

### **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 9, 2020, 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 requirements of having reached 18 years of age and having a medical practitioner confirm 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**

The appellant's PWD application comprised of:

- A Medical Report (MR) dated April 25, 2020 and an Assessor Report (AR) dated May 2, 2020, both completed by a general practitioner (GP) who has treated the appellant since February 2019 and has seen the appellant 2-10 times in the past 12 months.
- A Self-report (SR) dated April 17, 2020, completed by the appellant.

The appellant's June 15, 2020 Request for Reconsideration, comprised of a June 27, 2020 note ("the reconsideration note") from the GP and attached medical documentation, including:

- June 27, 2020 prescription for bilateral knee and ankle braces
- August 21, 2019 Colonoscopy Report
- May 21, 2019 Surgical Pathology Report
- May 13, 2019 Gastroscopy Report
- May 11, 2019 Gastroenterology Consult
- May 13, 2019 hospital Discharge Summary
- March 4, 2019 Report on Patient Care (post cardiac surgery and incision infection) - short term home support to help with showers
- February 6, 2019 Cardiovascular Surgery Discharge Summary - no lifting more than 5-10 lbs. for 8 weeks and no driving until assessed by sleep clinic
- February 26, 2019 4-page Discharge Prescription

**Information provided on appeal and admissibility**

The appellant's Notice of Appeal dated July 23, 2020, which the panel accepted as argument.

The ministry's appeal submission by email on August 25, 2020 stating that its submission was the reconsideration summary in the Record of Ministry Decision.

As no new evidence was provided on appeal, an admissibility determination under section 22(4) of the *Employment and Assistance Act* was not required.

The positions of both parties are set out in Part F of this decision.

## **Summary of relevant evidence**

### **Diagnoses and Health History**

The GP identified the following diagnoses and commentary:

- Morbid obesity
- Cardiovascular disease (bypass surgery 2019)
- Sleep apnea
- Fatty liver disease (secondary to obesity)

Additional commentary by the GP in the PWD application and Request for Reconsideration includes:

- Requires knee and ankle braces.
- Mobility limited ability.
- Gastrointestinal (GI) bleed November 2019.
- Morbid obesity is generally a life-long disability.
- Cardiovascular disease associated with morbid obesity resulting in marked deconditioning which makes it very difficult for the appellant to self-support (financially).

In the SR, the appellant states:

- Recovering from open heart surgery has been a very slow process. Left leg, from which a vein was taken, is still very numb and swells up.
- Right ankle has 3 fractures and makes it difficult to walk. Use a cane and poles to get around.
- Was told to use ankle and knee braces to help walk without pain, but cannot afford to buy them.
- Have poor circulation and need a C-pap machine to help breathe and sleep.
- Very difficult to move around or bend over.
- Take medication daily.
- Somedays fingers and joints in hands swell and arc – can't grab or hold anything.
- Before Covid-19, had to bring in someone to clean.

### **Physical Impairment**

In the MR, the GP reports:

- Able to walk less than 1 block unaided on a flat surface.
- Unable to climb any steps unaided.
- Unable to lift.
- Unknown how long can remain seated.
- Requires knee and ankle braces.

In the AR, the GP reports:

- Walking indoors and outdoors and climbing stairs are managed independently (“very slow”).
- Standing is managed independently.
- Climbing stairs requires an assistive device (“very slow”).
- Lifting is managed independently (“very limited”).
- Carrying and holding are managed independently.

### Mental Impairment

In the MR, the GP reports that there are no difficulties with communication or significant deficits in any of the 11 specified areas of cognitive and emotional function.

In the AR, where asked to assess cognitive and emotional functioning for an applicant with an identified mental impairment or brain injury, the GP identifies a minimal impact on daily functioning for “bodily functions.” The GP reports that speaking, reading, writing, and hearing abilities are good.

### DLA

In the MR, the GP responds by ticking the “No” box to the question “Does the impairment directly restrict the person’s ability to perform Daily Living Activities?” and indicates that the appellant has not been prescribed medications or treatments that interfere with ability to perform DLA and assistance needed with DLA is “nil.”

