

### **Part C – Decision Under Appeal**

Under appeal is the reconsideration decision of the Ministry of Social Development and Poverty Reduction (the ministry) dated June 3, 2022, that denied the appellant designation as a person with disabilities (PWD) under section 2 of the *Employment and Assistance for Persons with Disabilities Act*. The ministry stated that the appellant met the requirements of having reached 18 years of age and of a medical practitioner confirming the impairment is likely to continue for at least 2 years. However, the ministry was not satisfied that:

- the appellant has a severe mental or physical impairment
- the appellant's impairment, in the opinion of a prescribed professional, directly and significantly restricts the ability to perform daily living activities ("DLA") either continuously or periodically for extended periods; and,
- as a result of restrictions caused by the impairment, 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 found that the appellant is not in one of the prescribed classes of persons who may be eligible for PWD designation under section 2.1 of the *Employment and Assistance for Persons with Disabilities Regulation* ("EAPWDR"). As there was no information or argument provided for PWD designation on alternative grounds, the panel considers that matter not to be at issue in this appeal.

### **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**

A ministry observer attended the hearing with the consent of the appellant.

**Information before the ministry at reconsideration**

- A PWD application, comprised of:
  - A Medical Report (MR) and an Assessor Report (AR). Both were dated November 29, 2021, both completed by a general practitioner (GP #1) who was filling in for the appellant's doctor and had known the appellant for 1 day.
  - A Self-report (SR) dated November 29, 2021.
- Discharge Summary and Consultation Report, both dated March 22, 2021.
  - Discharge diagnoses: COPD, asthma exacerbation, allergic rhinitis.
  - Recommendations include emphasis on regular use of controller medications, weight management, outpatient follow up with respirologist.
  - Importance of treatment compliance and weight loss.
- January 6, 2021, Respirologist's letter respecting a December 30, 2020, telephone review.
  - Patient reports breathing improvement; weight loss seems to have helped; continue CPAP use; no further follow-up appointments.
- Respiratory Report (December 11, 2019 test date).
- The appellant's Request for Reconsideration (undated).

**Information provided on appeal and admissibility****Notice of Appeal, dated April 29, 2022**

The appellant indicates that he is appealing because the information from GP #1 was false – it was the appellant's first meeting with GP #1; his regular doctor of 4 years had moved.

**Second PWD Application**

Prior to the hearing, the appellant submitted a second PWD application, comprised of a MR and AR dated July 10, 2022, completed by a second GP (GP #2) who has known the appellant for 5 months and has seen the appellant 2-10 times. The appellant did not complete the SR section, writing "on file," which, the appellant confirmed at the hearing, means that he stands by the information in the SR completed in the first PWD application. The ministry confirmed that it had received the second PWD application and did not object to it being admitted by the panel.

**Oral Testimony at Hearing**

At the hearing, the appellant stated that through no one's fault, the information from GP #1 was inaccurate – he had just met GP #1, who completed only the first two pages with the appellant. GP #2, his new doctor, had a good sit down with the appellant and reviewed the information

with him. In response to questions from the panel, the appellant stated that he is able to perform his DLA but takes longer than typical. Friends provide help with shopping, yard work, and house maintenance. He hopes the panel will see how bad he really is. His respiratory system is shot, and he has to push through everything to get anything done. After being on disability in BC four years ago (through his work), he had a pretty good stretch when he was doing pretty well and tried working a seasonal job in 2020 for two months, but he couldn't do it. In response to a question from the panel, the appellant stated that it is really hard to determine in minutes how long a DLA task takes – every day is really different. Some days his breathing is so bad, he doesn't attempt things.

At the hearing, the ministry reviewed the reconsideration decision and the information in the second PWD application. The ministry did not introduce new evidence at the hearing.

The panel admitted the appellant's oral evidence and the second PWD application under section 22(4) of the *Employment and Assistance Act* as information reasonably required for full and fair disclosure of the matters at issue. The panel considered the information to be directly related to PWD eligibility.

The positions of both parties are set out in Part F of this decision.

### **Summary of relevant evidence from the PWD applications**

#### Diagnoses and Health History

GP #1 diagnoses:

- Severe asthma. Onset 1975
- Obesity. Onset date unknown

GP #2 diagnoses asthma.

