

### Part C – Decision Under Appeal

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the “Ministry”) reconsideration decision of March 8, 2022 (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, is 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

**Part E – Summary of Facts**

The information and documentation before the Ministry at the time of the Reconsideration Decision included:

- the Ministry's Persons with Disabilities Designation Denial Decision Summary (the "Decision") and letter to the Appellant, dated February 8, 2022;
- invoice from the Appellant's doctor (the "Invoice"), in the amount of \$130.00 for the cost of completing the Ministry forms;
- the signature page from an undated Request for Diet Supplement in the name of the Appellant, with post-it note reading "Written Confirmation Specific med condition the diet required duration";
- an undated, 11 page, handwritten letter from the Appellant (the "Appellant's Notes"), which describes the Appellant's, daily rituals, symptoms, activities, and limitations in respect of a number of functions/chores;
- a note from a health authority, dated November 5, 2008 (the "Post-Op Note"), with guidelines for eating after a hernia surgery;
- an undated page of undated and unsigned notes (the "Notes"), in various styles of handwriting;
  - the Appellant's application for PWD designation, dated April 6, 2021 (the "Application") which included: the Assessor Report ("AR"), dated November 15, 2021 and completed by the Appellant's doctor, the findings of which are summarized in the sections below;
  - the Medical Report ("MR"), dated November 15, 2021 and completed by the Appellant's doctor, the findings of which are summarized in the sections below;
- the Appellant's Request for Reconsideration ("RFR"), dated February 2, 2018, to which was attached:
  - the PWD Application, with additional notes from the Appellant, described as "Changes Past 10 mo" (the "Updated Application");
  - the Invoice;
  - the Appellant's Notes;
  - the Post-Op Notes;
  - the Notes;
  - a handwritten note from the Appellant, dated February 17, 2022;
  - the MR, with additional notes from the Appellant, described as "Changes Past 10 mo" (the "Updated MR");
  - the AR, with additional notes from the Appellant, described as "Changes Past 10 mo" (the "Updated AR");
  - a referral form, dated December 15, 2021, referring the Appellant for a CT Scan of the adrenal area;
  - an invoice, dated January 31, 2022, from a dental clinic for X-rays and a comprehensive exam;
  - a referral, dated November 15, 2021, for physiotherapy for the Appellant's right shoulder;
  - a lab requisition, dated December 9, 2021, for a urine test;

- an undated patient discharge form from a health authority, following the Appellant's admission to hospital for, according to a handwritten note on the form, "vomiting blood, glandes, gerd";
- a telephone contact list of local home health offices from the Appellant's health authority;
- a discharge prescription form, dated December 13, 2021, for acetaminophen+caffeine+codeine, celecoxib, gabapentin, metoclopramide, and a nicotine patch;
- a discharge prescription form, dated December 15, 2021, for nicotine, pantoprazole, quetiapine, and ramipril;
- a discharge prescription form, dated December 15, 2021, for venlafaxine;
- a discharge prescription form, dated December 15, 2021, for acetaminophen, almagel, and dimenhydrinate;
- a discharge prescription form, dated December 15, 2021, for dimenhydrinate, fluticasone propionate, and haloperidol;
- a discharge prescription form, dated December 15, 2021, for metoclopramide, nicotine lozenge, salbutamol;
- a request for a diet supplement, dated April/21, citing Dysphagia
- a handwritten, undated summary from the Appellant;
- a health supplement info sheet for diet supplements from the Ministry; and
- a letter from the Appellant's doctor, dated February 8, 2022, in support of an application for a nutritional supplement, in which the doctor writes that the Appellant was bothered by nausea and had digestive problems, including dysphagia.

In the Appellant's Notice of Appeal, dated March, 2022 (day missing), the Appellant indicated in the Reasons for the Appeal Section that attachments and letters would follow. The Appellant also attached a list of medications, including Venlafaxine, Quetiapine, Metonia, Gabapentin, Pantoprazole Magnesium, Ramipril, Haloperidol, and Tylenol 3.

The Appellant also made a late submission to the tribunal which was, in effect, an outline of the Appellant's argument at the hearing of the appeal.

