

### Part C – Decision Under Appeal

The decision under appeal is the Ministry of Social Development and Poverty Reduction (“ministry”) reconsideration decision dated July 13, 2022, that denied the appellant designation as a person with disabilities (“PWD”) under the *Employment and Assistance for Persons with Disabilities Act* (“EAPWDA”). The ministry was satisfied that the appellant met the requirements for age (over 18 years of age) and duration (impairment to continue at least 2 years) but was not satisfied that:

- the appellant had a severe mental or physical impairment;
- the appellant’s impairment significantly restricted his ability to perform daily living activities; and
- the appellant required significant help or supervision of another person to perform daily living activities restricted by his impairment.

The ministry found the appellant was not one of the prescribed classes of persons who may be eligible for PWD designation on the alternative grounds set out in section 2.1 of the *Employment and Assistance for Persons with Disabilities Regulation* (“EAPWDR”). As there was no information or argument for PWD designation on alternative grounds, the panel considers that matter not to be at issue in this appeal.

### Part D – Relevant Legislation

EAPWDA, section 2  
EAPWDR, section 2

Full text of the legislation is provided in the Schedule after these Reasons.

**Part E – Summary of Facts**

The hearing took place by teleconference on September 1, 2022. The panel waited approximately 15 minutes for the appellant to join the hearing, and the Tribunal attempted to contact the appellant, who was not available by telephone. The panel confirmed that the appellant had been notified of the date, time, and place of the hearing at least 2 business days before the hearing, as required under Section 85(2) of the Employment and Assistance Act, and the hearing proceeded in the absence of the appellant.

**Evidence Before the Ministry at Reconsideration:**

The appellant is over 18 years of age. In support of his application for PWD designation, he submitted a medical report completed by his family doctor, dated January 27, 2022, and an assessor report completed by a social worker, dated March 1, 2022. The appellant also provided his self-report dated March 1, 2022.

***Medical Report:***

The doctor states that the appellant has been their patient since 2019, and they have seen the appellant between 2 and 10 times in the past 12 months.

The doctor lists diagnoses of COPD (Chronic Obstructive Pulmonary Disease) and hypertension. In the section of the report that asks the doctor to indicate the severity of the medical conditions relevant to the appellant's impairment, the doctor indicates "COPD moderate – Cannot work >15 min. to stop and rest." The doctor also states that the appellant does not require any prostheses or aids for his impairment, and that impairment is likely to continue for 2 or more years.

Under "Functional Skills" the doctor states that the appellant:

- can walk 2 to 4 blocks unaided
- can remain seated less than 1 hour
- ability to climb stairs unaided and limitations in lifting are "unknown."

The doctor indicates that the appellant has significant deficits in:

- language (oral, auditory, written comprehension or expression)
- memory (ability to learn and recall information)
- perceptual psychomotor (visual spatial)
- emotional disturbance (e.g. depression, anxiety)
- motivation (loss of initiative or interest)
- motor activity (goal oriented activity, agitation, repetitive behavior).

Under Daily Living Activities ("DLA"), the doctor indicates that the impairment directly restricts the appellant's ability to perform DLA and identifies "Use of Transportation" as an activity that is restricted continuously. All other DLA, including social functioning, are shown as not restricted.

*Assessor Report:*

The social worker indicates that the appellant lives with his spouse. The impairments that impact his ability to manage DLA are “fatigue, constantly out of breath.” Under “Ability to Communicate” the social worker indicates that the appellant’s ability to speak and hear is good. His reading is satisfactory, though the social worker notes “needs lenses.” The appellant’s ability to write is poor, due to issues with literacy.

The social worker states that the appellant is independent for walking indoors and outdoors for 15 minutes at a time. He is independent in standing and lifting and needs to use a rail to climb 1 flight of stairs. The appellant is unable to carry and hold items.

Under “Cognitive and Emotional Functioning”, where the assessor is asked to indicate “to what degree the applicant’s mental impairment or brain injury restricts or impacts his/her functioning” the social worker has indicated that the appellant experiences a major impact on:

- consciousness (e.g., orientation; alert/drowsy; confusion)
- emotion (e.g. excessive or inappropriate anxiety; depression, etc.)
- motivation (e.g. lack of initiative; loss of interest)
- motor activity (e.g. increased or decreased goal-oriented activity; co-ordination; lack of movement; agitation; ritualistic or repetitive actions; bizarre behaviors; extreme tension)
- other emotional or mental problems (e.g. hostility).

The social worker notes moderate impact on:

- attention/concentration (e.g. distractible; unable to maintain concentration; poor short term memory)
- executive (e.g. planning; organizing; sequencing; abstract thinking; problem solving; calculations)
- memory (e.g. can learn new information, names, etc., and then recall that information; forgets over-learned facts).

The social worker notes minimal impact on bodily functions, impulse control, language and other (unspecified) neuropsychological problems.

Under “DLA” the social worker reports that the appellant uses assistive devices for bathing (has a shower seat), toileting (uses the sink as a bar) and transfers in and out of bed, and on and off a chair (uses the wall or arm rest). The appellant uses the door and rails as assistive devices when getting in and out of vehicles. The social worker reports that the appellant needs continuous assistance, in the form of a taxi, to go to and from stores, and needs support to carry purchases home. They indicate that the appellant needs periodic assistance with basic housekeeping. The social worker goes on to state that the appellant “can get extremely fatigued due to declining pulmonary functioning. Needs breaks & assistance.” The appellant needs periodic assistance with food preparation and cooking, banking, budgeting, paying rent and bills, and taking medications as directed. The appellant receives that help from his spouse. The appellant is independent in the rest of the listed DLA.

