is the estimated duration of the impairment and are there any treatments that may minimize or resolve the impairment? Please explain."

#### Diagnoses

In the MR, Part A – Diagnoses, the GP writes: *There is no diagnosis that would fulfill a disability claim. Consultation at UBC Neurovascular Disease Unit and Metabolic Consult and Genetic Workup support his ability to work.*

#### Severity of mental impairment

MR:

The GP indicates that the appellant is fit to work and needs emotional support to gently reintegrate him back to work and build up his confidence after many years on disability insurance.

The GP has ticked 'no' in response to whether there are difficulties with communication other than lack of fluency in English.

The GP indicates that the appellant does not have significant deficits with cognitive and emotional functioning in the areas of memory and emotional disturbance. No comments are provided.

AR:

The RN assesses the appellant's cognitive and emotional functioning as having no impact in the areas of insight and judgement, psychotic symptoms, other neuropsychological problems and other emotional or mental problems. The RN assesses minimal impacts on daily functioning in the areas of attention/concentration and memory. Moderate impacts on daily functioning are assessed in the areas of emotion, impulse control, executive and motor activity. Major impacts are assessed in the areas of bodily functions, consciousness, motivation and language.

SR:

The appellant describes suffering from anxiety and depression due to being afraid to do anything. He indicates that his home is messy because he has no motivation to clean it and this prevents him from socializing at home. He expresses difficulty with both socializing and communication due to anxiety.

### Severity of physical impairment

MR:

Under Health History, the GP writes: *He had a catastrophic event in the distant past with rhabdomyolysis that ended up in the ICU. Unfortunately he had been told to avoid work and exertion. This had resulting in many years on a disability insurance claim. He is fit to work and needs emotion support to gently reintegrate him back to work and build up his confidence.*

For functional skills, the GP indicates that the appellant can walk 4+ blocks unaided, climb 5+ steps unaided, and remain seated without limitation. Lift abilities have not been assessed.

The GP does not indicate whether the appellant requires any aids or prostheses.

AR:

In the AR, the RN has responded to the question "What are the applicant's mental or physical impairments that impact his/her ability to manage Daily Living Activities?" as follows: *Rhabdomyolysis – pain flare up. [Left] shoulder frozen. Hypertension. Only has one kidney. Tremors in hands. Nocturia 2-3 hours. Client is seeing a geneticist for further testing.*

The RN indicates that the appellant requires periodic assistance from another person with all areas of mobility and physical ability, including: walking indoors and outdoors, climbing stairs standing lifting and carrying and holding. As well, the RN indicates that the appellant takes significantly longer (10x) with walking indoors and outdoors and climbing stairs and significantly longer (3x) with carrying and holding. The RN comments: *Pain, weakness in body (rhabdomyolysis) with exertion.*

SR:

The appellant states that he suffers from rhabdomyolysis, which can be fatal, and is at risk of kidney failure. He explains his physical limitations, fear of exertion due to an inability to know his limitations, and difficulty with DLA, including dressing, bathing, carrying groceries, making his bed, cooking, laundry and housekeeping.

### Ability to perform DLA

MR:

The GP indicates that the appellant has not been prescribed medication that interferes with his ability to perform DLA.

The GP indicates that the appellant is not restricted in relation to: personal care, meal preparation, management of medications, basic housework, daily shopping, mobility inside and outside of the home, use of transportation and management of finances. The GP indicates that the appellant is restricted periodically with social functioning.

In explaining 'periodic' the GP comments: *avoidant of anxiety provoking situations such as job interviews. He manages well when he feels safe with friends and people whom he knows and trusts.*

The GP provides the following additional comments in relation to the degree of restriction: *has avoidance of job interviews due to the fear of failure and embarrassment, has resulted in unemployment.*

In relation to assistance needed with DLA, the GP comments: *Coaching and confidence building. Teaching of communication skills and teaching that anxiety symptoms will not hurt him but the avoidance and not facing the anxiety gently and gradually will strengthen his self doubt.*

AR:

The RN indicates that the appellant is independent in the personal care activities of dressing and transfers in/out of bed and on/off chair; the shopping activities of reading prices and labels, making appropriate choices and paying for purchases; the meals activity of safe storage; the pay rent and bills activities of banking and paying rent and bills; the medications activity of safe storage; and the transportation activities of getting in/out of a vehicle and using public transit.