Additional information from GP #1 includes:

- Has difficulty with any physical work in both work and personal life.
- Frequent exacerbations, triggered by allergens, temperature changes, smoke, air pollution, kitchen oils.
- 2018 lung testing showed severe asthma.
- Hospitalized due to asthma in 2017 and 2021.
- Saw a respirologist in 2021.
- Remedial treatments – regular puffer use, weight loss.
- "Impact is mainly related to physical work/function."

GP #2:

- Has severe asthma and severe obesity.
- Is at risk of having obesity-hypoventilation syndrome thus, physical exertion will worsen his shortness of breath.

- Has chronic knee pain – obesity will worsen pain.
- Medical condition is chronic requiring regular use of inhalers. He would need weight loss.
- Had acute exacerbations of asthma and was hospitalized in 2017 and 2021.

### Physical Impairment

GP#1 and GP #2 report:

- No prostheses or aids are required.
- Functional skills: the appellant can walk less than 1 block unaided on a flat surface; climb 2-5 steps unaided; and remain seated for 2 to 3 hours. There are no limitations for lifting.

GP #1 reports:

- Mobility and physical abilities - walking indoors and outdoors, climbing stairs, standing, lifting, and carrying and holding are managed independently. The GP comments “slow due to comorbidities.”

GP #2 reports:

- All areas of mobility and physical abilities take significantly longer than typical to perform - “mobility is poor due to his obesity.”

The appellant describes that he has severe uncontrolled asthma. Medication does not help enough to enable the appellant to hold the most basic form of employment. On a good day, which is 2 out of every 7 days, the appellant can perform basic tasks such as eating, washing dishes, laundry, showering, and other small house cleaning tasks. On a bad day, he can have several asthma attacks and can do very little because shortness of breath and asthma prevent any movement or exertion – for example, he can't shower because any temperature change results in shortness of breath and asthma. Sometimes the appellant can control it by relaxing and using an inhaler. He tries to be careful and is mostly a homebody because of not having control over situations outside the home that can cause an asthma attack. Taking care of himself is never easy – getting dressed takes time and effort; feeding himself depends on how he is feeling (prepares meals ahead on okay days). Groceries are delivered because he rarely has a good enough day to walk to the store without his asthma flaring up. For most of the hard jobs around the house, the appellant has a good support team of friends to help. He needs financial help because he can no longer work.

In the Request for Reconsideration, the appellant reports:

- He needs to rest and use an inhaler when walking even less than one block.
- Breathing and knee damage impact climbing stairs.
- Lifting is limited – he can lift a maximum of 30 lbs. just for seconds before needing his rescue inhaler to avoid an asthma attack.
- He can only sit for 1 hour – needs to get blood circulating or his legs fall asleep.
- It's not accurate that all mobility and physical ability is managed independently – everything he does takes significantly longer and requires a rescue inhaler before he has an asthma attack.

### Mental Impairment

Both GPs respond “Unknown” when asked if there are any significant deficits in any of the listed areas of cognitive and emotional function. Both GP’s report having just met the appellant and of no past record of diagnoses or record of cognitive and emotional function.

Both GPs report that there are no cognitive, motor, sensory or other difficulties with communication. GP #1 reports that the appellant’s ability to communicate (speaking, reading, writing, hearing) is good. GP #2 indicates that speaking and writing abilities are good; reading (blurry vision) and hearing (hearing impairment left ear, ↓ 70%) are satisfactory.

Neither GP completed the section in the AR respecting impacts on daily cognitive and emotional functioning.

### DLA

In the MR, GP #1, and GP #2 report:

- The appellant has not been prescribed medications and/or treatments that interfere with the ability to perform DLA.

In the AR,

- GP #1 answers that the appellant has difficulty with keeping house clean in response to the question “What are the applicant’s mental or physical impairments that impact his/her ability to manage Daily Living Activities?” GP #2 responds “Difficulty with mobility affects his ability to complete his ADLs. His severe asthma and severe obesity affects (sic) his mobility and exertions.”
- GP #1 reports that all listed tasks of the DLA personal care, basic housekeeping, meals, pay rent and bills, medications, and transportation are managed independently. None of the listed tasks within those DLA is reported to take significantly longer to perform. For the DLA shopping, one task, carrying purchases home, requires periodic assistance from another person; the remaining four tasks are managed independently. Where asked for additional comments, including a description of the type and amount of assistance required and to identify any safety issues, GP #1 writes “none.”
- GP #2 reports that all listed tasks of the DLA personal care and basic housekeeping take significantly longer to perform. Tasks for the DLA shopping (going to and from stores, carrying purchases home) and meals (food preparation, cooking, safe storage of food) take significantly longer to perform. The remaining tasks of shopping, meals, and all tasks of pay rent and bills, medications and transportation are managed independently and not reported to take longer to perform. “Patient has difficulty in carrying out his ADLs due to severe obesity.” Where asked for additional comments, including a description of the type and amount of assistance required and to identify any safety issues, GP #2 writes “none.”