### **Diagnoses**

In the MR, the Appellant's doctor made diagnoses of:

- digestive disorders, including gastroesophageal reflux disease ("GERD"), and vomiting; and
- a mood disorder/depression, and anxiety.

In the Updated MR, additional diagnoses were added, including:

- "Respiratory organs";
- "Respiratory- Lung Collapse";
- Chronic Obstructive Pulmonary Disease ("COPD");
- Asthma/Emphysema (sic); and
- Ulcer.

The Appellant confirmed that the amendments to the Updated MR, including the additional diagnoses, had been made by the Appellant. The Appellant's doctor did not sign the Updated MR or provide a letter confirming any additional diagnoses. In the updated AR, the Appellant did provide the names (and, in one case, the telephone number) of the medical practitioners providing care in respect of the conditions added as diagnoses in the Updated MR.

### ***Physical Impairment***

In the MR, the Appellant's doctor notes, with respect to functional skills, that the Appellant:

- is capable of walking 1 to 2 blocks with a cane;
- can climb 2 to 5 steps unaided;
- was able to lift 2 to 7 kg;
- was able to remain seated for 1 to 2 hours.

In the Updated MR, those functional skills had been amended to indicate that the Appellant:

- was not able to walk unaided;
- could climb no stairs;
- could perform no lifting; and
- could remain seated for less than an hour.

### ***Mental Impairment***

The MR identified the following significant deficits with cognitive and emotional function:

- consciousness;
- executive;
- memory;
- emotional disturbance;
- impulse control; and
- attention or sustained concentration.

The Appellant's doctor included a note that the Appellant "self reports intermittent confusion" and "Anxiety/Depression" which affects cognition.

In the Updated MR, perceptual psychomotor and motivation were also identified as significant deficits.

In the AR, only the following items were identified by the doctor as being minimally impacted:

- Consciousness;
- Emotion;
- Attention/concentration;
- Executive;
- Memory; and
- Motivation.

In the Updated AR, however, all of the indicators of cognitive and emotional functioning are described as being impacted in either a moderate or major way.

**DLAs**

In the MR, the Appellant's doctor identified meal preparation, management of medications, basic housework, daily shopping, and mobility outside the home as DLAs that were restricted. Only daily shopping and mobility outside the home were described as continuously restricted. In the Updated MR, all of the described DLAs were described as continuously restricted.

There are also discrepancies between the AR and the Updated AR. No communication issues were identified in the AR. In the Updated AR, the notes indicate that the Appellant had difficulties with communication, including poor speaking ability and satisfactory reading and writing.

In the AR, consciousness, emotion, attention/concentration, executive, memory, and motivation are described as being minimally impacted. All of the other indicators of cognitive and emotional functioning are described as not being impacted.

**Need for Assistance**

In the AR, the Appellant is described as independent in all DLAs other than those associated with paying rent and bills and dealing with medications. The Appellant is described as independent with respect to all indicators of social functioning and is reported to have good functioning with respect to dealing with immediate and extended social networks.

In the Updated AR, however, the notes record the Appellant as requiring continuous support from another person in respect of all DLAs, except feeding, transferring in and out of bed, and transferring on and off chairs, all of which are activities in respect of which the Appellant is described as requiring periodic assistance from another person. Likewise, the Updated AR reports a much bleaker picture of the Appellant's social functioning, noting that periodic support or supervision is required in respect of making appropriate social decisions and continuous support or supervision is required in respect of:

- developing and maintaining relationships;
- interacting appropriately with others;
- dealing appropriately with unexpected demands; and
- securing assistance from others.

The Updated AR describes the Appellant as marginally functioning with immediate and extended social networks and being estranged from family.

In the Updated AR, the Appellant was also described requiring continuous assistance from another person or being unable to:

- walk indoors and outdoors;
- climb stairs;
- stand; and
- lift, and carry and hold objects.

