

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 July 13, 2018, which held that the appellant did not meet 3 of the 5 statutory requirements of section 2 of the *Employment and Assistance for Persons with Disabilities Act* (EAPWDA) for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that a medical practitioner has confirmed that the appellant's impairment is likely to continue for at least 2 years.

However, the ministry was not satisfied that:

- the appellant has a severe physical or mental impairment;
- the appellant's daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and
- as a result of 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.

The ministry also determined that the appellant is not in any of the classes of persons set out in section 2.1 of the *Employment and Assistance for Persons with Disabilities Regulation* who may be eligible for PWD designation on alternative grounds.

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

Information before the ministry at reconsideration

- 1) The appellant's PWD application comprised of:
 - A Medical Report (MR) dated March 28, 2017, signed by a general practitioner (GP) who has known the appellant for between 2 weeks and 1 month, has seen the appellant 3 times and will continue to follow the appellant;
 - An Assessor Report (AR) dated March 29, 2017, completed by the same GP; and
 - The appellant's self-report (SR) section of the PWD application, dated April 3, 2017.
- 2) The appellant's Request for Reconsideration, with the following attachments:
 - i) A July 3, 2018 letter from the appellant completed with the assistance of his support worker without whom, the appellant notes, he could not have articulated his impairments.
 - ii) A July 4, 2018 letter from the support worker, who is Director of Client Services for a brain injury organization.

Documents provided on appeal

- 1) The appellant's Notice of Appeal (NOA) dated July 24, 2018 in which the appellant states that the GP hurriedly completed the PWD application without knowing the appellant and that the GP provided some misinformation. He has now been able to get a personal doctor and will take a new form to this doctor.
- 2) By email on August 14, 2018, the ministry indicated that its submission is the reconsideration summary provided in its reconsideration decision.

The panel accepts the information on appeal from the appellant and ministry as argument. The arguments of both parties are set out in Part F of this decision.

Summary of relevant evidence

Diagnoses and Health History

In the MR, the GP indicates that the appellant had a stroke in 2007 resulting in:

- Partial blindness both eyes. The GP includes a diagram showing half of both eyes blackened out.
- Right leg and arm residual deficits. Unable to use right arm, cannot use pen/paper or lift over 70 degrees, and is not able to use manual tools. Can barely carry grocery bags with it. Right leg requires brace for ambulation.
- Cognitive impairment/memory loss. Poor memory.

The GP describes the medical conditions as "Fairly severe."

The support worker writes that the appellant has very significant physical and mental impairments as a result of his brain injury. The appellant requires support from his mother and the brain injury organization on a daily basis. The support worker also notes that the physician who completed the PWD application was not known to the appellant and was unaware of the severity of the appellant's disability.

Physical Impairment

The GP reports:

- Able to walk less than 1 block unaided on a flat surface. Right leg brace required for walking. Walking indoors and standing are managed independently.
- Able to climb 5+ stairs unaided. "Can probably do stairs if there is rail."
- Able to lift 15 - 35 lbs.
- No limitations for remaining seated.
- Right leg brace is required for (illegible – could be "long" as the ministry indicates or could be "any") walking. Leg brace/orthosis is used for walking outdoors, climbing stairs, standing, and lifting and carrying/holding. Also right arm ↓↓ ROM.
- Reading ability is poor due to visual deficit/cognitive (illegible) and writing is satisfactory ("slow right hand 0 (illegible).")

In his SR, the appellant reports that he has partial paralysis on the right side – very limited use of his right arm, loss of muscle function in right ankle and foot. Total loss of vision in the right half of both eyes.

In his July 3, 2018 letter, the appellant notes that he was involved in an ATV accident, while the GP reported that the appellant had a stroke. The appellant writes that there were a lot of inaccuracies in his PWD application and that he cannot manage without significant daily supports. He describes his right leg as "not very useful", adding that he can weight bear but often twists his ankle, trips or falls. He walks very slowly and is unsteady. Due to having 50% of his vision, he often walks into objects or people, knocks things over, trips or falls.