- GP #1 reports that all listed aspects of social functioning are managed independently. Good functioning with immediate social networks; marginal functioning with extended social networks. Safety issues and support/supervision required are “N/A.” GP #2 confirms this information, except for identifying the need for continuous support/supervision for dealing appropriately with unexpected demands.

*Need for Help*

GP #1 indicates that assistance provided by other people is friends helping with house maintenance. Assistance provided through the use of assistive devices is “None.”

GP # 2 indicates that friends help with house chores. GP #2 reports that the appellant uses a CPAP machine.

Both GPs respond “N/A” when asked what assistance is necessary if help is required but not available.

**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 requirements of section 2(2) of the EAPWDA were not met because:

- a severe physical or mental impairment was not established
- the appellant's DLA are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods, and
- as a result of those restrictions, in the opinion of a prescribed professional, the appellant does not require an assistive device, the significant help or supervision of another person, or the services of an assistance animal to perform DLA.

**Panel Decision****Eligibility for PWD designation under section 2 of the EAPWDA**

Section 2 of the EAPWDA allows the minister to designate a person as a PWD if the person is in a prescribed class of persons (not at issue in this appeal) or if the minister is satisfied that a person has a severe physical or mental impairment that meets legislated requirements for duration, restrictions in the ability to perform DLA, and the need for help to perform DLA. As such, it is possible that a person could be found to have a severe impairment but not meet the duration, DLA and/or help criteria. As the minister must be "satisfied" that the legislative requirements are met, the minister has discretion as a decision-maker. In exercising this discretion, the legislation's requirement for information from a medical or nurse practitioner (and other prescribed professionals) makes it clear that the fundamental basis for assessing PWD eligibility is information from one or more prescribed professionals. The panel also notes that the legislation does not identify employability or financial constraints as considerations when determining PWD eligibility.

**Restrictions in the ability to perform DLA*****Positions of the Parties***

The appellant's position is that due to uncontrolled asthma he is only able to perform basic tasks 2 out of every 7 days.

The ministry's position is that it is not satisfied that the appellant has a severe impairment that directly and significantly restricts the appellant's ability to perform DLA.

In the reconsideration decision, the ministry states that it relies on the medical opinion and expertise of the GP, a prescribed professional, to determine if an impairment directly and significantly restricts DLA. The ministry notes that GP #1 reports that the appellant has difficulties keeping his house clean but also reports independence with all DLA tasks, except for carrying purchases home. The ministry finds that requiring periodic assistance with one aspect of shopping does not indicate a significant overall restriction for shopping. The ministry also notes that GP #1 responds "none" when asked about the type and amount of assistance required, and safety issues.

At the hearing, the ministry noted that GP #1 reported that the appellant is slow due to comorbidities and that GP #2 indicates that personal care, basic house keeping, and some shopping and meal tasks take significantly longer to perform. However, there is no indication how much longer DLA tasks take. The ministry noted that both GPs respond "none" when asked to describe the type and amount of assistance required for DLA and noted that the appellant requires a CPAP machine, which is therapy rather than an aid, prosthesis, or assistive device. For social functioning, the ministry noted that GP #2 identifies only one area as needing assistance and responds "N/A" when asked to describe the help needed with social functioning. The ministry stated that it considers the appellant as independent with DLA and is unable to determine that a restriction is significant if there is no description from the prescribed professional of how much longer DLA take to perform.

### *Panel Analysis*

Section 2(2)(b)(i) of the EAPWDA requires that the minister be satisfied that in the opinion of a prescribed professional, a severe mental or physical impairment directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods. While other evidence may be considered for clarification or support, the ministry's determination as to whether it is satisfied, is dependent upon the evidence from prescribed professionals. The term "directly" means that there must be a causal link between the severe impairment and the restriction. The direct restriction must also be significant.

