

**PART C – DECISION UNDER APPEAL**

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the “Ministry”) reconsideration decision of July 9, 2021 (the “Reconsideration Decision”), in which the Ministry determined that the Appellant was not eligible for a Persons with Disabilities (“PWD”) designation because the Appellant had not satisfied the Ministry that:

- the Appellant had a severe physical or mental impairment
- the Appellant’s ability to perform daily living activities (“DLAs”), in the opinion of a prescribed professional, are restricted on a continuous basis or periodically for extended periods; and
- as a result of restrictions to the Appellant’s DLAs, 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 DLAs

as required by section 2 of the Employment and Assistance for Persons with Disabilities Act (“EAPWDA”).

**PART D – RELEVANT LEGISLATION**

EAPWDA- section 2  
Employment and Assistance for Persons with Disabilities Regulation (“EAPWDR”)- sections 2, 2.1

## **PART E – SUMMARY OF FACTS**

The evidence before the Ministry at the time of the Reconsideration Decision included:

- the Ministry’s Persons with Disabilities Summary (the “Decision”) and letter to the Appellant, dated April 27, 2021;
- the Assessor Report (“AR”), dated March 29, 2021, and completed by the Appellant’s family physician (the “Doctor”);
- the Medical Report (“MR”), dated March 29, 2021, and also completed by the Doctor;
- the Appellant’s PWD Application, dated March 30, 2021 (the “Application”);
- the Appellant’s Request for Reconsideration, which appears to have been dated June 2, 2021, to which was attached the following documentation:
  - a typed four page letter, dated June 29, 2021 (the “Letter”);
  - a letter from an orthopedic surgeon (the “Ortho”), dated February 10, 2021 (the “Ortho Letter”); and
  - clinical notes from March 29, 2021 to June 14, 2021 (the “Clinical Notes”)

### ***Diagnoses***

In the Ortho Letter, the Ortho noted that the Appellant had had a video consult regarding the Appellant’s right hand. The Ortho described the history provided by the Appellant including that the Appellant’s right hand had been injured in a bicycle accident and had subsequently become infected. The Ortho described the Appellant as suffering from a swan-neck deformities of the second third fourth and fifth fingers” with a “fusion of the metacarpophalangeal joint of the middle finger” where the “metacarpophalangeal joint of the third finger does not move”. The Ortho also assessed disuse osteopenia of the right hand. The Ortho noted having discussed surgical options with the Appellant.

In the MR, the Doctor diagnosed

- “Musculoskeletal system”, with an onset in March, 2019; and
- Arthritis, with no onset date noted.

The Doctor did not make any diagnoses of conditions that fell within the mental disorders diagnostic category on the MR.

In the AR, the Doctor described the Appellant’s right had as “deformed due to complications from an infection.” In the next sentence, the Doctor wrote that the Appellant “is unable” but wrote nothing further after “unable.”

### ***Physical Impairment***

In the MR and the AR, the Doctor reported that:

- the Appellant is right-handed and injured the right hand with a subsequent infection which spread to the bone, causing chronic osteomyelitis;
- the Appellant’s wound healed but with “resultant deformity, osteopenia, and arthritis”;
- the Appellant has chronic pain in the right hand which affects the Appellant’s ability to work, as well as to carry, lift and perform household chores

- the Appellant has limited use of the right hand, affecting day to day functioning, such as “lifting and carrying, doing household chores”;
- in the MR, the Doctor set out that the Appellant’s only functional limitation was with respect to lifting as the Appellant could only lift 2 to 7 kg;
- in the AR, the Doctor noted that the Appellant was fully independent with respect to walking indoor and outdoors, climbing stairs, and standing, but had limitations on lifting and carrying and holding items with the right hand.

In the Application, the Appellant wrote that:

- the Appellant’s right hand was broken;
- bathing and housekeeping takes longer and that writing was difficult;
- the Appellant had worked as a cook, most recently two years ago;

At the hearing of the Appeal, the Appellant reiterated much of what was in the Letter. The Appellant described having been a cook at the time of the bicycle accident (a job the Appellant had held since the age of 15) and not being able to work any more as a result of the injury to the dominant hand. The Appellant can now only use the non-dominant left hand. The Appellant described worsening symptoms since the MR was prepared by the Doctor, particularly with respect to pain on the left side as a result of overuse of the left side limbs.

