

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 August 30, 2019, which held that the appellant did not meet 2 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 and duration requirements, and that the appellant had a severe physical impairment, but was not satisfied that:

- 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, the appellant requires an assistive device, the significant help or supervision of another person or the services of an assistance animal to perform DLA.

PART D – RELEVANT LEGISLATION

EAPWDA, section 2

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

PART E – SUMMARY OF FACTS

On June 14, 2019 the ministry received the appellant's PWD application comprised of a Medical Report (MR) and an Assessor Report (AR) completed by the appellant's general practitioner (the "Physician") on May 16, 2019, and the appellant's self-report (SR) undated.

The appellant's request for PWD designation was denied on July 5, 2019. On August 16, 2019 the ministry received the appellant's request for reconsideration form (RFR).

On August 30, 2019 the ministry completed its review.

On September 18, 2019 the tribunal received the appellant's Notice of Appeal dated September 10, 2019.

Summary of relevant evidence

Diagnoses

In the MR, the Physician indicates that the appellant has been diagnosed with chronic fractures left tibia fibula, date of onset November 2016. The Physician indicates that the appellant has been his patient for seven years and he has seen the appellant two to 10 times in the past 12 months.

Physical Impairment

In the MR for Functional Skills, the Physician indicates that the appellant is able to walk less than one block unaided, can climb 2 to 5 steps unaided, can lift under 5 pounds, and has no limitation with remaining seated.

In the Health History portion of the MR, the Physician indicates that the appellant had an open fracture severe displacement left tibia fibula and was treated by a specialist in 2016 but that the fracture has not healed.

In the MR, the Physician indicates that the appellant has to move around minimally and constantly uses a crutch and splinting. The Physician indicates that the appellant is trying to get treatments, including hospitalization for 2 years, and is not yet healed. The Physician indicates that the appellant is waiting for an orthopaedic surgeon assessment and possibly a second operation.

The SR indicates that the appellant has had a broken tibia/fibia for the last 2 years and 9 months. The appellant has had an external cast, fibre glass casts, boot casts, and is now waiting to have an external cast put back on for six or more months. The appellant states that it is difficult to walk around.

Mental Impairment

In the MR, the Physician indicates that the appellant does not have any significant deficits with cognitive and emotional function.

In the AR, the Physician indicates that the appellant does not have any impact to cognitive and emotional functioning.

DLA

In the MR, the Physician indicates that the appellant has been prescribed treatments that interfere with the appellant's ability to perform DLA as the appellant requires chronic splinting of tibia with crutch walking.

In the AR, the Physician indicates that the appellant requires periodic assistance from another person with bathing, laundry, going to and from stores, food preparation, cooking, and using public transit (use taxi).

The Physician indicates that the appellant requires continuous assistance from another person with basic housekeeping, (pain and instability of leg) and using transit schedules and arranging transportation (limited use of web).

Under additional comments, the Physician indicates that the appellant is supposed to be non-weight bearing on leg.

The Physician indicates that the appellant is independent with all aspects of social functioning. For immediate social networks, the Physician checked off all boxes indicating good functioning, marginal functioning and very disrupted functioning. For extended social networks, the Physician indicates that the appellant has good or marginal functioning.

In the SR, the appellant states that that "...because the bones are still broken the more I walk the more twisted my leg is, and because they are broken are not healing." The appellant indicates that the appellant has difficulty getting around and maintaining the appellant's apartment.

Need for Help

In the MR, the Physician did not check off the box indicating that the appellant requires prostheses or aids for the appellant's impairment but then indicated "*lower leg splint + crutch*".

In the AR, the Physician indicates that the appellant receives help with DLA from friends. The Physician also indicates that the appellant has to travel to and stay in another community for extended periods for physiotherapy. The Physician indicates that the appellant routinely uses crutches and requires crutches for non-weight bearing. The Physician also indicates that the appellant needs to sit on a scooter.

Additional information provided

In the Notice of Appeal the appellant states: "*I need assistance unable to walk far. I can walk a*

short distance. I'm in constant pain, unable to clean, cook, or walk far".

The ministry provided an email dated October 15, 2019 indicating that its submission will be the reconsideration summary provided in the Record of Ministry.

Admissibility of New Information

The ministry did not object to the information in the appellant's Notice of Appeal. The panel has admitted the information in the Notice of Appeal as it is evidence in support of information and records that were before the ministry at the time of reconsideration, in accordance with section 22(4) of the *Employment and Assistance Act*. In particular, the new information supports the information regarding the appellant's physical condition and ability to perform DLA.

With the consent of both parties, the hearing was conducted as a written hearing pursuant to section 22(3)(b) of the *Employment and Assistance Act*.

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. In particular, was the ministry reasonable when concluding it was not satisfied that

- 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 help, as it is defined in the legislation, 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**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 that the legislative criteria are met, 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 how frequently the activity is restricted.

