

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the ministry) reconsideration decision dated January 2, 2020, which found that the appellant did not meet one of the five statutory requirements of Section 2 of the *Employment and Assistance for Persons with Disabilities Act* for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement, that the appellant has a severe physical impairment, the appellant's daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted periodically for extended periods, and that, 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.

However, the ministry was not satisfied the evidence establishes that:

- in the opinion of a medical practitioner or nurse practitioner, the appellant's severe physical impairment is likely to continue for at least 2 years.

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

The evidence before the ministry at the time of the reconsideration decision included the Persons With Disabilities (PWD) Application comprised of the appellant's information and self-report dated October 10, 2019, a medical report (MR) dated October 7, 2019 completed by a general practitioner (GP) who had known the appellant as a walk-in patient and had seen the appellant once and wrote that the clinic notes the appellant has been persistent in complaint, and an assessor report (AR) dated November 1, 2019 completed by a physiotherapist (PT) who had known the appellant for one year and had seen the appellant 2 to 10 times.

The evidence also included the appellant's Request for Reconsideration dated December 16, 2019.

Diagnoses

In the MR, the GP diagnosed the appellant with osteoarthritis of the left knee, with no date of onset.

In the reconsideration decision, the ministry found that the appellant met the age requirement, that the appellant has a severe physical impairment, that daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted periodically for extended periods, and that, 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.

Duration

In the MR, the GP reported:

- When asked if the impairment is likely to continue for 2 years or more, the GP indicated neither "yes" nor "no."
- In response to the request to explain the estimated duration of the impairment, the GP wrote: "Unknown. Pending treatment plan from orthopedic surgeon."

In the self-report, the appellant wrote:

- The appellant had an injection in the knee more than 9 years ago and the appellant lived with the pain. About 3 months ago, the pain was much worse. The appellant went to the GP and was referred to a specialist.
- The appellant had another injection in the knee and then the specialist said that the appellant will need a knee replacement.
- In the meantime, the appellant cannot stand or do anything standing for more than 2 minutes. The only thing not painful is sitting.

In the Request for Reconsideration, the appellant wrote:

- Attached is the physician's letter verifying that there is a severe impairment that is likely to continue for several years.

- The appellant had a knee injection twice because the pain got worse each day. The specialist informed the appellant that the choice was either getting an injection in the knee or having knee surgery.

Additional information

In the Notice of Appeal stamped received January 14, 2020, the appellant expressed disagreement with the ministry's reconsideration decision and wrote that the GP mistakenly ticked off "no" for the duration when in fact the GP meant to tick "yes," indicating that the impairment is likely to continue for more than 2 years. The appellant asked the panel to please see the package in which the GP has ticked "yes" along with the GP's signature on January 9.

Prior to the hearing, the appellant provided the following additional documents:

- 1) Copy of a letter dated October 23, 2019 in which the ministry advised that the AR must be completed by a prescribed professional;
- 2) Copy of the PWD Application comprised of the appellant's information and self-report, the MR and the AR. In the section of the MR referencing the degree and course of impairment, the response remains the same by the GP, i.e. that the duration is "Unknown. Pending treatment plan from the orthopedic surgeon";
- 3) Copy of a letter dated November 20, 2019 in which the ministry advised that the appellant had been denied PWD designation and a copy of the ministry's original decision;
- 4) Copy of the appellant's Request for Reconsideration;
- 5) Copy of the letter from the ministry dated January 2, 2020 and the Reconsideration Decision of the same date with handwritten note on the first page of the decision: "please see duration box." On a page in the reconsideration decision, paragraph 2, where the ministry indicated "no" in response to the question whether the impairment is likely to continue for two years or more from today, the "no" conclusion has been crossed off and the "yes" has been marked and initialled. There is no stamp indicating the identity of the person who has applied initials or a signature next to the change and there is no date on the change made to the page of the decision; and,
- 6) Copies of undated informational brochures and notices from the ministry.

At the hearing, the appellant was represented by their adult child (the appellant's representative) who spoke on behalf of the appellant and translated from and to another language on the appellant's behalf.

At the hearing, the appellant's representative stated:

- The representative has attended all of the appellant's doctor's appointments. At the appointments the GP has been saying verbally that the appellant's condition will last for 3 or 4 years.
- When the representative and the appellant attended an appointment with a copy of the reconsideration decision, the representative reminded the GP of what the GP has always said, and the GP made the change on a page of the reconsideration decision where the ministry had indicated "no" and initialled it. The GP said it was a mistake and that the GP would initial it and "fix it right away." This is the page that the GP chose to change.
- As a result of this error, and another error with part of the application not being

completed, the GP has caused a lengthy reconsideration process that could have been avoided. One of the sections of the application had not been completed.

