

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the Ministry) Reconsideration Decision dated August 16, 2019, which found that the Appellant did not meet three of the five statutory requirements of Section 2 of the *Employment and Assistance for Persons with Disabilities Act* (EAPWDA) for designation as a person with disabilities (PWD). While the Ministry found that the Appellant met the age requirement and had an impairment which was likely to continue for at least two years, the Ministry was not satisfied that the evidence establishes 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 these restrictions, the Appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

The Ministry also found that the Appellant is not one of the prescribed classes of persons who may be eligible for PWD designation on the alternative grounds set out in Section 2.1 of the *Employment and Assistance for Persons with Disabilities Regulation* (EAPWDR) and the Appellant did not appeal the decision on this basis.

PART D – RELEVANT LEGISLATION

EAPWDA, Sections 2 and 3

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

Employment and Assistance Act (EAA), Section 22(4)

Employment and Assistance Regulation (EAR), Section 86(b)

PART E – SUMMARY OF FACTS

The Appellant is a sole applicant for the PWD designation currently in receipt of income assistance.

The evidence before the Ministry at the time of the Reconsideration Decision included the PWD Application comprised of a Medical Report (MR) dated April 29, 2019 and completed by the Appellant's General Practitioner (GP) who has known the Appellant since August 2018 and who has seen the Appellant 11 or more times in the past year, and an Assessor Report (AR) dated April 29, 2019 and also completed by the GP. The Appellant did not complete a Self Report (SR).

The evidence also included:

- A Request for Reconsideration (RFR) form, dated July 4, 2019, in which the Appellant states that he meets the eligibility requirements for a PWD designation as set out in Section 3 of the EAPWDA and requesting an extension of the deadline for submitting his RFR so that he can gather more information;
- Photocopies of the front and back of a Canadian National Institute for the Blind (CNIB) National Identity Card bearing the name and photograph of the Appellant and valid from May 6, 2015 to May 8, 2020;
- Photocopies of the front and back of a CNIB TransLink Compass Card bearing the name and photograph of the Appellant and valid from February 2017 to February, 2022; and,
- One page document in the form of the GP's response, dated June 13, 2019, (June 2019 GP Response) to a request from a Ministry adjudicator for clarification with respect to two aspects of the GP's diagnoses in the MR, specifically:
 - Regarding the Appellant's bladder cancer, is he currently undergoing treatment and if so, what is the prognosis? To which the GP has responded "*Cystoscopic ablation, regular cystoscopy moving forward*"; and,
 - Regarding the Appellant's chronic kidney disease or chronic renal failure (CRF), is the Appellant on dialysis and if so, what is the frequency and what affects does it have on DLA? To which the GP has responded "*No*".

Diagnoses

In the MR, the GP diagnosed the Appellant with urinary bladder cancer with an original onset of 2016 and a recurrence in 2018, diabetes mellitus (DM) causing visual disruption with no date of onset identified, a concussion, intracranial hemorrhage and post-concussion neurological symptoms resulting from an accident in November 2018, and visual impairment secondary to DM, congestive heart failure and CRF, all with the date of onset not identified.

Physical Impairment

In the health history section of the MR, where the prescribed professional is asked to indicate the severity of the applicant's impairment and how his medical condition impairs him, the GP has written that the Appellant suffered a severe fall in the winter of 2018 which caused intracranial bleeding and from which he has gradually recovered, but from which he still complains about daily headaches and balance

issues. The GP states that the intracranial bleeding, his bladder cancer, kidney failure and visual impairment resulting from diabetic retinopathy have all made him “*unfit from an occupational perspective*”. The GP also references the Appellant’s “*long history of DM along with CRF*” but does not identify their severity or impacts on his impairment. With respect to functional skills, the GP reports in the MR that the Appellant can walk 1 to 2 blocks unaided on a flat surface, climb 5 or more steps unaided, lift 2 to 7 kg, and has no limitations with respect to the amount of time he can remain seated. Where asked in the MR to provide any additional information relevant to understanding the applicant’s medical condition, the nature and extent of impairments and the impact on his DLA, the GP was written “*Intracranial Hemorrhage – post concussion ... > ongoing lingering post-concussion symptoms including imbalance and headaches – visual impairment → secondary to DM. (Patient) unable to drive, contributes to imbalance too.*”.

In the section of the AR where the assessor is asked to indicate the assistance required related to impairments that directly restrict the applicant’s management of mobility and physical abilities, the GP has indicated that the Appellant uses an assistive device for walking indoors and outdoors, standing, lifting and carrying, and that he avoids climbing stairs, adding the comment “*The (patient) is quite unsteady in terms of physical abilities*”. In the section of the AR where the assessor is asked to describe the type and duration of programs or services that he has provided to the applicant, the GP has written “*As patient’s family doctor; I have directed him to multiple specialists for various medical conditions. I follow up with his progress.*”.

In the June 2019 GP Response, the GP indicates that the Appellant’s bladder cancer is currently undergoing cystoscopic ablation treatment and identifies the prognosis as “*regular cystoscopy moving forward*” and that the Appellant is not on dialysis for his CRF.

