

### 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 January 4, 2022, 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* for designation as a person with disabilities (PWD). The ministry found that the appellant met the age and duration requirements, but was not satisfied that:

- the appellant has a severe mental and/or physical 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 these restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

In addition, the ministry found that it had not been demonstrated that the appellant is one of the prescribed classes of persons who may be eligible for PWD designation on alternative grounds, which includes: a person who is enrolled in palliative care; a person who has at any time been determined eligible for At Home Program payments through the Ministry of Children and Family Development; a person who has at any time been determined eligible by Community Living BC for community living support; and a person who is considered disabled under section 42(2) of the *Canadian Pension Plan Act*.

### Part D – Relevant Legislation

*Employment and Assistance for Persons with Disabilities Act* (EAPWDA), section 2

*Employment and Assistance for Persons with Disabilities Regulation* (EAPWDR), section 2

**Part E – Summary of Facts****Evidence at Reconsideration**

1. The appellant's PWD application comprised of a Medical Report (MR) [dated December 3, 2021], which was completed by the appellant's doctor of neuropathy (the 'specialist'), who had known the appellant for 1 year and seen him 11 or more times in the past 12 months.
2. An Assessor Report (AR) [dated December 3, 2021], which was completed by the appellant's social worker (the 'SW'), who had known the appellant for 1 year and seen him 11 or more times in the past 12 months. The approaches and sources used to conduct the MR and AR were indicated as office interview and file/chart information with the comment.
3. The PWD application also included the appellant's Self-Report (SR) dated December 2, 2021, which was left blank.
4. Medical records, including Lab results, EKG results, Outpatient Progress Note June 16, 2021. Outpatient Progress Note December 3, 2021, which confirms end-stage kidney disease. His energy level is "rather satisfactory at this time"; he is still quite functional "so to speak."
5. Request for Reconsideration, (RFR), signed and dated January 21, 2022.
6. The appellant's submission which consists of a SR, dated January 26, 2022. In it the appellant described his medical condition and the impacts it has on his DLA. The description included, but is not limited to, the following:
  - He has hemodialysis three times a week and the commute are 1.5-2 hours each way.
  - On non-dialysis days he is extremely fatigued and often sleeps most of the day and does not leave the house. The SW and specialist do not see him on these days and so are unaware that he cannot complete his functional skills and mobility and DLA.
  - He also experiences severe anxiety, moderate depression and lack of motivation due to ongoing health issues.
  - On non-dialysis days he can barely get out of bed so he is limited in meal preparation (maybe able to prepare one meal a day), basic housekeeping (cannot do any heavy housework, washing floors, vacuuming), and unable to do daily shopping.
  - He is able to go shopping on Sundays some weeks.
  - He works with a renal dietitian once a week to review lab values and adjust diet to reduce the toxins building up in the body.
  - He works with the renal pharmacist weekly to adjust his medication to ensure kidney function does not decline further.

**Diagnoses**

In the MR, the specialist notes that the appellant has been diagnosed with kidney disease (onset 2021) and diabetes (no onset).

**Health History**

In the MR, the specialist attached consults and lab imaging.

**Degree and Course of Impairment**

In the MR, the specialist indicated that the appellant's impairment is likely to continue for two years or more and that the kidney failure will resolve with a kidney transplant.

**Physical Impairment**

In the MR the specialist indicated the following about the appellant:

- Can walk 4+ blocks and climb 5+ steps unaided, lift 15-35lbs and remain seated with no limitation.

In the AR, the SW indicated the following about the appellant:

- Can perform walking indoors/outdoors, climbing stairs, standing, independently and carrying/holding.
- Periodic assistance is required with lifting (no other information was provided).

In the SR, the appellant stated that on non-dialysis days he is extremely fatigued and often sleeps most of the day and does not leave the house.

### ***Mental Impairment***

In the MR, the specialist indicated the following about the appellant:

- There are no difficulties with communication.
- There are significant deficits with motivation.
- There are no restrictions with the management of medication, management of finances and it is unknown if there are restrictions to social functioning.

In the AR, the SW indicated the following about the appellant:

- Speaking, reading, writing and hearing are good.
- In cognitive and emotional functioning there is a moderate impact to motivation.
- The section under DLA regarding social functioning was left blank.

In the SR, the appellant stated that he experiences severe anxiety, moderate depression and lack of motivation due to ongoing health issues.

### ***Daily Living Activities***

In the MR, the specialist indicated the following about the appellant:

- It was not indicated if medication interferes with the appellant's ability to perform DLA.
- The appellant will be on dialysis for the rest of his life or until he receives a kidney transplant.
- The listed DLA either have no restriction or it is unknown if there is a restriction.