- The representative lives in the same household as the appellant and sees the appellant struggle every day, which is emotionally damaging.
- Although the Request for Reconsideration refers to a physician's letter, the GP did not provide a letter. It is the GP's initialing of the form that is being referred to in the Request for Reconsideration. The representative does not have an explanation for why the Request for Reconsideration dated in December 2019 refers to a page initialled by the GP on January 2, 2020, or why the Notice of Appeal refers to the signature being placed "on January 9th."
- The appellant has taken physiotherapy treatments.
- The GP said that while the appellant is receiving the injections the pain would be more but the appellant would have some motor skills.
- The appellant met with the orthopedic surgeon on September 18, 2019. The surgeon stated that if the appellant chose to have surgery, the appellant would be bedridden for two months with less motor skills and the appellant did not like the surgery option, even though there would be less pain.
- They did not receive anything in writing from the orthopedic surgeon subsequent to their September 18, 2019 appointment and they do not know if the GP had received anything in writing from the orthopedic surgeon relating to options for treatment of the appellant's osteoarthritis in her knee.

At the hearing, the appellant stated:

- This process has taken an emotional toll.
- The appellant wants to give the injections in the knee more of a chance to be effective.
- The GP initialled the change on a page in the reconsideration decision on January 2nd.
- The appellant does not have an explanation for why the Request for Reconsideration dated in December 2019 refers to a page initialled by the doctor on January 2, 2020, or why the Notice of Appeal refers to the signature being placed "on January 9th."

The ministry relied on the reconsideration decision as summarized at the hearing. At the hearing, the ministry stated that although the ministry prefers a letter from the physician to explain any changes in the original report, the ministry will sometimes accept an initialled change like the page submitted in this case.

Admissibility of Additional Information

The ministry did not object to the admissibility of the additional documents. The panel considered the testimony on behalf of the appellant and the additional documents provided by the appellant as relating to the ministry's denial of PWD designation because the ministry was not satisfied that the duration criteria had been and, therefore, as being reasonably required for a full and fair disclosure of all matters related to the decision under appeal pursuant to Section 22(4) of the *Employment and Assistance Act*.

PART F – REASONS FOR PANEL DECISION

The issue on appeal is whether the ministry's reconsideration decision, which found that the appellant is not eligible for PWD designation, was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. The ministry found that the evidence does not establish that, in the opinion of a medical practitioner or a nurse practitioner, the appellant's severe physical impairment is likely to continue for at least 2 years.

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).

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, 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.

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).

Eligibility under section 2.1 of the EAPWDR

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.

Eligibility under section 2 of the EAPWDA

The ministry found that there was sufficient information to establish that the appellant met the age requirement, that the appellant has a severe physical impairment, daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted periodically for extended periods, and that, 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.

However, the ministry was not satisfied the evidence establishes that, in the opinion of a medical practitioner or nurse practitioner, the appellant's severe physical impairment is likely to continue for at least 2 years.

Duration

In the reconsideration decision, the ministry wrote that the GP did not indicate in the MR that the appellant's impairment is likely to continue for 2 years or more from the date of the report, and the GP commented "Unknown. Pending treatment plan from orthopedic surgeon." The ministry wrote that although the appellant indicated that a note from the doctor was attached to the Request for Reconsideration, there was none provided. The ministry wrote that the ministry tried to call the appellant to provide an opportunity to submit a copy of the medical letter and the appellant did not respond to the message prior to the due date for the reconsideration decision.

The appellant wrote in the self-report that the appellant had an injection in the knee more than 9 years ago and lived with the pain but more recently the pain was much worse. The appellant had another injection in the knee and then the specialist said that the appellant will need a knee replacement. The appellant wrote that, in the meantime, the appellant cannot stand or do anything standing for more than two minutes. In the Request for Reconsideration, the appellant wrote that the specialist informed the appellant that the choice was either getting an injection in the knee or having knee surgery. The appellant also wrote that “the physician’s letter, verifying that there is a severe impairment that is likely to continue for several years” was attached to the Request for Reconsideration dated December 16, 2019.