The Appellant also described being impacted mentally, due to not being able to work as a cook any longer. The Appellant confirmed that, to date, no treatment has been undertaken for the mental and psychological impact that the injury has had.

### ***DLAs***

In the AR, the Doctor found that the Appellant was independent with respect to all DLAs, other than basic housekeeping. With respect to same, the Doctor noted that it normally took the Appellant double the amount of time.

In the Letter attached to the RFR, the Appellant wrote that:

- the Appellant had difficulty with the following personal care routines:
  - washing;
  - dressing;
  - getting ready for bed;
  - shaving;
  - brushing teeth;
  - face washing;
  - drying;
  - taking a shower; and
  - writing correspondence
- the Appellant had difficulty with the following tasks related to the preparation and eating of meals:
  - opening cans and jars;
  - opening and re-sealing bags;
  - moving food from shelves to counters,
  - chopping, peeling, and mixing/stirring food;
  - handling kitchen utensils for preparing and eating meals

- the Appellant had concerns about becoming addicted to Tylenol 3
- the Appellant had difficulty with the following household tasks:
  - cleaning and putting away dishes;
  - cleaning counters, sink, stove, and oven;
  - dusting;
  - vacuuming floors and cleaning windows;
  - cleaning the bathroom;
  - doing laundry and related tasks;
  - taking out garbage; and
  - making the bed;
- the Appellant had difficulty with the following shopping tasks:
  - picking items from shelves and loading them;
  - taking groceries home;which resulted in more trips to the store and purchasing less with each trip
- the Appellant had difficulty with mobility, both indoors and outdoors, including restrictions with:
  - getting in and out of furniture;
  - opening and closing doors;
  - picking things up from the floor;
  - kneeling;
  - ascending and descending stairs; and
  - walking on uneven surfaces; and
- the Appellant had difficulty using public transportation;

At the hearing of the Appeal, the Appellant described the above restrictions and described being unable to lift anything heavy with the injured hand. The Appellant also described the injury to the right hand as causing significant limitations with respect to personal hygiene.

The Appellant described having pain in the torso and the non-dominant arm as a result of having to favour the injured hand and arm. The Appellant noted that holding on to railings and the like has been made more difficult and that falling is more likely to cause injury because the Appellant can no longer use the right hand to brace for impact.

### ***Need for Assistance***

In the AR, the Doctor did not describe any specific assistive devices required by the Appellant but advised that the Appellant was waiting for assessment by an occupational therapist to advise on appropriate assistive device.

In the Letter attached to the RFR, the Appellant described having the following help:

- assistance from various local community health units, family members, including a sibling, and a friend who came over 3 times per week for a couple of hours and helped with dishes, laundry, sweeping/mopping, taking out garbage, and meal preparation; and
- using a wheeled cart to transport groceries and laundry.

At the hearing, the Appellant noted that a friend assists with shopping and household chores such as cooking and cleaning, approximately two to three times per week, consistent with the information contained in the Letter. Only simple meals that don't require much preparation, such as opening cans, etc. are within the Appellant's current abilities.

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The Appellant described getting some help with shopping from a sibling and also described using the wheeled cart referenced in the Letter. The Appellant confirmed that the wheeled cart was not something recommended or prescribed by the Doctor but was something that the Appellant located.

## PART F – REASONS FOR PANEL DECISION

The issue in this appeal is whether the Ministry was reasonable in its determination that the Appellant did not meet the statutory requirements of Section 2 of the EAPWDA for designation as a PWD because:

- the Appellant did not have a severe physical or mental impairment
- the Appellant's ability to perform DLAs are not, in the opinion of a prescribed professional, restricted on a continuous basis or periodically for extended periods; and
- as a result of restrictions to the Appellant's DLAs, the Appellant does not require the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLAs.

## STATUTORY FRAMEWORK

The statutory requirements for designation as a PWD are set out in section 2 of the EAPWDA:

### 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).

Section 2.1 of the EAPWDA sets out addition classes of person who may qualify for the PWD designation.

#### **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).

Section 2 of the EAPWDR defines the DLAs that references in section 2 of the EAPWDA and sets out who qualifies as a prescribed professional for the purposes of section 2 of the EAPWDA:

#### **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.

## PANEL DECISION

There is no indication in the evidence that the Appellant meets any of the criteria set out in section 2.1 of the EAPWDA. In the result, the panel finds that the Ministry was reasonable in its determination that the Appellant's eligibility for the PWD designation is governed by section 2 of the EAPWDA.