The RN indicates that the appellant requires periodic assistance with the personal care activities of grooming, bathing, and feeding self; and the shopping activity of carrying purchases home.

The RN indicates that the appellant requires continuous assistance for basic housekeeping; shopping activity of going to and from stores; the meals activities of meal planning, food preparation and cooking; the pay rent and bills activity of budgeting; the medications activities of filling/refilling prescriptions and taking as directed; and the transportation activity of using transit schedules and arranging transportation.

#### Section 2(1)(b) DLA

The following DLA are applicable to a person who has a severe mental impairment:

#### *Make decisions about personal activities, care or finances*

MR:

The GP indicates that the appellant is not restricted in his ability to manage personal self care, meal preparation, medications and finances.

AR:

The RN indicates that the appellant is independent with shopping activities of reading labels, making appropriate choices, and paying for purchases; the meals activities of safe storage; the pay rent and bills, of banking and bill payment; the medications DLA of safe storage.

The RN indicates that the appellant requires assistance with meal planning (continuous), budgeting (continuous), filling/refilling prescriptions and taking as directed (continuous) and the transportation DLA of using transit schedules and arranging transportation (continuous).

#### *Relate to, communicate or interact with others effectively*

MR:

The GP indicates that the appellant has no difficulties with communication and is periodically restricted in relation to social functioning.

AR:

The RN assesses the appellant's ability to communicate as satisfactory in the areas of reading, writing and hearing and poor in the area of speaking with the comment: *speech impediment*.

In assessing social functioning activities, the RN indicates that the appellant requires periodic assistance with appropriate social decisions and continuous support/supervision with developing and maintaining relationships, interacting appropriately with others, dealing appropriately with unexpected demands and securing assistance from others. The RN indicates that the appellant has marginal functioning in his immediate (*social phobia, seclusion*) and extended social networks (*isolates, polite if engaged*).

In response to help required the RN comments: *mental health supports for anxiety, depression and isolation*.

#### Help required

MR:

The GP does not indicate whether the appellant needs help.

AR:

The RN indicates that the appellant receives assistance from health authority professionals, community service agencies and friends and provides the comment: *friends may assist with these ADLs when available and if the client asks – however client has difficulty asking for help*.

In response to the prompt to specify what help is required but there is none available, the RN writes: *housekeeping, laundry, cooking, budgeting, transportation, shopping, social interaction, counselling for depression, dietary assistance, genetic testing, speech therapy, memory prompts, blister pack medication kidney care – urology consult*.

The RN does not indicate that the appellant uses assistive devices. The RN responds to the prompt for equipment needed but not being used with the comment: *blister pack medication. OT assessment for assistive devices needed*.

The RN indicates that the appellant does not receive assistance from assistance animals.

2. A 4-page advocate's letter dated 16 January 2018, arguing that the appellant meets all PWD criteria.
3. A 1-page letter dated 5 May 2018, written by a geneticist, indicating that the appellant has a "micro deletion which is a susceptibility locus for neurodevelopmental disorders."
4. A 3-page letter, dated 29 March 2017, written by a geneticist, indicating that the appellant's rhabdomyolysis with relatively minor exercise suggests a metabolic disorder but the panel conducted has largely eliminated the known possibilities. The letter indicates that it seems likely that he might suffer similar episodes with significant exercise and it is difficult to know how much activity to advise or how to monitor it.