DLA are defined in section 2(1) of the EAPWDR and are listed in both the MR and the AR sections of the PWD application with the opportunity for the prescribed professional to check marked boxes and provide additional narrative. The definition of DLA does not include the ability to work or employability.

Both GP #1 and GP #2 provided information respecting the appellant's ability to perform DLA.

The panel finds that both GPs report that the appellant's ability to manage DLA is impacted by the combined effect of asthma and obesity. GP #1 reports difficulty with housekeeping and the need for periodic assistance from another person to carry purchases home. GP #2 reports that due to obesity, the appellant has difficulty with DLA and that all mobility, personal care, and basic housekeeping tasks as well as the physical tasks of shopping and meals take significantly



longer than normal to perform. The panel notes that when completing the DLA section of the AR, the prescribed professional is directed to indicate that a person is independent, requires periodic assistance from another person, requires continuous assistance from another person/ or unable, uses an assistive device, and/or takes significantly longer than typical. The prescribed professional is also directed to explain/describe how much longer a task takes to perform and/or describe the type and amount of assistance required. However, neither GP indicates how much longer DLA tasks take to perform and both describe assistance required as “none.” The panel considers that taking “significantly longer” is notable, but that it is reasonable for the ministry to require further explanation to establish direct and significant restrictions that are either continuous or periodic for extended periods, particularly as GP #2 did not indicate the need for periodic or continuous assistance or an assistive device. At the hearing, the appellant stated that he is able to perform DLA tasks, but it takes longer, though he could not say how much longer an activity takes because every day is different. The panel notes that the appellant’s written submissions, in part, reflect more limited functioning than either GP reports, most notably with the appellant reporting that he can do very little due to shortness of breath except on good days, which only occur every 2 out of 7 days. The panel finds that this degree of impairment is not confirmed by either GP as neither report the appellant as being unable to manage any DLA tasks.

The panel finds that, on balance, the information from the prescribed professionals indicates that the appellant is able to independently manage his DLA, albeit slowly. The panel further finds that, in the absence of information establishing how much longer the appellant takes to perform physical DLA tasks, it was reasonable for the ministry to decide that the restrictions are not established as significant. Therefore, the panel finds that the ministry was reasonable in concluding that direct and significant restrictions in the ability to manage DLA either continuously or periodically for extended periods were not established.

### **Help to perform DLA**

#### *Positions of the Parties*

The appellant’s position is that he requires the help of friends for shopping and to maintain his home.

The ministry’s position is that because it has not been established that DLA are directly and significantly restricted, it cannot be established that help is required as a result of direct and significant restrictions.

#### *Panel Analysis*

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 to perform DLA.

Establishing direct and significant restrictions with DLA is a precondition of the need for help criterion. As the panel found that the ministry reasonably determined that direct and significant

restrictions in the appellant's ability to perform DLA have not been established, the panel also finds that the ministry reasonably concluded that it cannot be determined that the appellant requires help to perform DLA.

### **Severe Impairment – Mental or Physical**

As previously noted, the ministry has the discretion to determine if a severe impairment is established. While neither "impairment" nor "severe impairment" is defined in the legislation, the PWD Application defines "impairment" as a loss or abnormality of psychological, anatomical, or physiological structure or function, causing a restriction in the ability to function independently, effectively, appropriately, or for a reasonable duration. Although this definition is not binding on the panel, the panel considers the assessment of the severity of impairment based on daily functional abilities to be reasonable. Accordingly, diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish severe impairment.

#### **Mental Impairment**

##### *Positions of the Parties*

The appellant does not address mental impairment.

The ministry's position is that the information does not establish a severe mental impairment. The ministry notes that GP #1 does not diagnose a medical condition that explicitly results in a severe degree of mental impairment and does not indicate impacts of daily cognitive and emotional functioning or any difficulties with communication. Therefore, a severe mental impairment has not been established.

At the hearing, the ministry stated that the impacts on cognitive and emotional functioning reported by GP #2 are not sufficient to establish severe mental impairment, noting that neither GP diagnosed a mental condition.

##### *Panel Analysis*

The panel finds that as neither GP diagnoses a mental health condition and has indicated no impact on almost all areas of cognitive, emotional, and social functioning, the ministry was reasonable to decide that severe mental impairment is not established.

#### **Physical Impairment**

##### *Positions of the Parties*

The appellant's position is that his physical functioning is impaired by severe uncontrolled asthma.