### ***Severe Physical Impairment***



In the Reconsideration Decision, the Ministry determined that the Appellant had not provided information that established a severe physical impairment.

The Cambridge Dictionary defines “impairment” in the medical context to be “a medical condition which results in restrictions to a person’s ability to function independently or effectively” and defines “severe” as “causing very great pain, difficulty, worry, damage, etc.; very serious”. The term “Impairment” is defined in the MR and the AR sections of the PWD application form to be “a loss or abnormality of psychological, anatomical, or physiological structure or function causing a restriction in the ability to function independently, appropriately or for a reasonable duration”. Although the terms “impairment” and “severe” are not defined in the EAPWDA, the Panel finds that the Ministry’s definition of “impairment” as set out in the MR and the AR is a reasonable definition of the term for the purpose of determining whether an applicant has an impairment that is severe in assessing an applicant’s eligibility for the PWD designation.

A diagnosis of a severe impairment does not in itself determine PWD eligibility. Section 2(2) of the EAPWDA requires that in determining whether a person may be designated as a PWD, the Ministry must be satisfied that the individual has a severe physical or mental impairment with two additional characteristics: in the opinion of a prescribed professional, it must both be likely to continue for at least two years [EAPWDA 2(2)(a)], and it must directly and significantly restrict a person’s ability to perform DLA continuously or periodically for extended periods, resulting in the need for the person to require an assistive device, significant help or supervision, or an assistance animal in performing those activities [EAPWDA 2(2)(b)]. Therefore, in determining PWD eligibility, after assessing the severity of an impairment the Ministry must consider how long the severe impairment is likely to last and the degree to which the ability to perform DLA is restricted and assistance in performing DLA is required. In making its determination the Ministry must consider all the relevant evidence, including that of the Appellant. However, the legislation is clear that the fundamental basis for the analysis is the evidence from prescribed professional(s)-in this case, the Doctor who completed both the AR and the MR.

The Ministry acknowledged that the Appellant was unable to work and had chronic pain in the right hand, as diagnosed by the Doctor. Although the Appellant is taking some medications to deal with pain, none had been prescribed by the Doctor.

In the case of the Appellant, the Doctor assessed the Appellant’s functional skills in the MR being able to walk unaided on a flat surface for 4+ blocks, capable of climbing 5+ stairs, able to lift between 2 and 7 kilograms. The Appellant was also described as having no restrictions with respect to sitting and no communication difficulties. Finally, the Appellant was not noted to be having any significant deficits with respect to cognitive and emotional functioning. All of the Appellant’s functional skills, with the exception of lifting, were found to be at the maximum level of functioning.

In the AR, the Appellant was found to have good speaking and hearing communication abilities but only satisfactory reading ability and poor writing ability. It is not clear whether or how the limitations on reading are related to the Appellant’s right hand injury but it stands to reason that the Appellant’s limitation with respect to writing is at least partly the result of the injury and the Appellant described being unable to write any correspondence in the Letter.

The Appellant was also assessed in the AR as being independent with most aspects of mobility and physical ability, other than lifting and carrying and holding with the right hand.

The Appellant also described a number of different limitations with respect to physical functioning, both in the Letter and at the hearing. These restrictions were described by the Appellant as having worsened since the AR and the MR were prepared. In particular, the Appellant described experiencing left side pain which was not referenced in either the MR or the AR.

While the above information does indicate restrictions in the Appellant's ability to carry out some aspects of physical functioning and DLAs, including writing, lifting, carrying and holding with the right hand, all other aspects of the Appellant's functional skills were found by the Doctor to be at the maximum level of functioning and independent with most aspects of mobility and physical ability. . There is also some conflict in the Appellant's self-reporting of the impact of the right hands injury and the Doctor's description of the impact of the right hand injury on the Appellant's functioning. In the result, it is not clear that the Appellant is significantly restricted in carrying out DLAs, due to a physical impairment and the panel finds that the Ministry was reasonable in weighing the evidence found in the AR, the MR, and the Appellant's self-reporting in its determination that the Appellant has not established that a *severe* physical impairment as per section 2(2) of EAPWDA.