#### **5. Request for Reconsideration**

In the appellant's signed Request for Reconsideration, dated 18 June 2018, the following reasons for the request are provided: *{Appellant} disagrees with the assessment. The adjudicator appears to place more weight on the physician's portion. Employment and Assistance for Person with Disabilities Legislation must be interpreted with a benevolent purpose in mind. There is no statutory requirement that both the physician and assessor must confirm the impairment – it is either.*

Included with the Request for Reconsideration is a 6-page advocate's letter, in which it is argued that the appellant meets all PWD criteria set out in the legislation and that the information provided by the RN should be preferred over the information provided by the GP.

Additional information before the panel on appeal consisted of the following:

#### **Notice of Appeal**

In the Notice of Appeal dated 26 July 2018, the following reasons for appeal are provided *[Appellant] disagrees with the weight given to the physician's portion given the evident bias and the ministry's decision makes reference to the assessor not being a nurse practitioner.*

#### **Appeal Submissions**

At the hearing, the appellant, with assistance from an advocate, argued that the ministry erred in its weighing of the evidence as it preferred the information provided by the GP over the information provided by the RN. In addition, the appellant argued that there is no statutory requirement for confirmation of the appellant's eligibility from both the RN and GP. The appellant's position is that the right approach is to consider the scales of probability, and erring on the side of caution with a benevolent purpose in mind to resolve any ambiguities in favour of the appellant. As well, the appellant urged the panel to consider that 3 advocates, the RN and appellant all attest to the appellant's eligibility. As well, the appellant argued that the GP has displayed inherent bias, as it is evident that the GP has a concern with clients on disability.

The ministry relied on the reconsideration decision.

#### **Admissibility**

The panel finds that the information provided in the appellant's Notice of Appeal and at the hearing consists of argument, which does not require an admissibility determination in accordance with section 22 (4)(b) 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 four of the five statutory requirements of Section 2 of the *EAPWDA* for PWD designation 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 has a severe mental or severe physical impairment;
- that the appellant's severe mental or physical impairment, in the opinion of a medical practitioner or nurse practitioner, is likely to continue for at least 2 years;
- that the appellant's severe mental or physical impairment, in the opinion of a prescribed professional, directly and significantly restricts his ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and
- as a result of those restrictions, he requires help to perform those activities.

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

### 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 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.

### **Duration**

The legislation requires that for PWD designation, an opinion from either a medical practitioner or nurse practitioner is required to determine that the person's severe impairment is likely to continue for at least two years.

In the reconsideration decision, the ministry noted that the GP's assessment in the MR does not indicate or speak to the expected duration of the appellant's impairment. The ministry also noted that the assessor who completed the AR is a RN, not a nurse practitioner. The ministry considered the March 29 geneticist's letter, noting that it spoke to the possibility of recurring episodes rather than the duration of impairment. The ministry concluded that it could not be established that the appellant's impairment, in the opinion of a nurse practitioner or medical practitioner, is likely to continue for two years.

At the hearing, the appellant argued that the RN is technically qualified to complete the PWD application, according to the BC government website. As well, the appellant argued that the supplemental information, specifically the geneticist's March 29 letter does speak to duration of impairment.

The panel finds that the legislation clearly states that the opinion of a medical practitioner or nurse practitioner is required for duration. As a result, the panel finds that information provided by a Registered Nurse is not "the opinion of a medical practitioner or nurse practitioner". In addition, the panel finds that the geneticist's statement that *It does seem likely that he may night suffer similar episodes with significant exercise, so it is difficult to know how much activity to advise, or indeed how to monitor it* does not speak to duration. The panel finds the ministry's conclusion that this statement speaks to the likelihood of recurring episodes rather than expected duration is a reasonable application of the legislation. The panel concludes that the ministry's determination that the duration requirement has not been established is reasonably supported by the evidence and a reasonable application of the legislation.

### **Severity of impairment**

The legislation requires that for PWD designation, the minister must be "satisfied" that the person has a severe mental or physical impairment. The legislation makes it clear that the determination of severity is at the discretion of the minister, considering all the evidence, including that of the appellant. Diagnosis of a serious medical condition or the identification of mental or physical deficits does not in itself determine severity of impairment.

