

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 September 22, 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

The appellant was not in attendance at the hearing. Having confirmation of delivery of the Notice of Hearing, the hearing proceeded without the appellant in accordance with section 86(b) of the Employment and Assistance Regulation.

Information before the ministry at reconsideration

- The appellant's PWD application, received by the ministry on May 8, 2020, comprised of:
 - An undated Medical Report (MR) completed by the appellant's general practitioner (GP) of 2 years who saw the appellant 2-10 times in the twelve months preceding completion of the MR.
 - An Assessor Report (AR) completed by a social worker (SW) on June 10, 2020 who has known the appellant for 3 years and saw the appellant 2-10 times in the twelve months preceding completion of the AR.
 - A Self-report (SR) completed by the appellant on April 6, 2020.
- The appellant's September 9, 2020 Request for Reconsideration, comprised of a written submission written by someone who identifies as the appellant's roommate and caregiver.

Information provided on appeal and admissibility

The appellant's Notice of Appeal dated September 29, 2020, which didn't contain any information.

At the hearing, the ministry highlighted the conflicting information and lack of description respecting impacts on the ability to perform DLA and explained that the PWD application does not address employability, instead focusing on a person's own ability to manage the normal daily activities described in the legislation. The ministry did not introduce new evidence.

As there was no additional evidence, a determination of admissibility 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 diagnoses the appellant with:

- Alcoholic cirrhosis (onset 2013) – permanent.
- Tobacco and alcohol abuse - ongoing heavy alcohol and tobacco abuse with limited engagement in any rehabilitation or medical follow up.
- COPD – permanent.
- Major depressive disorder.

Physical Impairment

In the MR, the GP reports:

- How far the appellant can walk unaided on a flat surface is unknown.
- How many stairs the appellant can climb unaided is unknown.
- Limitations in lifting are unknown.
- No limitations for the time the appellant can remain seated.

No response is provided respecting the need for prostheses or aids.

In the AR, the SW reports:

- Walking indoors and climbing stairs require periodic assistance from another person.
- Standing (unable to stand for a long while), lifting, and carrying and holding require continuous assistance from another person.
- The appellant has COPD and cirrhosis of the liver.

No information is provided respecting the ability to walk outdoors.

Information provided in the SR includes:

- Terminal cirrhosis of the liver causes major abdominal pain, extreme fatigue, confusion, nausea, and bloating.
- Due to COPD, the appellant has a hard time breathing, can't walk a block without running out of air and dizziness.
- "Can't leave my house."
- Sees stars when bends over.

In the reconsideration submission, the appellant's roommate/caregiver reports:

- There are days that the appellant cries due to being in so much pain.
- The appellant's legs give out from time to time.
- Someone has to be with the appellant all of the time.
- The appellant's blood is so thin that a cut or scrape results in bleeding that cannot be stopped.
- The appellant cannot:

- stand for more than 10 minutes at a time without getting dizzy;
- bend down because of abdominal bloating and pain; or
- walk for long periods of time due to shortness of breath.

Mental Impairment

In the MR, the GP reports:

- A significant deficit in 1 of 11 specified areas of cognitive and emotional function is identified – emotional disturbance. No additional commentary is provided.
- There are no difficulties with communication.

In the AR, where asked to indicate no impact, minimal impact, moderate impact, or major impact on daily functioning for 14 listed areas of cognitive and emotional functioning (examples included in the AR are italicized), the SW reports:

- Moderate impact for psychotic symptoms (*delusions, hallucinations, disorganized thinking*) and other emotional or mental problems (*hostility*).
- Minimal impact for bodily functions (*eating problems, toileting problems, sleep disturbance*), emotion (*excessive or inappropriate anxiety; depression*), impulse control (*inability to stop doing something or failing to resist doing something*), executive (*planning, organizing, sequencing*), motivation (*initiative, loss of interest*), motor activity (*increased or decreased goal-oriented activity*), language (*expression or comprehension problems*), and other neuropsychological problems (*visual/spatial problems, psychomotor problems*).
- No impact for consciousness (*orientation, alert/drowsy, confusion*), insight and judgement (*poor awareness of self and health conditions*), attention/concentration (*distractible, unable to maintain concentration, poor short-term memory*), and memory (*can learn new information and then recall that information*).