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 as a result of a severe physical impairment, the appellant is in

constant pain, and is unable to clean, cook, or walk more than a short distance.

The ministry's position is that while the information confirms that the appellant has a severe physical impairment, the information provided by the Physician is not sufficient to confirm that the severe impairment significantly restricts the appellant's ability to perform DLA continuously or periodically for extended periods.

The ministry notes that the Physician reports that the appellant requires continuous assistance with basic housekeeping (due to pain and instability of leg), as well as using transit schedules and arranging transportation (limited use of web). The ministry notes that the Physician in the AR indicates that the appellant requires periodic assistance with bathing, laundry, going to and from stores, food preparation, cooking, and using public transit (use taxi). The ministry notes that while the Physician identifies that as a result of being non-weight bearing on the appellant's left leg, the appellant requires periodic assistance to help manage specific DLA, the Physician does not provide any additional information to describe the periodic assistance required to help manage these activities, such as the type, the frequency, or the duration of the assistance.

The ministry's position is that it is unable to determine that the impairment restricts the appellant's ability to manage DLA for extended periods, resulting in a need for a significant amount of assistance. The ministry notes that the appellant is independently able to manage activities of personal care, shopping, meals, paying rent and bills, medications and getting in and out of a vehicle.

The ministry notes that the Physician reports that the appellant has good, marginal, and very disrupted functioning with the appellant's immediate social network, but does not provide any further information to explain why he checked all three boxes. The Physician indicates that the appellant has good functioning with extended social network and does not report that the appellant requires any support/supervision to help maintain in the community.

While the ministry acknowledges that the appellant experiences some restrictions to DLA as a result of the appellant's medical condition, the ministry's position is that as the majority of DLA are performed independently or require little help from others, there is not enough evidence to confirm that a severe mental or physical impairment significantly restricts the appellant's ability to perform DLA continuously or periodically for extended periods. The ministry's position is that the legislative criteria has not been met.

The panel finds that as the information from the Physician indicates that the majority of DLA are performed independently with little help from others, the ministry reasonably determined that the appellant did not meet the legislative criteria. In particular, the Physician indicates that the appellant is independent with dressing, grooming, toileting (pain and instability), feeding self, regulating diet, transfers (in/out of bed), transfers (on/off chair), reading prices and labels, making appropriate choices, paying for purchases, carrying purchases home, meal planning, safe storage of food, banking, budgeting, paying rent and bills, all aspects of medications, and getting in and out of a vehicle.

Although the Physician indicates that the appellant requires periodic assistance from another person with bathing, laundry, going to and from stores, food preparation, cooking and using

public transit the Physician does not provide any further information to indicate the frequency or duration of periodic assistance needed.

Although the Physician indicates that the appellant requires continuous assistance with using transit schedules and arranging transportation, noting limited use of the web, the Physician does not explain how the appellant's severe impairment is the cause of the continuous assistance required for this DLA.

The Physician did not indicate that the appellant has an identified mental impairment but the Physician completed Section C DLA of Social Functioning that states is to be completed only if the appellant has an identified mental impairment. The Physician indicated that the appellant is independent with making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others, dealing appropriately with unexpected demands and securing assistance from others. However, the Physician did not provide any further information to explain why he completed this section of the AR when no mental impairment was identified.

The Physician indicates that the appellant's relationships with immediate social network are impacted, checking off all three boxes indicating good functioning, marginal functioning, and very disrupted functioning. However, the Physician did not provide any further information to explain why all three boxes were checked. The Physician's information in this regard is inconsistent and makes it difficult to understand the actual impact on the appellant's functioning with the appellant's immediate social network.

The panel finds that the ministry reasonably determined that although the information demonstrates that the appellant has some restrictions to some aspects of DLA, the information provided by the Physician was not sufficient to determine that the legislative criteria was met. In particular, the panel finds that the ministry reasonably determined that the information provided does not confirm that the appellant has a severe impairment that 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*, 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 appellant's position is that the information provided should be sufficient to find that the appellant meets the criteria for designation as PWD.

The ministry's position is that because it has not been established that DLA are significantly restricted, it cannot be determined that help is required.

The information from the Physician in the MR and the AR indicates that the appellant receives help from friends, requires the use of a crutch, would benefit from sitting on a scooter and has to stay in another community for extended periods for physiotherapy.

While the information provided indicates that the appellant receives assistance from friends and that the chronic splinting of tibia with crutch walking impacts the appellant's ability to perform some aspects of DLA, confirmation 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 is a reasonable application of the applicable enactment, and therefore confirms the decision. The appellant is not successful on appeal.

APPEAL NUMBER

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

Helene Walford

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2019/11/08

PRINT NAME

Susanne Dahlin

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/11/08

PRINT NAME

Carlos Garcia

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/11/08