Mental Impairment

In the MR, the GP indicates that the Appellant does not have any difficulties with communication but indicates that the Appellant has significant deficits with cognitive and emotional function in the area of memory, with no explanation or comments provided.

The GP has not provided any information in the section of the AR where the assessor is asked to identify the applicant’s mental impairments that impact his ability to manage DLA. In the section of the AR where the assessor is asked to indicate the level of ability to communicate, the GP assesses a good ability in all areas (speaking, reading, writing and hearing). In the section of the AR where the assessor is asked to indicate to what degree the applicant’s mental impairment restricts or impacts his functioning, the GP has indicated a moderate impact on his bodily functions (“*sleep*”), attention/concentration, executive functioning and memory, and no impact in the other listed areas (consciousness, emotion, impulse control, insight and judgment, motivation, motor activity, language, psychotic symptoms, or any other neuropsychological or emotional or mental problems).

The Appellant does not argue that he has a mental impairment.

Restrictions in the Ability to Perform DLA

In the MR, the GP indicates that the Appellant has been prescribed medications or treatments that interfere with his ability to perform DLA, adding “*antiglycemic meds can cause hypoglycemic episodes*

and fainting spells". The GP also indicates that the anticipated duration of the medications or treatments is lifelong.

In the AR, the GP states that the Appellant is independent with respect to all listed DLA in all listed areas and activities. In the section of the AR where the assessor is asked to indicate the level of support or supervision required by the applicant, the GP indicates that the Appellant is independent in all areas and has not provided any additional comments. Where asked to provide any additional information that may be relevant to understanding the nature and extent of the applicant's impairment and its effect on his DLA, the GP has written "N/A".

The Appellant did not identify any restrictions in his ability to perform DLA.

Need for Help

In the MR the GP indicates that the Appellant does not require any prostheses or aids for his impairment, adding "*not at this time*".

In the AR, the GP has indicated that the Appellant lives alone and that his friends provide the help required with his DLA. Where asked to describe what assistance is necessary where none is available, the GP has indicated that the Appellant needs help in transportation to appointments. In the section of the AR where the assessor is asked what equipment or devices the applicant routinely uses to help compensate for his impairment, the GP has ticked "Cane" and added the comment "*needs to use cane – walker to help with balance and avoiding falls*". The GP has also indicated that the Appellant does not have a guide animal.

The Appellant did not identify any need for help.

Additional Information Submitted after Reconsideration

In his Notice of Appeal (NOA) dated August 26, 2019, the Appellant states that he believes that he is more disabled than the Ministry believes.

The Appellant did not attend the hearing. After confirming that the Appellant was notified of the hearing, the Panel proceeded with the hearing pursuant to Section 86(b) of the EAR.

At the hearing, the Ministry summarized the reasons for its decision.

Admissibility of Additional Information

Section 22(4) of the EAA provides that panels may admit as evidence (i.e. take into account in making its decision) the information and records that were before the Ministry when the decision being appealed was made and "*oral and written testimony in support of the information and records*" before the Ministry when the decision being appealed was made – i.e. information that substantiates or corroborates the information that was before the Ministry at reconsideration. Because a panel can accept oral and written testimony in support of the information and records before the Ministry when the decision was made, there is limited discretion for a panel to admit new evidence. Accordingly, instead of asking whether the decision under appeal was reasonable at the time it was made, panels must determine whether the

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decision under appeal was reasonable based on all admissible evidence, including any new evidence admitted under EAPWDA Section 22(4).

The Panel considered the written information in the NOA to be argument. No other evidence was submitted by either party after the Reconsideration Decision was made.

PART F – REASONS FOR PANEL DECISION

The issue under appeal is whether the Ministry's Reconsideration Decision, which found that the Appellant is not eligible for 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. Was it reasonable for the Ministry to determine that the evidence does not establish that the Appellant has a severe mental or physical impairment and that his DLA are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods? Was it reasonable for the Ministry to determine that as a result of those restrictions, it could not be determined that the Appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA?

The criteria for being designated as a PWD are set out in Section 2 of the EAPWDA as follows:

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).

Eligibility of family unit

3 For the purposes of this Act, a family unit is eligible, in relation to disability assistance, hardship assistance or a supplement, if

- (a) each person in the family unit on whose account the disability assistance, hardship assistance or supplement is provided satisfies the initial and continuing conditions of eligibility established under this Act, and
- (b) the family unit has not been declared ineligible for the disability assistance, hardship assistance or supplement under this Act.

The EAPWDR provides as follows:

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 ...

Part 1.1 — Persons with Disabilities

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).

The EAA provides as follows:

Panels of the tribunal to conduct appeals

22 (4) In a hearing referred to in subsection (3), a panel may admit as evidence only

- (a) the information and records that were before the minister when the decision being appealed was made, and
- (b) oral or written testimony in support of the information and records referred to in paragraph (a).

The EAR provides as follows:

Procedures

86 The practices and procedures of a panel include the following: ...

- (b) the panel may hear an appeal in the absence of a party if the party was notified of the hearing ...