In the AR, the SW indicated the following about the appellant:

- All listed DLA tasks are performed independently except regulating diet (works with dietitian) and taking medication as directed (works with pharmacist) which require periodic assistance.
- All DLA associated with social functioning were left blank.

In the SR, the appellant stated that on non-dialysis days he can barely get out of bed so he is limited in meal preparation (maybe able to prepare one meal a day), basic housekeeping (cannot do any heavy housework, washing floors, vacuuming), and unable to do daily shopping. He is able to go shopping on Sundays some weeks.

### ***Need for Help***

In the MR, the specialist indicated the following:

- That the appellant does not require any prostheses or aids for the impairment.

In the AR, the SW indicated the following:

- The appellant lives alone.
- The appellant does not require assistance from assistance animals.
- All other sections related to help were left blank.

In the SR, the appellant did not elaborate on the assistance he requires, how often or for what duration.

**Evidence at Appeal**

A Notice of Appeal (NOA) signed and dated March 9, 2022 and stated “there are additional medical concerns to take into consideration”.

**Evidence at the Hearing**

At the hearing the appellant relied on the information presented at the time of the reconsideration decision and RFR, and, in part, added the following:

- The medical condition has caused a big impact on his mental health. This is exacerbated by the fact that he is alone. He tries not to worry. His mood is much better lately.
- His physical health is also deteriorating.
- Covid-19 has caused more exhaustion and he is still recovering from it.
- Home dialysis is not an option because his living space (a bedroom in a house), is not large enough for the dialysis equipment that would be necessary. Travelling is the best option.
- He was not present with the specialist when the PWD application was completed. He handed his information to the specialist.
- Diabetes is also a medical condition that he suffers from, and he is trying to get a handle on.
- He recently had surgery on his left arm which further restricts his ability. However, he is expected to recover from his.
- The words in the PWD application do not fully explain how this disease impacts a person.
- The day after dialysis is physically and mentally exhausting.
- He is forced to perform his DLA because he is alone and does not have the help he needs.
- By the end of the month, he is out of money and cannot make it to his dialysis appointments. This exacerbates his medical condition.

At the hearing the ministry relied on its reconsideration decision.

**Part F – Reasons for Panel Decision**

The issue on appeal is whether the ministry's reconsideration decision, which found that the appellant is not eligible for 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. The ministry found that the evidence does not establish that the appellant has a severe mental or physical impairment, and that his DLA are, in the opinion of a prescribed professional, directly, and significantly restricted either continuously or periodically for extended periods. Also, as a result of those restrictions, it could not be determined that the appellant requires the significant help or supervision of another person.

**Panel Decision****Severe Impairment**

In the reconsideration decision, the ministry was not satisfied that the information provided establishes a severe physical or mental impairment. Determining a severe physical or mental impairment requires weighing the evidence provided against the nature of the impairment and its reported functional skill limitations. A diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment. An "impairment" is a medical condition that results in restrictions to a person's ability to function independently or effectively. To assess the severity of an impairment, the ministry must consider the nature of the impairment and the extent of its impact on daily functioning.

The panel finds that employability is not a consideration for eligibility for PWD designation because neither is not a criterion in section 2(2) of the EAPWDA nor is it listed among the prescribed daily living activities in section 2 of the EAPWDR.

**Physical Impairment**

The appellant argued that his medical condition is a severe physical impairment.

The ministry argued that, based on the information provided in the PWD application, a severe impairment of the appellant's physical functioning has not been established.

In its reconsideration decision, the ministry noted that, in the MR the specialist indicted that the appellant is at end stage renal failure and requires life-sustaining treatment 3 times per week. This will go on until the end of his life or until he has a kidney transplant. The ministry stated that the information provided by the prescribed professionals does not support a severe degree of physical impairment. The specialist reports that the appellant can walk four or more blocks and climb five or more stairs without assistance. He can lift 15-35 pounds and has no limitation in the duration he can remain seated. In the Assessor Report, the SW reports the appellant is independent in walking indoors/outdoors, climbing stairs, standing, and carrying and holding. It was noted that the appellant requires periodic assistance lifting, however, the frequency, duration and nature of assistance is not reported, making it difficult to establish a severe impairment in lifting; especially in light of the specialist's report that the appellant can lift 15-35 pounds. The ministry also noted that the appellant indicated that he is not able to get out of bed or function on weekdays that he does not have dialysis, these limitations have not been confirmed by the specialist or the SW who indicate that he is functioning within normal limits.