#### Severity of physical impairment

In the reconsideration decision, the ministry determined that a severe impairment of physical functioning had not been established. In making this determination, the ministry considered the functional skills assessment by the GP noting that the appellant is able to walk 4+ blocks unaided, climb 5+ steps unaided, limitations in lifting are not indicated and the appellant has no limitation with remaining seated. The ministry argued that while the RN states in the AR that the appellant suffers from a number of medical conditions and flare-ups, the GP does not describe these conditions in the MR. As well, the ministry argued that while the RN has indicated in the AR that the appellant suffers from flare-ups, she has not described the frequency of such flare-ups. The ministry noted that the RN had met the appellant for the first time when completing the AR, while the GP has known the appellant for more than 10 years and has seen him 11+ times in the past 12 months. The ministry indicated its inclination to put more weight on the assessment of the GP. The ministry's conclusion on this criterion was that a severe impairment of the appellant's physical functioning had not been established.

The panel finds that the ministry's determination was reasonable. The panel notes that the assessments of the appellant's functional capacity and mobility and physical ability assessments in the MR and AR are not consistent with one another and do not provide a clear picture of the appellant's ability to function independently. The argument provided by the appellant is that the information in the AR is to be preferred because the GP is biased and the information he has provided does not accurately reflect the appellant's situation. However, the panel finds that despite assertions of bias by the appellant's advocates, the physician's statements in the MR do not reflect a

severe physical impairment. The appellant also argued that any ambiguities should be resolved in favour of the appellant. However, the panel finds that, when faced with conflicting information in the MR and AR, the ministry's decision to prefer the information from the prescribed professional who has known the appellant for more than 10 years over the information provided by the prescribed professional who had met him one time is reasonable. The panel finds that the information provided in the assessments, and the additional medical letters from the two geneticists, does not provide a clear, consistent and detailed account of the impacts of the appellant's limitations. The panel finds that the ministry's determination, that a severe physical impairment has not been established, is reasonably supported by the evidence.

#### Severity of mental impairment

In the reconsideration decision, the ministry found that the appellant does not have a severe mental impairment. The ministry noted that the GP's assessment in the MR did not indicate that the appellant has difficulties with communication. The ministry considered that in the MR the GP indicates no deficits in the areas of emotional disturbance and memory and in the AR the RN assesses a number of major, moderate and minor impacts. As well, the ministry considered the GP's assessment of the appellant's social functioning abilities. In this consideration, the ministry took note of the GP's MR assessment of periodic restrictions with social functioning and noted the absence of information relating to frequency or duration restrictions. The ministry noted that the RN has indicated impacts to communication, while the GP indicates no difficulties. As well, the ministry noted that the RN has indicated that the appellant has significant deficits with cognitive and emotional functioning, while the GP has indicated no significant deficits. The ministry indicated its inclination to put more weight on the assessment of the GP because the RN had met the appellant for the first time when completing the AR, while the GP has known the appellant for more than 10 years and has seen him 11+ times in the past 12 months. As well, the ministry considered that the RN indicated a need for continuous assistance with 4 of the 5 listed area of social functioning, while the GP indicated periodic restrictions to social functioning. The ministry concluded that the information provided had not established a severe impairment in mental functioning.

The panel finds that the ministry's determination that a severe mental impairment has not been established was reasonable. The panel notes the presence of a number of inconsistencies between the MR and AR. Again the panel finds that, when faced with conflicting information in the MR and AR, the ministry's decision to prefer the information from the prescribed professional who has known the appellant for more than 10 years over the information provided by the prescribed professional who had met him one time is reasonable. As well, the panel also notes that both the RN's and GP's assessments relating to decision-making indicate that the appellant is independent in most of these areas. The panel finds that the ministry's conclusion that the information provided does not establish a severe mental impairment and that this criterion was not met is reasonably supported by the evidence.