The support worker writes that the appellant has very significant physical and mental impairments as a result of his brain injury and that he requires support from his mother and the brain injury organization on a daily basis.

Mental Impairment

In the MR, the GP reports:

- Significant deficits with 2 of 11 listed areas of cognitive and emotional function - executive (planning) and memory (recall information).
- Cognitive difficulties with communication – poor memory.
- Social functioning is not restricted.

In the AR, the GP reports:

- Good ability to communicate in the areas of speaking and writing; above noted limitations with reading due to visual and cognitive problems.
- Where asked to assess the impact on daily functioning for listed aspects of cognitive and emotional functioning, the GP assesses a major impact on motor activity (leg and arm) and moderate impacts for attention/concentration, executive, and memory.
- Good functioning with immediate and extended social networks.

In the SR, the appellant writes that perhaps the most damaging result of his accident is his mental ability being sharply slashed. He can no longer think quickly; it takes him a bit of time.

In his reconsideration letter, the appellant writes that, in terms of mental impairment, there are an additional 6 areas of cognitive and emotional functioning that are moderately impacted. He describes problems with sleep disturbance, confusion/ comprehension and communication, poor judgment, loss of interest in activities, and short term memory.

DLA

The GP reports the following:

- The appellant has not been prescribed any medication and/or treatments that interfere with the ability to perform DLA.
- The ability to perform personal self-care is continuously restricted. Dressing, grooming and bathing take 3 times longer due to right arm and leg disability. Other listed tasks are managed independently.
- Basic housework is continuously restricted and requires periodic assistance from another person.
- Daily shopping is continuously restricted. Going to and from stores, paying for purchases and carrying purchases home are managed independently. Reading prices and labels and making appropriate choices require periodic assistance from another person.
- Mobility inside and outside the home are continuously restricted. Functioning also as described above under physical impairment.
- Meal preparation is continuously restricted. Meal planning, food preparation and safe storage of food are managed independently. Cooking takes significantly longer. "Arm (illegible)."
- The GP describes the assistance needed as "other people required for meal prep, house work, otherwise takes > 3 times more to complete."
- Management of medications, use of transportation, management of finances, and social functioning are not restricted (though periodic support/supervision is required for 1 of 5 listed aspects of social functioning – deal appropriately with unexpected demands).

Additional commentary by the GP is "Cognitive – memory impairment. Needed to ask for (illegible) concentration issues." Right arm and leg and visual problems as previously described.

In the SR, the appellant explains that it takes an excessive amount of time, about 3 times as long, for personal care, to prepare simple meals and to eat. The appellant does everything with his left hand, and has struggled with tendonitis in that arm for nearly 2 years. With slowed thought processes, half blindness, and only one arm to do minimal work, his job opportunities are very few, and near minimum wage.

In his reconsideration letter, the appellant writes that he cannot assist his mother with cooking or cook for himself because he cut his fingers and has very poor coordination with his left hand. Everything he does takes significantly longer than typical to perform. His mother does all the meal prep, cooking, basic housework and provides transportation. She assists him with laundry and grocery shopping. He would not be able to manage independently without this assistance.

Information from the support worker is as described under physical impairment.

Need for Help

The GP indicates that the appellant routinely used a right leg brace and orthosis. Assistance is provided by family and friends.

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 appellant is not a person described in section 2.1 of the EAPWDR and that the requirements of section 2(2) of the EAPWDA were not met because:

- 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?

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

In the absence of any evidence or argument respecting eligibility for PWD designation under section 2.1 of the EAPWDR, the panel finds that the ministry reasonably determined that it has not been established that the appellant falls within the prescribed classes of persons under that section. The panel's discussion below is limited to eligibility for PWD designation under section 2 of the EAPWDA and section 2 of the EAPWDR.

Physical Impairment

The appellant is diagnosed by a medical practitioner, the GP, with partial blindness in both eyes and residual deficits with his right arm and leg as a result of a stroke.