The SW reports poor speaking, reading and writing abilities; hearing ability is satisfactory.

In the SR, the appellant reports often not wanting to get out of bed, see anyone or go anywhere due to depression.

DLA

In the MR, the GP indicates:

- There is no restriction for any DLA - personal self-care, meal preparation, management of medications, basic housework, daily shopping, mobility inside and outside the home, use of transportation, and management of finances, and social functioning.

No response is provided where asked if the appellant has been prescribed medications or treatments that interfere with ability to perform DLA.

In the AR, the SW reports:

- Excessive use of alcohol has affected or causes poor memory and slowed reflexes. Poor

memory makes rehabilitation and medical appointments difficult “to follow through.”

- All listed tasks of personal care require periodic assistance from another person.
- All listed aspects of basic housekeeping and shopping require continuous assistance from another person (unable to follow instruction and follow through).
- For meals, planning and food preparation require continuous assistance from another person. Cooking may require support, identified as an assistive device, and safe storage of food requires periodic assistance from another person.
- All listed tasks of pay rent and bills require continuous assistance from another person.
- All listed tasks of medications require continuous assistance from another person.
- For transportation, getting in and out of a vehicle and using public transit require periodic assistance from another person; using transit schedules/arranging transportation requires continuous assistance from another person.
- Patient is usually known for not following through with instruction which makes it difficult to provide expected services. Medical/rehabilitation follow-up is difficult to achieve.
- For social functioning, appropriate social decisions, develop and maintain relationships, interact appropriately with others, and deal appropriately with unexpected demands require periodic support/supervision. The appellant is independent with ability to secure assistance from others. Marginal functioning with immediate and extended social networks.

In the SR, the appellant reports being able to clean for maybe 10 minutes before running out of air and being barely able to eat due to bloating.

The appellant’s roommate/caregiver reports that the appellant can no longer mow the lawn or do laundry. Due to depression, the roommate has to run the appellant’s bath. The roommate does all of the grocery shopping and housework.

Need for Help

The GP does not identify the need for assistance with DLA.

The SW indicates:

- Support/supervision required to help maintain the appellant in the community is “regular prompting if willing to engage.” Poor memory has affected ability to engage.
- Assistance with DLA is usually provided by family and friends.
- Help required, but not available, is described as “Most times patient support to navigate ways around certain situation.”
- Assistive devices are not required “at this time.”

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

As stated in the SR, the appellant's position is that as a result of COPD the appellant cannot walk a block without running out of air and getting dizzy. Additionally, terminal liver cirrhosis causes major abdominal pain, extreme fatigue, nausea, and bloating.

The ministry's position is that the information provided establishes some limitations to physical functioning but does not establish a severe physical impairment. The ministry notes that the GP

does not identify the need for assistive devices and, except for assessing no limitation for remaining seated, indicates that physical functional skills are unknown. The GP also reports that there are no restrictions with any DLA. Noting that the SW does not address the appellant's ability to walk outdoors, the ministry finds that the information respecting the need for periodic assistance with walking indoors and climbing stairs is not explained, and therefore does not establish severe impairment. Respecting the SW's assessment of the need for continuous assistance with standing, the ministry finds it unclear why continuous assistance with standing would be required given the assessments of the ability to walk and/or mobilize to some degree. Noting again that the GP did not assess restrictions in DLA, including those requiring some lifting (e.g. meal preparation, basic housework, daily shopping), the ministry finds the SW's assessment of the need for continuous assistance with lifting, carrying, and holding to be conflicting and not sufficient, in and of itself, to establish a severe physical impairment. The ministry acknowledges the information from the appellant and roommate respecting limitations for walking and standing, but finds it is not supported by the GP's assessment and again points to the inadequacies of the SW's information respecting walking and standing. The ministry notes that, as both the GP and SW have known the appellant for approximately the same length of time and have both seen the appellant 2-10 times in the past 12 months preceding completion of the PWD application, it is difficult to place more weight on one assessment over the other and thus, the contradictory assessments of physical functioning make it difficult to determine the degree of physical impairment.