#### **Direct and significant restrictions in the ability to perform DLA**

The legislation specifies that the minister assess direct and significant restrictions in the ability to perform DLA in consideration of the opinion of a prescribed professional, in this case the GP and RN. At issue in this assessment is the degree of restriction in the appellant's ability to perform the DLA listed in section 2(1)(a) and (b) of the EAPWDR applicable to a person with a severe mental or physical impairment.

The ministry was not satisfied that the appellant has a severe impairment that, in the opinion of a prescribed professional, directly and significantly restricts his ability to perform DLA. In reaching this conclusion, the ministry noted that the appellant has not been prescribed medication that impacts his ability to perform DLA. The ministry considered the GP's assessment that the appellant is not restricted with any DLA except for social function. The ministry considered that the RN's AR assessment indicates that the appellant is restricted with some areas of personal care, basic housekeeping, shopping, meals, paying rent/bills, medications, and transportation but the GP has indicated no restrictions in all of these areas. The ministry indicated its inclination to put more weight on the assessment of the GP because the RN had met the appellant for the first time when completing the AR, while the GP has known the appellant for more than 10 years and has seen him 11+ times in the past 12 months. The ministry concluded that the assessments provided did not provide enough evidence to confirm that the appellant has a severe impairment that significantly restricts his ability to perform DLA continuously or periodically for extended periods.

The panel finds that the ministry's determination that the assessments provided do not establish that a severe impairment significantly restricts the appellant's ability to perform DLA continuously or periodically for extended periods was reasonable. The panel notes that the legislation specifies that direct and significant restrictions to DLA must be in the opinion of a prescribed professional. The panel finds that, in relation to the areas where some periodic restriction is assessed, neither the RN nor GP has provided sufficient information in relation to the nature, degree and duration of the assistance required by the appellant to establish that there are significant restrictions for extended periods in the appellant's ability to perform DLA. As well, the panel finds that the only area in which the



GP and RN seem to agree that there are restrictions in social function. The panel finds that the appellant is restricted with respect to social functioning. There is disagreement between the MR and AR with respect to all other areas, with the RN indicating some level of restriction in many areas and the GP indicating no restrictions in any areas. The panel notes that the appellant has argued that the GP's information is biased and inaccurate. However, the panel finds that the ministry's approach to addressing the conflicting information in the MR and AR is reasonable. Given the limitations in the information before the ministry, the panel concludes that the ministry's determination that this criterion has not been met is reasonably supported by the evidence.

### **Help required**

The legislation 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. 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, significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

In the reconsideration decision, the ministry determined that as it had not been established that appellant's ability to perform DLA were significantly restricted, it cannot be determined that significant help is required. While the information provided indicates that the appellant does receive assistance from other people, and that he requires more assistance and/or supervision than he is currently receiving, the panel has concluded that the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established. As such, the panel finds that the ministry 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, determining that the appellant had not met all of the legislated criteria for PWD designation, was a reasonable application of the legislation in the circumstances of the appellant and reasonably supported by the evidence. The panel confirms the ministry's reconsideration decision. The appellant is not successful on appeal.

**PART G – ORDER**

**THE PANEL DECISION IS: (Check one)**

**UNANIMOUS**

**BY MAJORITY**

**THE PANEL**

**CONFIRMS THE MINISTRY DECISION**

**RESCINDS THE MINISTRY DECISION**

If the ministry decision is rescinded, is the panel decision referred back to the Minister for a decision as to amount?  Yes  No

**LEGISLATIVE AUTHORITY FOR THE DECISION:**

*Employment and Assistance Act*

Section 24(1)(a)  or Section 24(1)(b)

and

Section 24(2)(a)  or Section 24(2)(b)

**PART H – SIGNATURES**

PRINT NAME

Jennifer Smith

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2018/08/16

PRINT NAME

Glenn Prior

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018/08/16

PRINT NAME

Donald Stedeford

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018/08/16