The Appellant's doctor did not note any persons upon whom the Appellant was reliant to carry out DLAs and noted that only that the Appellant required a cane "for support" as the Appellant's left leg tended to give way, leading to falls. In the Updated AR, the Appellant is described as requiring a scooter, knee brace, breathing device (puffers), bathing aids, and front stairs.

***Appellant's Evidence***

At the hearing of the appeal, the Appellant took the panel to the Updated MR and the Updated AR and described the changes in the Appellant's health over the previous ten months from the date that both were amended by the Appellant.

The Appellant described recent hospitalizations brought on by several of the conditions that are referred to as diagnoses in the Updated MR. The Appellant confirmed being unable to walk as far as noted by the doctor in the MR and also described other restrictions on mobility, including requiring something to hold on to at all times and having difficulty entering the residence. The Appellant noted specifically that leg pain can be severe and requires hospitalization when it flares up. The Appellant described being "out" with pain for weeks at a time when flare ups happened. The Appellant described being entirely reliant on others to carry and hold things, including groceries, etc.

The Appellant described having poor executive decision-making ability and needing to make notes constantly, poor impulse control, an inability to concentrate, and little to no motivation. The Appellant also described being estranged from family as a result of these issues and the physical limitations and feeling isolated and alone. The Appellant described not being able to handle finances independently. The Appellant also mentioned constantly facing financial shortfalls and having to shop only about once per month.

When asked, the Appellant stated that the MR likely painted an accurate picture of the Appellant's health on or about April 2021 when the PWD application process was started. However, the Appellant did not obtain any updated medical report from the doctor due to what the Appellant described as the constraints on the doctor's time. The Appellant described showing the doctor the Updated MR and the Updated AR and the doctor indicating agreement with the amendments made.

The panel admits the oral evidence given at the hearing of the appeal under section 22(4) of the Employment and Assistance Act as evidence that is not part of the record but that is reasonably required for a full and fair disclosure of all matters related to the appeal.

**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 is 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.

**PANEL DECISION*****Severe Physical Impairment***

The Appellant's position is that the criterion for severe physical impairment has been met. The Ministry's position is that the evidence indicates that the Appellant's physical impairment is moderate. The MR, the AR, and the Application itself set out information that, as noted in the Reconsideration Decision, supports a finding of some impairment. The Updated MR, the Updated AR, and the Updated Application, on the other hand, suggest a more significant level of impairment.

The MR does describe the Appellant as having moderate restrictions with respect to walking, climbing, lifting, and with seating. The Appellant is being described as able to walk 1 to 2 blocks with a cane, climb 2 to 5 stairs, lift 2 to 7 kilograms, and remain seated for 1 to 2 hours. However, the AR describes the Appellant as being almost completely independent with respect to mobility and physical ability. While the Updated MR and Updated AR suggest a more severe level of impairment, both are self reports from the Appellant and, based on the Appellant's evidence at the hearing, the MR and AR did reflect the Appellant's state of health at the time the Application was filed.

While the Appellant's doctor may have reviewed the amended forms prior to the Appellant's submitting them to the Ministry prior to the Reconsideration Decision, that is not the same as the doctor providing an opinion that the Appellant had a severe physical impairment. Likewise, although the Appellant provided the names and contact details of the medical practitioners providing treatment for the additional conditions referenced in the Updated MR, that is also not the same as providing a medical opinion about the severity of those conditions. In the circumstances, the panel finds that the Ministry reasonably determined that the medical information provided to it did not support a finding that the Appellant had a severe physical impairment.

***Severe Mental Impairment***

The position of the Appellant is that the evidence establishes a severe mental impairment. The Ministry's position is that the evidence does not establish a severe mental impairment.

Likewise, the information contained in the Application, the AR, and the MR supports a finding of some mental impairment. While a number of areas of cognitive and emotional function are identified as having significant deficits in the MR, the sections of the AR assessing cognitive and emotional functioning suggest a moderate level of impairment with most indicators described as only minimally impacted or not impacted at all. Although the Updated AR suggests a more significant mental impairment, the notes in

the Updated AR were also made by the Appellant, making it, in effect, a self-assessment, as opposed to a professional assessor report or medical opinion. In view of the foregoing, the panel finds that the Ministry reasonably determined that the medical information before it did not support a finding that the Appellant had a severe mental impairment, as contemplated by the EAPWDR.

