

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 November 4, 2020, 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 requirements of having reached 18 years of age and of having a severe physical impairment that, in the opinion of a medical practitioner, is likely to continue for at least 2 years.

However, the ministry 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 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

Documents before the ministry at reconsideration

The appellant's PWD application comprised of:

- A Medical Report (MR) dated June 3, 2020, completed by the appellant's general practitioner (GP) of 2 years, who had seen the appellant 2 -10 times in the 12 months prior to completing the application;
- An Assessor Report (AR) also completed by the appellant's GP on June 3, 2020; and,
- The appellant's self-report (SR) section of the PWD application, dated October 11, 2020.

Request for Reconsideration, dated September 7, 2020, comprised of:

- The appellant's reasons for requesting reconsideration and an October 14, 2020 2-page letter from the appellant to the GP.
- An October 20, 2020 letter from the GP to which the GP attached consult letters from an orthopedic specialist, a psychiatrist, spine and pain clinics, as well as pelvic CT, cervical spine MR and sleep study results. While much of this information supports the GP's diagnoses, most of it does not address the appellant's functional abilities or ability to perform DLA and is therefore not summarized below.

Information provided on appeal and admissibility

On December 8, 2020, the appellant provided a late submission which was accepted by the panel chair. The submission comprised letters dated November 23rd and December 7th, 2020 from the GP. In its December 14, 2020 response, the ministry stated that had it had this information at the time of the reconsideration decision, it may have found the appellant had met the criteria for PWD designation.

In accordance with section 22(4) of the *Employment and Assistance Act* (EAA), the panel may admit evidence required for the full and fair disclosure of all matters related to the appeal. Finding that the letters submitted on appeal addressed the issue on appeal, the appellant's ability to perform DLA, the panel admitted the new information under section 22(4) of the EAA.

Summary of Relevant Evidence

Diagnoses and Health History

In the MR, the GP diagnoses avascular necrosis and osteoarthritis of the right hip and cervical radiculopathy. In the subsequent October 20, 2020 letter, the GP confirms those diagnoses adding the diagnoses of ADHD and anxiety.

In the MR, the GP reports that walking and mobility are limited due to severe pain – needs cane for walking. Significantly affecting quality of life and sleep – medical management failed and may need hip replacement. Also left cervical radiculopathy with pain and weakness of left arm.

DLA

In the PWD application, the GP reports:

- The appellant has not been prescribed medication and/or treatments that interfere with the ability to perform DLA.
- Right hip pain, cervical radiculopathy and depression impact the appellant's ability to manage DLA.
- Currently needs walking aid, may need hip replacement. Can walk unaided less than 1 block on a flat surface and climb 2 to 5 steps unaided. Able to lift 5 to 15 lbs. and remain seated less than 1 hour. Walking indoors and outdoors, climbing stairs, lifting, and carrying/holding require the use of an assistive device, with walking outdoors taking 2-3 times longer.
- All listed tasks of personal self-care, basic housekeeping, meal preparation, management of medications, pay rent and bills, medications, and transportation are managed independently. The need for assistance from another person or an assistive device is not indicated nor are the tasks identified as taking significantly longer to perform.
- For daily shopping, the listed tasks are managed independently with the exception of requiring a cane to go to and from stores.
- No difficulties with communication.
- Respecting social functioning, appropriate social decisions, interact appropriately and ability to secure assistance from others are managed independently. Develop and maintain relationships and deal appropriately with unexpected demands require periodic support/supervision.
- The appellant has marginal functioning with immediate and extended social networks.

In the October 20, 2020 letter, the GP reports that due to pain from severe right hip osteoarthritis and osteonecrosis walking is significantly limited, described as 1-2 blocks with a cane on good days. Climbing the stairs is significantly limited and the appellant cannot climb the stairs on bad days. Pain also affects sleep, only getting 4-6 hours of very interrupted sleep. The appellant is a candidate for hip arthroplasty but at this stage the goal is to delay surgery as much as possible and manage pain with injections and nerve block. Left cervical radiculopathy

with ongoing pain and numbness further affects function and quality of (sic) sleep and life. ADHD and anxiety, as reviewed by psychiatrist, affect function, concentration, motivation, and coping abilities, further reducing functional level.

In the November 23, 2020 letter, the GP writes that the appellant's basic daily activity has been significantly affected by the chronic medical conditions discussed in detail in previous letters.

In the December 7, 2020 letter, the GP writes to certify that the appellant's activities of daily living (such as walking and moving around) and Instrumental Activities of Daily Living (such as housekeeping, meal preparation, shopping) and Quality of Life (such as mood and sleep) are significantly affected by the appellant's chronic medical conditions as were described in detail in previous correspondence.

In the reconsideration submissions, the appellant reports that even with a cane, walking is limited to about 1-2 blocks before needing a wheelchair. Some days are worse than others, when the appellant can barely make it 5 feet, while others the appellant could go 3 blocks. Because of limited mobility, need of a cane, and difficulty with stairs, everyday living activities wouldn't be possible without help and support and are very difficult to complete. Living on the second floor means carrying items up and down the stairs for trash/compost/recycling, and laundry is also downstairs. Yard work takes days, while cooking and cleaning is a constant back and forth, even more so when using one hand. Grocery shopping is done by the other people with whom the appellant lives - the appellant is able to grab a couple things and go but can't look for things and go around the store and is unable to carry anything without ending up unable to walk. Everything takes 10x longer because of limited mobility, difficulty with stairs, and need of a cane, crutches or wheelchair.