Panel Analysis

Section 2 of the EAPWDA requires that the minister "is satisfied" that a person has a severe physical or mental impairment, giving the minister discretion when making the determination. When exercising this discretion, the legislation's requirement for information from a medical or nurse practitioner (and other prescribed professionals) makes it clear that the fundamental basis for assessing PWD eligibility is information from one or more prescribed professional. The panel also notes that the legislation does not identify employability or financial constraints as considerations when determining PWD eligibility.

The panel finds that the information provided in the MR and AR when read together or separately does not present a clear picture of the appellant's physical functioning.

In the MR, the GP provides no commentary respecting the impact of the appellant's COPD or cirrhosis on physical functioning and reports that physical functional skills are unknown, except for there being no limitation with remaining seated. The GP assesses no restrictions in the appellant's ability to manage DLA, including walking indoors and outdoors, which suggests good physical functioning.

Information provided by the SW is both in conflict with the GP's assessment and, in part, incomplete. The only commentary respecting impacts on physical functioning is that the appellant is unable to stand for a long while, though it is unclear what is meant by "a long while." In contradiction, the SW reports that standing requires continuous assistance, despite the ability to stand for periods shorter than "a long while" and the ability to walk indoors and climb stairs with periodic rather than continuous assistance from another person. No description of the

periodic assistance is provided, such as the nature of the assistance or the frequency or duration. Assessing physical functioning is also more difficult given the SW's failure to respond where asked to assess the appellant's ability to walk outdoors, the appellant reporting the ability to walk less than a block before losing breath and the roommate's statement that the appellant is unable to walk for "long periods" due to shortness of breath. The appellant also reports being unable to leave home, though it is unclear whether this is related to physical or mental impairment. Additionally, the SW does not explain why walking and climbing stairs, which could reasonably be viewed as being more susceptible to the effects of COPD, are less impacted than the ability to stand. The SW does clearly state that no assistive devices are required "at this time." Finally, clarity respecting physical capabilities is not provided by the SW's assessment of DLA because, except for stating that the appellant is unable to stand for a long while, all comments relate restrictions with DLA to problems with memory and following through with activities, not physical impairment.

The panel notes that while both the appellant and the roommate describe additional impacts on physical functioning, including dizziness, pain with bending and the appellant's legs giving out, they are not confirmed by either the GP or the SW.

In conclusion, based on the above analysis, the panel finds the ministry reasonable when concluding that the information does not establish a severe physical impairment.

Mental Impairment

Positions of the Parties

As stated in the SR, the appellant's position is that depression results in the appellant often not wanting to get out of bed, see anyone or go anywhere.

The ministry's position is that while the depression diagnosis is notable, and the appellant reports not wanting to get out of bed, see anyone or go anywhere, the assessments of the GP and SW either conflict or, where less conflicting, indicate moderate rather than severe impairment. The ministry notes that the GP assesses one significant deficit with cognitive and emotional functioning, emotional disturbance, and no communication difficulties. Noting the SW's comments respecting poor memory, the ministry notes that the SW assesses no impact on daily functioning. The ministry acknowledges the appellant's comments respecting extreme fatigue and confusion but finds that the SW identifies no impact on daily functioning for consciousness (e.g. orientation, alert/drowsy, confusion) and that the GP did not identify a significant restriction for consciousness. Additionally, the ministry finds the SW's assessment as a whole is of minimal to moderate impacts on daily functioning.

Respecting social functioning, the ministry notes the conflict between the GP's assessment of no restriction and the SW's assessment of the need for periodic support/supervision in most areas, with no description of the degree and duration of the periodic support/supervision. Additionally, while commenting that the appellant needs regular prompting and has limited engagement, the SW contrarily indicates independence in the ability to secure assistance from others and no impact on daily functioning respecting insight and judgement.

Panel Analysis

The appellant is diagnosed with two mental health conditions, major depressive disorder and alcohol and tobacco abuse, and while both the GP and the SW emphasize the seriousness of the substance abuse, there are significant conflicts between their assessments as well as significant inconsistencies within the SW's information.

The GP identifies a significant deficit in the area of emotional functioning. However, the GP also reports that the appellant has no communication difficulties and independently manages all social functioning. No additional commentary respecting the appellant's emotional functioning is provided by the GP.