In the AR, the GP reports:

- When asked “What are the applicant’s mental or physical impairments that impact his/her ability to manage Daily Living Activities?” the GP responds “household chores, toenail hygiene x care” and that the appellant has financial difficulties.
- All listed tasks of the DLA personal care, meals, pay rent and bills, and medications are managed independently with no indication that they take longer.
- For shopping, going to and from stores (“may need assistance”), reading prices and labels and making appropriate choices are independently managed. Carrying purchases home requires periodic assistance from another person. None of the tasks are reported to take significantly longer to perform.
- For basic housekeeping, the appellant “normally has a house keeper.”
- For transportation, getting in and out of a vehicle is managed independently “with difficulty.” The appellant does not use public transportation.
- For social functioning, appropriate social decisions, develop and maintain relationships, interact

appropriately with others, and ability to deal appropriately with unexpected demands are managed independently. No information is provided respecting the appellant's ability to secure assistance from others. Good functioning with immediate and extended social networks is reported.

- "Difficulty standing prolonged periods."

### Need for Help

In the PWD application, the GP indicates:

- Assistance is provided by family, friends and volunteers.
- Help is required with general housekeeping and self-grooming – toe nail care.
- The appellant routinely uses a cane, breathing device, toileting aids and bathing aids.

At reconsideration, the GP identifies the need for ankle and knee braces and assistance with shopping and bathing.

## **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.

### **Panel Decision**

#### **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. The panel's discussion below is limited to eligibility for PWD designation under section 2 of the EAPWDA and section 2 of the EAPWDR.

#### **Eligibility under section 2 of the EAPWDA**

##### **Physical Impairment**

##### *Positions of the Parties*

The appellant disagrees with the ministry's decision, and notes being without a computer or the assistance of an advocate and that the GP had no experience filling out the forms. The appellant reports that recovery from open heart surgery has been very slow, that walking is difficult and requires ankle and knee braces.

The ministry notes that a diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment; impairment is a medical condition that results in restrictions in a person's ability to function independently or effectively. The ministry's position is that a severe physical impairment cannot be determined based on the information provided. The ministry acknowledges the medical reports and lab documents but finds that they do not speak to limitations/restrictions in the appellant's ability to perform DLA or the help required. The ministry concludes that the information demonstrates limitations to physical functioning due to morbid obesity and cardiovascular disease but that information from the GP and appellant establishes a moderate rather than severe physical impairment. In reaching this conclusion, the ministry notes the assessment of difficulty with standing for prolonged periods and that in the MR the GP indicates limitations in basic functional skills but in the AR indicated independence in all categories of mobility and physical ability. Additionally, there is no explanation regarding how much longer the appellant takes walking and climbing stairs which are "very slow" or what the limitations are with lifting.

#### *Panel Analysis*

The appellant is diagnosed with morbid obesity, cardiovascular disease (bypass surgery in 2019), sleep apnea, and fatty liver disease, with the GP also noting a GI bleed in 2019. While the additional medical documentation provided, which may be generally described as lab, surgical and consult reports, supports the diagnoses made by the GP, the panel agrees with the ministry that the information therein does not address the appellant's ability to manage physical activities or mobilize, excepting some details of post-operative limitations (ex. no lifting for 8 weeks following cardiovascular surgery). Accordingly, the determination of severity of impairment rests on the information provided by the GP and the appellant.

The GP's information respecting the appellant's physical functioning primarily attributes limitations to morbid obesity and cardiovascular disease, with the GP also confirming the need for bilateral knee and ankle braces, though it is unclear if this need relates to morbid obesity and/or the past ankle fractures mentioned by the appellant. When assessing specific functional abilities, the GP reports that the appellant is able to walk independently indoors and outdoors very slowly with walking limited to less than 1 block unaided. A similar degree of limitation is reported for climbing stairs, which requires an assistive device and is managed very slowly. As noted by the ministry, the information respecting lifting is not entirely consistent, with the appellant assessed in the MR as unable to do any lifting and in the AR as having "very limited" lifting ability. Also, as noted by the ministry, in the AR the GP does not describe how much longer walking and climbing stairs take or what "very limited" means in terms of actual weight capacity. However, the panel finds that the assessment in the AR cannot be viewed in isolation from the physical functional skills assessment in the MR and that when considered as a whole, the information establishes that while the appellant independently manages aspects of physical functioning, the level of that independent functioning is markedly limited and reflects severe impairment of physical functioning.