Severity of Impairment

The Ministry's position is that, based on the information provided in his original application for the PWD designation and his RFR, the Ministry is unable to confirm that the Appellant has either a severe physical impairment or a severe mental impairment. The Appellant's position is that he meets the eligibility requirements for a PWD designation as set out in the EAA and that he is more disabled than the Ministry believes he is.

Panel Decision

Neither the terms “*impairment*” nor “*severe*” are defined in the EAPWDA. The Cambridge Dictionary defines “*impairment*” in the medical context to be “*a medical condition which results in restrictions to a person’s ability to function independently or effectively*” and defines “*severe*” as “*causing very great pain, difficulty, worry, damage, etc.; very serious*”. “*Impairment*” is defined in the MR and AR sections of the PWD application form to be “*a loss or abnormality of psychological, anatomical, or physiological structure or function causing a restriction in the ability to function independently, appropriately or for a reasonable duration*”. The Panel finds that the Ministry’s definition of “*impairment*” as set out in the MR and the AR, while not defined in the legislation, is a reasonable definition of the term for the purpose of partially assessing an applicant’s eligibility for the PWD designation.

The Ministry has based its assessment on the lack of evidence of a severe impairment to the Appellant’s physical functioning on the information that the GP provides in the MR; specifically that the Appellant can walk 1 to 2 blocks unaided on a flat surface, climb 5 or more steps unaided, lift 2 to 7 kg, and has no limitations with respect to the amount of time he can remain seated. In addition, the Ministry argues that, while the Appellant requires an assistive device for all mobility and physical activity tasks, the use of the assistive device for these activities “*does not support a severe degree of impairment given the functional skills reported in the MR*”. In its Reconsideration Decision, the Ministry also states that, despite the Appellant’s reported need or medical and assistive devices, the GP reports that the Appellant is independent in all DLA, and that therefore it is not clear that there is a severe degree of impairment.

The Panel finds the Ministry’s analysis of all of the available information to be a sound assessment of the Appellant’s physical capabilities. In addition, the Panel notes that the Appellant has not argued that he has a mental impairment. Having considered all of the evidence, the Panel finds that, based on all of the available evidence, the Ministry reasonably determined that severe impairments of the Appellant’s mental and physical functioning have not been established.

Restrictions in the Ability to Perform DLA

The Ministry’s position is that, as the GP has reported that the Appellant is independent with respect to all DLA and because there is no narrative of information provided to indicate that the Appellant’s impairment significantly restricts his DLA, the Ministry is unable to confirm that the Appellant meets this criterion. The Appellant has not commented on his ability to perform DLA.

Panel Decision

Section 2(2)(b) of the EAPWDA requires that the Ministry be satisfied that a prescribed professional has provided an opinion that an applicant’s severe impairment *directly* and *significantly* restricts his or her DLA, continuously or periodically for extended periods. In this case, the GP is the prescribed professional. DLA are defined in Section 2(1) of the EAPWDR and are also listed in the MR and, with additional details, in the AR.

The Panel notes that neither the Appellant nor the prescribed professional have identified any DLA that are severely restricted. Therefore, the Panel finds that the Ministry reasonably determined that the

Appellant did not have a severe impairment that directly and significantly restricts his DLA continuously or periodically for extended periods.

Help with DLA

The Ministry's position is that it cannot be determined that significant help is required because it has not been established that DLA are significantly restricted. The Appellant has not commented on his need for help in performing DLA.

Panel Decision

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. That is, the establishment of direct and significant restrictions under section 2(2)(b)(i) is a precondition of meeting the need for help criterion. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform one or more DLA.

As indicated above, the Panel has found that the Ministry reasonably determined, based on all of the evidence presented, that it has not been demonstrated that the Appellant has direct and significant restrictions in his ability to perform DLA. The Panel does note that the GP states in the AR that the Appellant requires assistance with transportation, as he must be driven to appointments by friends because he is unable to drive himself. The Panel further notes that the Appellant does not require the use of an assistance animal, is able to walk one to two blocks using a cane (but otherwise unaided), and that there is no evidence presented to suggest that he has any difficulty getting in or out of a vehicle. Therefore, while the Ministry did not specifically address the Appellant's need for assistance with private transportation, the Panel finds that the available information suggests that the Appellant is capable of using public transport without the assistance of another person.

The Panel has reviewed all the evidence and finds that the Ministry reasonably determined that the Appellant did not require help to perform any of his DLA.

Conclusion

Having reviewed and considered all of the evidence and relevant legislation, the Panel finds that the Ministry's Reconsideration Decision, which determined that the Appellant was not eligible for the PWD designation under Section 2 of the EAPWDA, was reasonably supported by the evidence and was a reasonable application of the EAPWDA in the circumstances of the Appellant, and therefore confirms the decision. The Appellant's appeal, therefore, is not successful.

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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

Simon Clews

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2019/09/19

PRINT NAME

Shirley Heafey

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

PRINT NAME

Edward Wong

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/09/19