At reconsideration, the ministry's position is that the information provided shows that the appellant's physical functioning takes additional time due to reliance on a rescue inhaler to prevent asthma attacks. However, the ministry finds that the unspecified additional time does not confirm a severe degree of impairment. The ministry notes the appellant reports more difficulty with mobility and lifting than reported by GP #1 but finds that the appellant continues to be able to walk one block, climb an unspecified number of stairs, lift up to 30 lbs. and remain seated for up to 1 hour, which does not confirm a severe degree of impairment. The ministry also finds that physical functioning and mobility in conjunction with the assessment of independence in almost all DLA activities does not establish a severe degree of impairment.

At the hearing, the ministry stated that the assessment of physical functional skills by both GPs was the same and that the assessments for mobility/physical ability were similar. The ministry states that being slow (GP #1) and taking unspecified extra time (GP #2) is not sufficient to establish severe physical impairment.

#### *Panel Analysis*

The appellant is diagnosed with severe asthma and severe obesity and commentary from both GPs reflects the interplay, or comorbidity, between the appellant's severe asthma and severe obesity resulting in the appellant's mobility being slow and taking significantly longer. However, as discussed above, under Restrictions in the ability to perform DLA, how much longer activities take to perform is unknown. Additionally, both GPs report what the panel considers to be reasonably good physical functional skills, with the exception of being limited to walking less than 1 block unaided. As both GPs indicate that the appellant does not require prostheses or aids, and that all aspects of mobility and physical ability do not require assistance from another person, the panel finds that the "unaided" distance the appellant can walk refers to walking ability without the appellant's inhaler medication – both GPs identify the need for regular inhaler use. The panel again acknowledges the appellant's self-reported ability to do very little most days of the week but finds that this degree of impairment of physical functioning is not reported by either GP. Therefore, while recognizing that the appellant is diagnosed with severe medical conditions that impact his ability to function physically, the panel finds that the ministry was reasonable to conclude that a severe impairment of physical functioning has not been established.

#### **Conclusion**

The panel finds that the ministry's reconsideration decision, which determined that the appellant was not eligible for PWD designation, was reasonably supported by the evidence, and therefore confirms the decision. The appellant is not successful on appeal.

**Relevant Legislation**

**EAPWDA**

2 (1) In this section:

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

"**daily living activity**" has the prescribed meaning;

"**prescribed professional**" has the prescribed meaning.

(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person has a severe mental or physical impairment that

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

(b) in the opinion of a prescribed professional

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

(A) continuously, or

(B) periodically for extended periods, and

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

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

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

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

(i) an assistive device,

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

(iii) the services of an assistance animal.

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

**EAPWDR**

**Definitions for Act**

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

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

(i) prepare own meals;

(ii) manage personal finances;

(iii) shop for personal needs;

(iv) use public or personal transportation facilities;

- (v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
- (vi) move about indoors and outdoors;
- (vii) perform personal hygiene and self-care;
- (viii) manage personal medication, and

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

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

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

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

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

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

- (i) an authority, as that term is defined in section 1 (1) of the [Independent School Act](#), or
- (ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the [School](#)

[Act](#),

if qualifications in psychology are a condition of such employment.

### **Alternative grounds for designation under section 2 of Act**

**2.1** The following classes of persons are prescribed for the purposes of section 2 (2) [*persons with disabilities*] of the Act:

- (a) a person who is enrolled in Plan P (Palliative Care) under the Drug Plans Regulation, B.C. Reg. 73/2015;
- (b) a person who has at any time been determined to be eligible to be the subject of payments made through the Ministry of Children and Family Development's At Home Program;
- (c) a person who has at any time been determined by Community Living British Columbia to be eligible to receive community living support under the [Community Living Authority Act](#);
- (d) a person whose family has at any time been determined by Community Living British Columbia to be eligible to receive community living support under the [Community Living Authority Act](#) to assist that family in caring for the person;
- (e) a person who is considered to be disabled under section 42 (2) of the [Canada Pension Plan](#) (Canada).

APPEAL NUMBER 2022-0102

**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

Jane Nielsen

Signature of Chair

Date (Year/Month/Day)

2022/07/27

Print Name

Joseph Rodgers

Signature of Member

Date (Year/Month/Day)

2022/07/27

(on behalf of Joseph Rodgers)

Print Name

Carla Tibbo

Signature of Member

Date (Year

2022/07/27