The panel finds the ministry's analysis of the evidence as stated here was reasonable as the evidence provided by both prescribed professionals about the appellant's mobility and physical functioning does not support a finding of a severe physical impairment. The panel notes that the appellant cannot work but he stated that he completes his DLA because he is forced to as he is alone and has no help. The panel concluded that though he is exhausted after treatment, he is

physically able to mobile at a functional level. The appellant did not argue that when he is exhausted after treatment that he still cannot functional physically.

Given the overall assessments of the appellant's functional ability, and mobility and physical ability in the PWD application and the lack of any additional information provided at appeal from a prescribed professional, the panel finds that the ministry was reasonable in its determination that the evidence does not support a finding that the appellant suffers from a severe physical impairment and that the legislative criteria outlined in Section 2(2) of the EAPWDA have not been met.

### Mental Impairment

The appellant argued that he suffers from anxiety, depression and a lack of motivation.

The ministry argued that that based on the assessments provided in the PWD application, a severe impairment of mental functioning has not been established.

The ministry noted that in the MR, the specialist did not provide a diagnose of a mental condition that would result in a mental impairment. The ministry also noted that the specialist indicated one significant cognitive and emotional deficit in the area of motivation which the SW has assessed to have a moderate impact on your daily functioning. The ministry noted that the appellant maintains his independence in almost all daily living activities. He receives periodic assistance from a renal dietitian for regulating his diet and a renal pharmacist for his medication. However, this support does not confirm a severe degree of mental impairment, but rather, appears to be within typical range of functioning given the physical medical condition. In regard to communication, the ministry noted that there are no difficulties in this area. The SW reported good abilities in speaking, reading, writing and hearing. Therefore, the ministry cannot confirm a severe impairment regarding communication. While the appellant has reported that he experiences depression and anxiety due to his medical conditions, the specialist has not confirmed these diagnoses, nor have the professionals indicated that the appellant has a severe mental impairment.

The panel finds that the ministry analysis of the evidence was reasonable, and it reasonably concluded that the information provided by the specialist and SW regarding the appellant's mental, cognitive and emotional functioning does not support a finding of a severe mental impairment. The panel notes that the appellant is independent with activities and tasks typically difficult to perform for those with a severe mental impairment. That is, the evidence demonstrates that the appellant can make decisions about personal activities, care and finances. Though social functioning is also typically associated with mental impairment, the evidence does not provide any information on the appellant's social functioning as the section was left blank. The panel also notes that either prescribed professional explains how a deficit in motivation impacts the appellant's mental, cognitive and emotional functioning. The panel notes that the evidence indicated that the appellant is able to work with the dietician and pharmacist which requires a functional level of cognitive skills. The panel understands that one would feel anxiety and depression given his medical diagnosis, however, the evidence indicates that it does not prevent the appellant from functioning cognitively or emotionally.

Given the overall assessments of the appellant's mental, cognitive, and emotional ability and functioning in the PWD application and the lack of any additional information provided at appeal from a prescribed professional, the panel finds that the ministry was reasonable in its determination that the evidence does not support a finding that the appellant suffers from a severe mental impairment and that the legislative criteria outlined in Section 2(2) of the EAPWDA have not been met.

Restrictions in the ability to perform DLA

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 that the legislative criteria are met, 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 may be either continuous or periodic. If periodic, it must be for extended periods. Any analysis of periodicity must also include consideration of how frequently the activity is restricted. 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.

The appellant argued that due to his medical conditions he is not easily able to complete his DLA such as meal preparation, basic housekeeping and shopping.

The ministry argued that it is not satisfied that the information provided establishes that the impairment directly and significantly restricts DLA continuously or periodically for extended periods.

The ministry noted that in the MR, the specialist does not confirm restrictions in any daily living activity. It was indicated that the appellant is not restricted in personal care, medication management, mobility inside/outside the home, transportation, and finances. The specialist indicated "it is "unknown" if the appellant is restricted in medication management, basic housework, daily shopping, or social functioning.

In the AR, the SW indicated that the appellant is independent in almost all daily living activities, including all aspects of basic housekeeping, shopping, meals, finances, and transportation, and the majority of personal care and medication activities. No information was provided regarding social functioning. The ministry noted that the appellant works with a renal dietitian to receive periodic assistance regulating diet, and with a renal pharmacist to receive periodic assistance taking medication as directed. However, periodic assistance working with professionals to adjust treatment and diet do not confirm a significant overall restriction in the activities of medication management and personal care.

The ministry noted that the appellant indicated that he is bed bound Tuesdays and Thursdays when he does not have to undergo 3-4 hours of transportation and 4 hours of treatment. However, these limitations are not assessed nor discussed by either prescribed professional.