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

The Appellant's position is that DLAs are restricted continuously or periodically for extended periods of time. The Ministry's position is that the evidence does not establish that DLAs are continuously restricted or restricted for extended periods of time.

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 significantly restricted. This does not mean that other evidence is discounted, particularly where it may provide clarification of 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.

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.

While the Appellant describes significant restrictions in both the Updated MR and the Updated AR, those restrictions are not confirmed in writing by the doctor or any other prescribed professional. The legislation requires an opinion from a medical practitioner with respect to any restrictions on the ability to perform DLAs. Both the AR and MR describe only limited restrictions and only shopping and mobility outside the home were described as restricted continuously. Meal preparation, medication management, and basic housework were described as being impacted periodically but all other DLAs, including social functioning were noted to not be restricted. It was also not specified that DLAs were restricted on a periodic basis for extended periods. The AR also noted the Appellant as being independent with almost all DLAs, including shopping. In view of the above information in the AR and MR concerning the Appellant's ability to carry out DLAs, the panel finds that the Ministry reasonably determined that the Appellant does not, *in the opinion of a prescribed professional*, have a severe physical or mental impairment that significantly restricts the Appellant's ability to perform DLAs, either continuously or periodically for extended periods of time, as required by section 2(2)(b)(i) of the EAPWDR.

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

The Appellant's position is that help is required in the performance of DLAs. The Ministry's position is that the evidence does not establish that the Appellant requires help in the performance of 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 with carrying out DLAs continuously or periodically for extended periods.



“Help” is defined in section 2(3) of the EAPWDA as requiring an assistive device, significant help or supervision of another person, or the services of an assistance animal.

The information about the need for assistance with carrying out DLAs is set out primarily in the AR. As noted above, the doctor described the Appellant as independent with respect to almost all DLAs, other than those associated with medications and paying rent and bills. In both instances, the Appellant was described by the doctor as requiring only periodic assistance from another person. The Appellant was described as needing a cane but no other assistive devices in the AR.

The Appellant was also described as independent with respect to the indicators of mental functioning by the doctor in the AR.

As with restrictions on DLAs, the Updated AR and the Updated MR painted a much bleaker picture with respect to the Appellant needing assistance with performing DLAs. On the evidence of the Appellant, part of that appears to have been the Appellant’s overall health taking a turn for the worse in the past year or so.

As with the issue of restrictions on being able to perform DLAs, the matter of whether a recipient requires help with carrying out DLAs turns on the opinion of a prescribed professional. In this case, the information contained in the Updated AR and the Updated MR were not the written opinions of the Appellant’s doctor or any other prescribed professional but, in effect, the self report of the Appellant. In the absence of an opinion from the Appellant’s doctor (or another prescribed professional), the panel finds that the Ministry reasonably determined that the Appellant had not demonstrated that, *in the opinion of a prescribed professional*, the Appellant had a severe physical or mental impairment that required the Appellant to have help with the performance of DLAs, as required by section 2(2)(b)(ii) of the EAPWDR.

### **Conclusion**

While the Appellant’s health may have taken a turn for the worse in the months between first applying for the PWD designation and the hearing of this appeal, in view of all of the foregoing, the panel finds that, based on the information about the Appellant’s medical condition at the time of the Reconsideration Decision, the Ministry reasonably determined that the Appellant did not have a severe physical or mental impairment that, in the opinion of a prescribed professional, directly and significantly restricted the Appellant’s ability to perform DLAs, continuously or periodically for extended periods, and required help to perform DLAs.

The Appellant is not successful in this appeal.

## SCHEDULE A

### Applicable Legislation

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.

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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

Adam Shee

Signature of Chair

Date (Year/Month/Day)

2022/April/12

Print Name

Robert McDowell

Signature of Member

Date (Year/Month/Day)

2022/April/12

Print Name

Susan Ferguson

Signature of Member

Date (Year/Month/Day)

2022/April/12