### ***Severe Mental Impairment***

The Ministry was likewise not satisfied that the Appellant had established a severe mental impairment. At the hearing, the Appellant stated that the injury has impacted the Appellant emotionally and mentally; that the resulting limitations and restrictions have "taken a toll" on the Appellant's self esteem. However, there was no diagnosis of any impairment that fell within the mental disorders diagnostic categories set out in the MR and the Doctor did not describe any issues with communication or with respect to cognitive and emotional function in the MR. Although some impairment was noted in the AR and MR, the Doctor does not indicate that this is the result of any mental impairment and the Appellant's restrictions on written communication are at likely to be at least partially attributable to the injury to the right hand.

Given the foregoing, the panel finds that the Ministry's determination that the Appellant is not suffering from a severe mental impairment was reasonable.

### ***Restrictions in Ability to Perform DLAs***

Pursuant to section 2(2)(b) of the EAPWDA, the Ministry must assess whether, in the opinion of a prescribed practitioner, such as the Doctor, DLAs are directly and significant restricted. This does not mean that other evidence is discounted, particularly where it may provide clarification to the information from the prescribed professional, but the legislative language makes it clear that a prescribed professional's evidence is the basis for the ministry's determination as to whether it is "satisfied" that DLAs are directly and significantly restricted.

The application for PWD designation directs practitioners who complete the MR and AR to explain, in as much detail as possible, the nature of any continuous restrictions to an applicant's DLAs and the nature, frequency and duration of any periodic restrictions to an applicant's ability to perform DLAs. In the result, the prescribed professional completing the reports has the opportunity to indicate which, if any, DLAs are significantly restricted by the appellant's impairments, either continuously or periodically for extended periods.

In the AR, the Doctor stated that the Appellant was independent with all aspects of personal care DLAs. With respect to basic housekeeping, the Appellant was deemed independent with respect to laundry but restricted when it comes to basic housekeeping in that it took the Appellant significantly longer than

typical (“double the amount of time”, according to the Doctor). The Appellant was also deemed to be independent when it came to shopping, meals, paying rent and bills, medication, and transportation.

The Appellant described limitations and the need for assistance with respect to several of these DLAs, including shopping and meals. The Appellant also described increasing reliance and less ability to carry out these DLAs independently.

However, with respect to DLAs, the legislation requires a prescribed professional to provide an opinion that the Appellant’s ability to perform DLAs is directly and significantly restricted continuously or periodically for extended periods.

The Doctor has:

- assessed the Appellant as taking significantly longer than typical with only one of the listed DLAs in the AR; and
- has not indicated the need for assistance with respect to any DLAs.

The panel notes that there is some discrepancy between the reports of the Appellant regarding both restrictions in carrying out DLAs and needing assistance with respect to same. The Appellant did describe worsening functioning at the hearing and that both the MR and AR were prepared almost five months ago. However, the panel finds that the Ministry was reasonable in its determination that there was insufficient evidence to establish that the Appellant’s ability to carry out DLAs is significantly restricted, either continuously or periodically for extended periods, *in the opinion of a prescribed practitioner*, as required by section 2(2)(b)(i) of the EAPWDA.

### ***Help with Performing DLAs***

Section 2(2)(b)(ii) of the EAPWDA sets out that one of the requirements for designation as a PWD is that a person require assistance continuously or periodically for extended period with carrying out DLAs. Help is defined in section 2(3) of the EAPWDA describes the requirement of an assistive device, significant help or supervision of another person, or the services of an assistance animal as requiring “help.”

In the AR, the Doctor does not describe the Appellant as requiring help with any specific DLAs, although the Appellant does describe receiving help from a sibling and a friend with respect to several DLAs, including shopping, meal preparation, and some household chores. The Appellant also described using a wheeled cart for transporting groceries, although this was not something prescribed by the Doctor. The Doctor does note that the Appellant is awaiting an occupational assessment to determine what, if any, assistive devices may be appropriate.

However, based on the current information available, the panel finds that the Ministry was reasonable in its determination that the evidence does not establish that the Appellant requires assistance continuously or periodically for extended periods of time, as required by section 2(2)(b)(ii) of the EAPWDA.

### ***Conclusion***

In view of all of the foregoing, the panel finds that the Ministry’s Reconsideration Decision, which determined that the Appellant had not satisfied the criteria of section 2(2) of the EAPWDA for designation as a PWD was reasonably supported by the evidence and Confirms the Reconsideration Decision. The Appellant is not successful in this appeal.

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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

Adam Shee

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2021/08/15

PRINT NAME

Barbara Insley

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2021/08/15

PRINT NAME

Carmen Pickering

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2021/08/24