The panel finds the ministry's analysis of the evidence and its conclusion regarding the evidence as stated here was reasonable. The panel finds that being independent with the majority of listed DLA and lacking information regarding frequency and duration of the periodic assistance that is required does not satisfy the legislative requirements. The panel notes that the appellant also stated that he completes his DLA because he has no one to help him. Though impacted physically by exhaustion and in bed after treatment, he is still able to complete what he needs to. The panel notes that the specialist did not indicate whether treatment interferes with the appellant's ability to perform his DLA. The panel notes

there is a discrepancy between the appellant's account of his abilities and the information provided by the prescribed professionals. However, the legislation is clear that restrictions to DLA must be confirmed by the prescribed professionals.

The panel considered the assessment by the specialist in the PWD application of independence with almost all of the DLA, the lack of sufficient information indicating whether there is a restriction to perform some DLA either continuously or periodically for extended periods, and that insufficient additional or supporting information was provided from a prescribed professional at appeal to support the appellant's position.

The panel finds that the evidence provided by the specialist and SW does not describe or indicate that a severe impairment restricts the appellant's ability to perform DLA either continuously or periodically for extended periods. Given the evidence as a whole, the panel finds that the ministry reasonably concluded that the evidence does not establish that an impairment significantly restricts DLA continuously or periodically for extended periods, pursuant to Section 2(2)(b)(i) of the EAPWDA.

### 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 appellant indicated that he requires help with his DLA.

The ministry argued that because it has not been established that DLA are significantly restricted, it cannot be determined that help is required.

The panel notes that in the PWD application, the specialist and SW did not elaborate on the assistance that is required.

Given that confirmation of direct and significant restrictions with DLA is a precondition of the need for help criterion and because 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 is a reasonable application of the applicable enactment, and therefore confirms the decision. The appellant is not successful on appeal.

**The criteria for being designated as a PWD are set out in Section 2 of the EAPWDA as follows:**

#### **Persons with disabilities**

2 (1) In this section:

"assistive device" means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform;



"daily living activity" has the prescribed meaning;

"prescribed professional" has the prescribed meaning.

(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the

purposes of this Act if the minister is satisfied that the person is in a prescribed class of persons or that the person

has a severe mental or physical impairment that

(a) in the opinion of a medical practitioner or nurse practitioner is likely to continue for at least 2 years, and

(b) in the opinion of a prescribed professional

(i) directly and significantly restricts the person's ability to perform daily living activities either

(A) continuously, or

(B) periodically for extended periods, and

(ii) as a result of those restrictions, the person requires help to perform those activities.

(3) For the purposes of subsection (2),

(a) a person who has a severe mental impairment includes a person with a mental disorder, and

(b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires

(i) an assistive device,

(ii) the significant help or supervision of another person, or

(iii) the services of an assistance animal.

(4) The minister may rescind a designation under subsection (2).

The EAPWDR provides as follows:

### **Definitions for Act**

**2 (1)** For the purposes of the Act and this regulation, "**daily living activities**",

(a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following

activities:

(i) prepare own meals;

(ii) manage personal finances;

(iii) shop for personal needs;

(iv) use public or personal transportation facilities;

(v) perform housework to maintain the person's place of residence in acceptable sanitary condition;

(vi) move about indoors and outdoors;

(vii) perform personal hygiene and self care;

(viii) manage personal medication, and

(b) in relation to a person who has a severe mental impairment, includes the following activities:

- (i) make decisions about personal activities, care or finances;
- (ii) relate to, communicate or interact with others effectively.

(2) For the purposes of the Act, "**prescribed professional**" means a person who is

(a) authorized under an enactment to practise the profession of

- (i) medical practitioner,
- (ii) registered psychologist,
- (iii) registered nurse or registered psychiatric nurse,
- (iv) occupational therapist,
- (v) physical therapist,
- (vi) social worker,
- (vii) chiropractor, or
- (viii) nurse practitioner, or

(b) acting in the course of the person's employment as a school psychologist by

- (i) an authority, as that term is defined in section 1 (1) of the Independent School Act, or
- (ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the School Act, if qualifications in psychology are a condition of such employment.

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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)

Section 24(2)(a)     or Section 24(2)(b)

**Part H – Signatures**

Print Name

Neena Keram

Signature of Chair

Date (Year/Month/Day)

2022/03/29

Print Name

Joseph Rodgers

Signature of Member

Date (Year/Month/Day)

2022/03/29

Print Name

Vivienne Chin

Signature of Member

Date (Year/Month/Day)

2022/03/29