In contrast, the SW indicates that most communication abilities are poor and that most aspects of social functioning require periodic support/supervision, described as "regular prompting" and "most times patient support to navigate ways around certain situation." The SW also repeatedly comments that the appellant has problems following through with instructions and with memory. However, when assessing impacts on daily functioning, the SW does not identify any area of cognitive and emotional functioning as having a major impact, and more notably, indicates no impact for memory, consciousness, insight and judgement, and attention/concentration. Additionally, where impacts on daily functioning are reported, almost all are minimal, including emotion, executive, motivation, and impulse control.

The appellant and roommate describe impacts related to depression, including that the appellant does not want to get out of bed, see anyone or go anywhere, and as the ministry acknowledges, the appellant reports extreme fatigue and confusion. It is also possible that the appellant's statement about being unable to leave home relates to depression. However, as discussed above, the assessments of the GP and SW reflect either no or minimal to moderate impacts on daily functioning and therefore do not support the appellant's self-reported degree of impairment from depression.

In conclusion, based on the above analysis, the panel finds that the ministry was reasonable when concluding that a severe mental impairment is not established.

Restrictions in the ability to perform DLA

Positions of the Parties

As stated in the SR, the appellant's position is that the symptoms of cirrhosis of the liver, COPD and depression impact daily functioning, including the impacts of abdominal pain and bloating, shortness of breath, and often not wanting to do anything or interact with anyone.

Noting that it relies on the medical opinion and expertise of the GP when assessing DLA restrictions, the ministry concludes that there is not enough evidence to confirm that the

appellant's impairment significantly restricts the ability to perform DLA continuously or periodically.

Respecting the information provided by the SW, the ministry notes that despite commentary respecting poor memory and problems with follow through, instructions and slowed reflexes, the SW reports no impact on daily functioning for consciousness, insight and judgment, attention/concentration, and memory. Additionally, only minimal impacts are reported for impulse control, executive, motivation and motor activity. The SW also reports independently being able to secure assistance from others.

Respecting the prescribed DLA, the ministry notes that the GP reports no restrictions for any DLA in contrast with the SW's assessment of the need for continuous assistance from another person with all or most tasks of basic housekeeping, shopping, meals, paying bills and budgeting, managing medications, and transportation. The ministry finds no explanation for these differences. Additionally, the ministry notes that where the SW identifies the need for periodic assistance from another person, (personal care, etc.) there is no description of the frequency or duration of the assistance in order to determine whether the restriction is significant and for extended periods. The ministry also notes the absence of an explanation regarding the possible need for an assistive device with cooking and the lack of clarity as to what assistance is indicated by the statement "Most times patient support to navigate around certain situation [*sic*]."

The ministry concludes that much of the information from the GP and SW conflicts and that the SW's information itself has discrepancies and provides insufficient description.

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 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.

Respecting the appellant's ability to manage DLA, the panel finds that the assessments by the GP and the SW, both of whom have known the appellant for 2-3 years and had about the same frequency of contact with the appellant in the last year, significantly conflict. No explanation for the difference is provided.

The GP indicates that the appellant's ability to manage all DLA is not restricted whereas the SW identifies the need for periodic or continuous assistance/support from another person with all but

one listed task of social functioning (securing assistance from others). The SW's commentary relates the need for assistance (with the exception of assistance standing) to problems with follow through and memory, that is, mental rather than physical impairment. Equally notable, as previously discussed by the panel, are the substantial inconsistencies within the SW's assessments. There is no explanation why the appellant's cognitive and emotional daily functioning is either minimally or not impacted in most areas, including no impact for memory, but problems with memory and the ability to follow through with tasks result in the need for the degree of assistance with DLA reported by the SW. The appellant's own information does not address impacts related to alcohol and substance abuse and therefore does not clarify these inconsistencies.

Given the significant conflict between the assessment of DLA by the GP and the SW and the inconsistencies within the SW's information, the panel finds the ministry reasonable when concluding that the information was insufficient to 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.

Establishing 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.

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.

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).

APPEAL NUMBER
2020-00233

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)

2020/10/28

PRINT NAME

Kevin Ash

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2020/10/28

PRINT NAME

Linda Pierre

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2020/10/28