Noting that his impairment is the result of an accident, the appellant argues that the resulting partial paralysis of his right side leaves him with very limited use of his right arm and that because he was right handed, he now does everything with his left hand and takes significantly longer than typical. The appellant describes problems with his mobility because his right leg "is not very useful" and because his vision loss causes him to bump into things and to fall.

The ministry's position is that to assess severity of physical impairment, it must consider the nature of the impairment and the extent of its impact on daily functioning as evidenced by limitations and restrictions in mobility, physical ability and functional skills. The ministry states that while all evidence, including that of the applicant is taken into account, the legislation is clear that the fundamental basis for the analysis is the evidence from a prescribed professional. Accordingly, while the information from the appellant's support worker is helpful to gain insight into the appellant's medical condition, as there is no indication that the support worker is qualified as a prescribed professional as defined in the EAPWDR, the ministry must rely on the assessments provided by the GP in the PWD application.

In considering the GP's assessments, the ministry notes that the appellant independently manages standing and walking indoors, that he can walk less than 1 block unaided and requires a "right leg brace for long walking." The ministry does not consider this use of a leg brace in itself to be indicative of a severe level of impairment and considers the other physical functional skills and abilities assessed by the GP. In terms of lifting, the ministry considers that although periodic assistance from another person with carrying and holding items is required,

being able to lift between 15 and 35 lbs., presumably with the left arm, indicates a reasonable level of functioning in this area. The ministry finds the information respecting the appellant's ability to climb stairs contradictory as the appellant is assessed as "probably" able to climb 5+ steps unaided if there is a rail and also as requiring a leg brace/orthosis to climb stairs. The ministry also considers that the GP's narrative in the MR suggests that the assessments are not based on an actual medical assessment of the appellant's ability but the GP's estimation. The ministry concludes that, as a result, it is unable to determine the appellant's ability to climb stairs. The ministry determines that while the appellant has limitations to his physical functioning, the functional skills assessment and the ability to manage activities requiring mobility and physical ability do not establish a severe impairment of physical functioning.

The panel concludes that the ministry was reasonable when determining that the information does not establish a severe physical impairment. In reaching this conclusion, the panel acknowledges the appellant's concern that he was unknown to the GP and that the GP provided some misinformation, but notes that no additional information from a prescribed professional was provided. Accordingly, the ministry was reasonable to rely on the information from the GP when determining if it is satisfied that there is a severe impairment. The appellant reports that he walks slowly and unsteadily due to partial paralysis of his right side and that his mobility is also impacted by his vision loss and the GP reports that a right leg brace/orthosis is required for walking outdoors. While this information clearly establishes limitations to the appellant's physical functioning, the overall level of physical functioning assessed by the GP was reasonably viewed by the ministry as not establishing severe physical impairment. In particular, the panel notes that the appellant is reported as independently managing walking indoors and as being able to lift between 15 -35 lbs., (reasonably presumed as reflecting functioning of the appellant's left arm), and as requiring only periodic assistance with carrying and holding. The appellant does not address his lifting ability. As the ministry notes, the appellant's ability to climb stairs is unclear, with the GP reporting that the appellant is probably able to manage 5+ steps if there is a stair rail. The appellant does not dispute this information and the panel notes that stair railings are routinely used by people to safely manage climbing and descending stairs and are therefore not assistive devices as defined in the legislation – "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."

Based on the available information, the ministry was reasonable when concluding that the appellant's functional skills and mobility and physical abilities do not establish a severe physical impairment.

Mental Impairment

The appellant is diagnosed with cognitive impairment/memory loss resulting from a stroke.

The appellant's position is that the impact on his mental ability is perhaps the most damaging result of his accident. Arguing that the GP has not adequately reflected the impact of his injury, the appellant states that there are an additional six areas of cognitive function that are moderately impacted.