At the hearing, the appellant was asked about the reference to a physician’s letter in the Request for Reconsideration. The appellant’s representative stated that although the Request for Reconsideration refers to a physician’s letter, the GP did not provide a letter. The representative stated that the GP initialled the page in the reconsideration decision and this is what is being referred to in the Request for Reconsideration. The appellant stated that the page in the reconsideration decision was initialed by the physician on January 2, 2020. Although asked, there was no explanation given for why the Request for Reconsideration dated in December 2019 refers to a page initialled by the GP later, on January 2, 2020, or why the appellant wrote in the Notice of Appeal that the physician’s signature was placed “January 9th.”

At the hearing, the appellant’s representative stated that the representative has attended all of the appellant’s doctor’s appointments with the GP where the GP has been saying verbally that the appellant condition will last for 3 or 4 years. The representative stated that when the representative and the appellant attended an appointment with a copy of the reconsideration decision, the representative reminded the GP of what the GP has always said, and the GP made the change on a page of the decision and initialed it. The GP said it was a mistake and that the GP would initial it and “fix it right away.” On a page in the reconsideration decision, where the ministry indicated “no” in response to the question whether the impairment is likely to continue for two years or more from today, the “no” response has been crossed off and the “yes” has been marked and initialled. There is no stamp indicating who has initialled the change and there is no date to indicate when the alteration to the page of the decision was made.

In the MR, the GP did not indicate either “yes” or “no” when asked if the appellant’s impairment is likely to continue for 2 years or more. In response to the request to explain the estimated duration of the impairment, the GP wrote: “Unknown. Pending treatment plan from orthopedic surgeon.” At the hearing, the appellant’s representative stated that the appellant met with the orthopedic surgeon on September 18, 2019, and the appellant stated that the appellant wants to allow more time for the injections in the knee to be effective. The appellant’s representative stated that the surgeon indicated that if the appellant chose to have surgery, the appellant would be bedridden for two months with less motor skills and the appellant did not like this option. The appellant’s representative stated that they had not received anything in writing from the orthopedic surgeon subsequent to their September 18, 2019 appointment and that they did not

know if the GP had received anything in writing from the orthopedic surgeon relating to options for treatment of the appellant's osteoarthritis in her knee. There was no further information that the appellant could provide in the form of a proposed treatment plan and the impact of surgery or other possible treatments on the duration of the appellant's physical impairment. There was no further information provided on the appeal from the GP or the orthopedic surgeon confirming the proposed treatment plan and the impact of surgery on the duration of the appellant's physical impairment.

Given the original opinion of the GP in the MR was that it is "unknown" how long the appellant's physical impairment will continue and that the GP wrote a further opinion regarding duration was dependant on receiving information from the orthopedic specialist, the lack of an explanation for the purported change of the GP's response in the absence of evidence of a treatment plan from the orthopedic surgeon detracts from the weight that the panel applies to the new information submitted. The panel notes that the GP indicated in the MR that osteoarthritis of the appellant's left knee is the only diagnosis relating to the appellant's impairment.

Without this explanation by the GP and considering the inconsistency in information about when the initials were applied to the page and the absence of a stamp for the medical clinic, as was applied on the last page of the MR, or a medical practitioner number or some other support for the identity of the person applying the initials, the panel places little weight on the page from the reconsideration decision which has been submitted by the appellant as the further opinion of the medical practitioner. Although the ministry stated at the hearing the ministry sometimes accepts an initialled change like the page submitted in this case, the ministry also indicated that the ministry prefers a letter from the physician to explain any changes in the original report, and the panel has considered the reliability of the evidence submitted in the context of the particular facts and the requirement in Section 2(2)(a) of the EAPWDA.

Section 2(2)(a) of the EAPWDA stipulates that the ministry must be satisfied that the appellant's severe physical impairment is, in the *opinion* of a medical practitioner or nurse practitioner, likely to continue for at least 2 years. The panel finds that the ministry reasonably concluded that there was insufficient evidence to establish that the medical practitioner had provided an opinion that the appellant's severe physical impairment is likely to continue for at least 2 years.

Conclusion

The panel finds that the ministry's reconsideration decision, which determined that the appellant was not eligible for PWD designation pursuant to Section 2(2) of the EAPWDA, was reasonably supported by the evidence. The panel confirms the ministry's decision. The appellant's appeal, therefore, is not successful.

APPEAL NUMBER
2020-00013

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
S. Walters

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

PRINT NAME
Simon Clews

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

PRINT NAME
Susanne Dahlin

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)