Therefore, based on the above analysis, the panel concludes that the ministry was not reasonable to determine that a severe physical impairment has not been established.

### Mental Impairment

#### *Positions of the Parties*

The appellant's information does not address mental impairment.

The ministry's position is that a severe mental impairment is not established based on the GP's assessment of a minimal impact on daily functioning for bodily functions and no other impacts on daily functioning, no significant deficits with cognitive and emotional functioning, good communication and social functioning, and no indication of the need for support/supervision to maintain the appellant in the community ("you are doing fine").

#### *Panel Analysis*

The appellant is not diagnosed with a mental impairment or brain injury and, but for a minor impact on daily functioning for bodily functioning, neither the appellant nor the GP identifies any difficulties with cognitive, emotional or social functioning. Accordingly, the panel considers the ministry's conclusion that a severe mental impairment has not been established to be reasonable.

### Restrictions in the ability to perform DLA

#### *Positions of the Parties*

The appellant's position does not expressly address DLA other than noting difficulties with moving around and walking and the assistance of a housekeeper prior to the Covid-19 pandemic.

Noting that the ministry relies on the medical opinion and expertise from the GP, the ministry concludes that there is not enough information to confirm that the appellant's impairment significantly restricts the ability to perform DLA continuously or periodically for extended periods. The ministry notes that in the MR the GP indicates that the appellant's impairment does not restrict DLA and that assistance required is "Nil." In the AR, the GP reports that most aspects of DLA are independently managed with the exception of basic housekeeping for which the appellant normally has a housekeeper, assistance may be needed for going to and from stores, with no description of frequency, and that assistance is required with self-grooming - nail care, and bathing. Getting in and out of a vehicle is managed independently with difficulty. The ministry notes that the GP does not describe the frequency for which help is required with house cleaning, shopping or bathing, in order to determine a significant restriction, commenting that a restriction that only arises once a month is less likely to be significant than one which occurs several times a week.



*Panel Analysis*

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.

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.

In the appellant's case, the GP is the only prescribed professional who has provided an assessment of the appellant's current ability to manage DLA.

In the MR, despite identifying physical functional limitations that the panel considered to be indicative of severe physical impairment, the GP clearly indicates that the appellant's impairment does not result in restrictions in the ability to perform any of the prescribed DLA, including mobility inside and outside the home (relates to the DLA move about indoors and outdoors) and the DLA basic housekeeping for which the appellant "normally has a housekeeper." The GP also expressly states that the assistance the appellant requires to perform DLA is "nil."

In contrast, in the AR and reconsideration note, the GP identifies restrictions in the ability to manage some DLA. However, minimal or no description of these restrictions is provided by the GP making it difficult to establish the restrictions as being significant, particularly given the assessment in the MR. For example, while the GP's narrative clearly identifies the need for toe nail care, a relatively infrequent task, it is unclear what assistance is required for the more routine task of bathing – it is possible the assistance relates to the reported use of bathing devices, but is unclear. Respecting shopping, periodic assistance is required for carrying purchases home, but there is no information to establish under what circumstances this assistance is required – e.g. for all shopping or only for heavier bags. In the AR the GP reports that the appellant "may need assistance" with going to and from stores and in the reconsideration note indicates that assistance is required for shopping. In the panel's view, that a person "may" need assistance does not establish a significant restriction and it is unclear what shopping assistance the GP is referring to in the reconsideration note; it is possible that the GP is confirming the need for periodic assistance with carrying purchases home or that the GP is identifying that other assistance is required. The appellant is also reported to get in and out of a vehicle "with difficulty" which, in the absence of further description, falls short of establishing a significant restriction.

Given the marked inconsistency between the information in the MR and AR and the inconclusive description of DLA restrictions identified in the AR and reconsideration, the panel concludes that the ministry was reasonable in determining that the evidence does not establish that in the opinion of a prescribed professional the appellant's impairment *significantly* restricts the 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.

The panel notes that its decision does not prevent the appellant from obtaining additional information and re-applying to the ministry for PWD designation.

**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](#);

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(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).

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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

Jane Nielsen

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2020/09/10

PRINT NAME

Michael Skinner

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2020/09/10

PRINT NAME

Anne Richmond

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2020/09/10