Acknowledging that difficulty with reading and writing would be challenging in many situations, the ministry concludes that it does not establish the presence of a severe impairment of physical (*sic*) function. Noting that the additional 6 areas of moderate impact on cognitive function reported by the appellant have not been confirmed by a prescribed professional, the ministry relies more heavily on the GP's assessments and concludes that the information provided does not establish a severe impairment of mental functioning. Respecting social functioning, the ministry notes that while the appellant periodically requires assistance to deal with unexpected demands, all other areas of social functioning are not restricted.

The panel concludes that the ministry is reasonable in determining that a severe mental impairment has not been established. While the appellant feels that the impact on his cognitive functioning may be the most significant impact of his accident, the assessment by the GP does not reflect a severe impairment of mental function. In particular, out of 14 listed areas of cognitive and emotional function, only one major impact on daily functioning

was reported and it appears to relate to the physical functioning of the appellant's leg and arm, rather than the cognitive related examples of motor activity problems described in the AR. Moderate impacts on daily functioning are reported for three areas - attention/concentration, executive and memory – with no impact on daily functioning assessed for the remaining 10 areas. Additionally, with the exception of making appropriate shopping choices, all other listed decision making tasks are managed independently by the appellant. In terms of social functioning, the appellant is assessed as having good functioning with both immediate and extended social networks and as independently managing all but one aspect of social functioning, with only periodic assistance required for dealing with unexpected demands. In terms of communication, the GP identifies that the appellant's reading ability is poor due to both visual and cognitive problems and that there are cognitive difficulties, described as poor memory, but in the absence of further description, and again noting the absence of major impacts on daily cognitive and emotional functioning, these limitations do not establish severe mental impairment.

Accordingly, the panel finds that the ministry was reasonable in concluding that a severe mental impairment was not 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 he needs daily assistance from his mother and support worker.

The ministry's argues that the GP's assessments are lacking information in some respects as there is no description of the periodic assistance required with some activities in order to determine if the restrictions are significant and for extended periods. The ministry also considers the GP's information to be contradictory in some respects, noting that the GP comments that meal preparation and house work require other people but also reports that the appellant is independent with food preparation and only periodic assistance is required for basic housekeeping. Similarly, mobility indoors is reported as continuously restricted in the MR but in the AR the appellant is reported as independent with walking indoors. The ministry also does not consider taking three times longer to complete three activities of personal care represents a significant restriction in the appellant's ability to perform those activities. The ministry also argues that there is a discrepancy between the level of assistance the appellant describes that he receives from his mother and the assistance the GP reports is needed which makes it difficult to determine whether the level of assistance provided by the appellant's mother is because the appellant is unable to do these activities or if it is related to familial roles within the home.

The legislation expressly requires the opinion of a prescribed professional when assessing an applicant's ability to perform DLA. Accordingly, the ministry has reasonably given greater weight to the GP's assessment of DLA where

the information from the appellant conflicts with that of the GP. The GP indicates that assistive devices (brace/orthosis) are used to mobilize outdoors (part of the DLA move about indoors and outdoors), that the appellant takes three times longer with some listed tasks of the DLA personal care and significantly longer with one listed task of the DLA meals, and that the DLA basic housekeeping, two tasks of the DLA shopping and one aspect of social functioning require periodic assistance or support from another person. With these exceptions, the appellant is assessed as independently managing all other listed tasks of DLA. Additionally, as noted by the ministry, there is no description of the periodic assistance required so that the significance of the restriction can be assessed. As the appellant is reported as independently managing most DLA tasks and there is insufficient information to establish that the need for periodic assistance with some DLA tasks reflects a significant restriction that is for extended periods, the ministry is reasonable in concluding that there is not enough evidence to establish that in the opinion of a prescribed professional the appellant's impairment *significantly* restricts his ability to perform DLA either *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*, 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 of the need for help criterion. 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 therefore confirms the 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

Jane Nielsen

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2018/08/30

PRINT NAME

Chris McEwan

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018/08/30

PRINT NAME

David Roberts

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2018/08/30