Need for Help

The GP drew a line through the section of the AR that addresses assistance provided by other people, indicated that the appellant does not have an assistance animal. The appellant uses a cane for walking/pain.

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:

- 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

Severe Impairment

Section 2(2) of the EAPWDA requires that the ministry is satisfied that an applicant has a severe mental or physical impairment; an applicant need not have both a severe physical and severe mental impairment. In this case, the ministry was satisfied that a severe physical impairment was established and appears, on that basis, to have not addressed severity of mental impairment.

As the ministry was satisfied that the appellant has a severe physical impairment, this legislative requirement has been met.

Restrictions in the ability to perform DLA

Positions of the Parties

The appellant's position as expressed in the SR and reconsideration submissions is that degenerative spinal arthritis and avascular necrosis of the right hip result in pain and limited mobility. Together with often having the use of only one hand, everything takes 10x longer, and life is further slowed down by lack of sleep and activities of daily living (ADD). The appellant argues that significant restrictions in the ability to perform DLA are confirmed by the GP in the information provided on appeal.

The ministry's position is that it relies on the information from prescribed professionals when assessing restrictions in the ability to perform DLA. The ministry notes the GP's assessment of independence with DLA, with the exception of requiring a cane to go to and from stores, and that periodic support/supervision is required for two aspects of social functioning, though the nature, frequency and duration of the support/supervision is not described and the appellant is reported to maintain marginal functioning with immediate and extended social networks. Based on the degree of independence reported with almost all DLA and the absence of details regarding restrictions with social functioning, the ministry concludes that direct and significant restrictions in the ability to perform DLA either continuously or periodically for extended periods are not established. The ministry acknowledges the appellant's own description of restrictions respecting the ability to manage stairs, housekeeping and shopping but finds that a prescribed professional has not confirmed these restrictions.

Panel Analysis

Section 2(2)(b)(i) of the EAPWDA requires 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. Finally, there is a component related to time or duration – the direct and significant restriction must be either continuous or periodic. If periodic, it must be for extended periods. Inherently, any analysis of periodicity must also include consideration of the frequency. 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.

In the appellant's case, information respecting the ability to perform the prescribed DLA is provided by the GP.

Respecting the two DLA specific to mental impairment - make decisions about personal activities, care or finances and relate to, communicate or interact with others effectively – the panel finds that the information does not establish significant restrictions. The GP does not indicate difficulties with decision making or communication. For social functioning, the GP identifies the need for periodic support/supervision with developing and maintaining relationships and dealing with unexpected demands, but as the other aspects of social functioning are managed independently and there is no description of the nature, frequency or duration of the assistance required, the ministry reasonably concluded that significant restrictions, either continuous or periodic for extended periods, are not established. Additionally, the panel notes that the information from the GP and the appellant available at reconsideration emphasizes the appellant's physical medical conditions and that although the GP's information provided on appeal is that the appellant's mood and sleep are significantly affected, no direct correlation to any of the prescribed DLA is identified.

Respecting the impact of physical impairment on DLA, in the PWD application the GP assessed the appellant as independently managing all but one of the listed physical DLA tasks despite identifying markedly reduced physical functional abilities directly related to the medical condition of the appellant's right hip and cervical spine. Physical functional abilities reported by the GP include being able to walk less than 1 block unaided and having limitations in the ability to climb stairs, lift, and remain seated as well as requiring an assistive device for all aspects of physical ability and mobility, including standing. The severity of these physical functional limitations was confirmed by the GP at reconsideration in the October 20, 2020 letter. On appeal, the GP writes that the appellant's chronic medical conditions, as described in previous correspondence, significantly affect the appellant's abilities with walking and moving around, housekeeping, meal preparation, and shopping. The panel finds that this new information is consistent with the severely restricted physical functioning and reliance on a cane previously described by the GP and with the appellant's description of DLA restrictions resulting from reduced mobility and pain. Having considered the GP's information, including that provided on appeal, the panel concludes that the appellant's severe physical impairment results in direct and significant continuous restrictions in the ability to perform the DLA move about indoors and outdoors, basic housekeeping, shopping, and meals.

Based on all of the available evidence, the panel concludes that the ministry was not reasonable when determining that the appellant's severe physical impairment does not result in direct and significant restrictions, either continuous or periodic for extended periods, in the ability to perform DLA.

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 daily living “activities” is a precondition of requiring “help to perform those activities.” The panel found that the ministry was not reasonable to conclude that this precondition was not met. The panel also finds that the GP identifies the need for the continuous use of an assistive device, a cane, with all aspects of mobility which would include managing the DLA move about indoors and outdoors and the physical tasks of the DLA basic housekeeping, shopping, and meals. For these reasons, the panel also finds that the ministry unreasonably concluded that the appellant does not require help to perform DLA.

Conclusion

The panel finds that the ministry’s reconsideration decision, which determined that the appellant did not meet all requirements set out under section 2(2) of the EAPWDA for designation as a PWD, was not reasonably supported by the evidence. The ministry’s decision is rescinded and the appellant is 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.

(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).

APPEAL NUMBER
2020-00252

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)

2020/12/16

PRINT NAME

Jeremy Scott

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2020/12/16

PRINT NAME

Keith Lacroix

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2020/12/16