Under “Social Functioning” the social worker reports that the appellant needs periodic support or supervision to make appropriate social decisions and deal appropriately with unexpected

demands. The social worker notes that the appellant's sibling and friend provide support for social decisions, and that the appellant "can get frustrated easily at times." They note that the appellant "can be isolated at times", and while he has good functioning with his immediate social network, he has only marginal functioning – "little more than minimal acts to fulfill basic needs" – with his extended social networks ("neighbourhood contacts, acquaintances, storekeepers, public officials, etc.").

The social worker indicates that the appellant needs an assessment for assistive devices in the home and may need a mobility scooter. They note that the appellant's illness is progressive, his ability to work is significantly impaired, and "he struggles to ambulate." They also state that he "experiences challenges with his mood (depressed) and motivation due to his deterioration."

### *Self-Report*

When asked to describe his disability, the appellant wrote that he has chronic lung disease, arthritis in his hands, he has only one eye and that one is "dissipating." The appellant states:

- his lungs do not have the capacity for him to work more than 15 minutes without taking a rest;
- he has no depth perception
- he cannot read without a magnifying glass
- his knees and hips are "shot"; he cannot walk far without pain, and then is "hunched over like an old man".

### *Notice of Appeal*

In the Notice of Appeal, the appellant added that:

- his left hip is worn out
- his lungs are full of scar tissue, and it is hard to breathe
- he broke his C2 vertebrae in April 2021, is getting x-rays once a week and is in constant pain.

**Part F – Reasons for Panel Decision**

The issue on appeal is whether the ministry's reconsideration decision, in which the ministry found the appellant to be ineligible for PWD designation under the EAPWDA, was reasonably supported by the evidence or was a reasonable application of the legislation in the appellant's circumstances. The ministry found that the appellant met the requirements for age (over 18 years old) and duration (impairment to continue for at least two years) but 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 his 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.

Full text of the legislation is provided in the Schedule after these reasons.

***Appellant's Position***

The appellant's position is that he has severe physical impairments due to chronic lung disease, limited vision, injury to the C2 vertebra, arthritis in his hands and deteriorating condition of the hips and knees. While the appellant does not mention mental impairment in his self-report or his Notice of Appeal, both the doctor and the social worker indicate deficits in cognitive and emotional functioning, with major impacts reported on some aspects of daily functioning.

The appellant maintains that his DLA are directly and significantly restricted by the severe impairments described in the reports. In particular, he is unable to carry and hold items, cannot walk more than 15 minutes, and needs to hold rails and other supports, such as walls and armrests, to transfer from bed, chairs, or vehicles. He gets extremely fatigued due to chronic lung disease, and needs breaks, and assistance from others, to perform DLA. He needs support from his spouse to manage payment of rent and bills, taking medications, and meal preparation. The social worker indicates that the appellant needs an assessment for mobility aids, in particular a scooter, and rails in the home.

***Ministry's Position***

The ministry's position is that the evidence indicates a moderate, rather than severe, physical impairment. The ministry notes that, even though the appellant gets extremely fatigued and is constantly out of breath, the appellant is "independent with most of his mobility and physical ability." While the appellant has reported arthritis and other problems with his hands, knees and hips, the ministry says that it cannot consider that information because the appellant's doctor has not confirmed those conditions. The ministry accepts that the appellant requires lenses or a magnifying glass to read.

The ministry notes that the doctor does not provide a diagnosis of a mental disorder or brain

injury, and the appellant does not refer to mental health issues in his self-report. They maintain that the major impact on daily functioning reported by the social worker is not consistent with the information in the medical report or with other sections of the assessor report. For example, the ministry says that the doctor indicates no restrictions on social functioning, or any other DLA except use of transportation. The ministry also points out that, when reporting the functional limitations the appellant faces, the social worker focuses on fatigue and COPD and does not indicate those restrictions are due to mental health issues.

The ministry maintains that the appellant is independent with a large majority of DLA and is not reported to take significantly longer because of his medical condition. The ministry argues that using rails and other supports does not indicate a significant restriction in DLA. While recognizing that the appellant can get extremely fatigued, requires breaks after 15 minutes and needs some assistance, the ministry argues that the restrictions identified do not represent a significant overall restriction in DLA.

#### Panel Decision:

To find a person eligible for PWD designation, the ministry must be satisfied of all the requirements in section 2 of the EAPWDA. In this case, the ministry was not satisfied that:

1. the appellant has a severe mental or physical impairment;
2. in the opinion of a prescribed professional, the impairment directly and significantly restricts the appellants ability to perform daily living activities; and
3. as a result of those restrictions, the appellant requires help to perform those activities.

#### Severe mental or physical impairment:

##### *Physical impairment:*

Under section 2 of the EAPWDA, the ministry must be satisfied that the appellant has a severe physical or mental impairment that, in the opinion of a medical or nurse practitioner, is likely to last for at least two years. In the medical report, the doctor provides the diagnoses of COPD and hypertension. They indicate that the lung disease is chronic, and of moderate severity. While the appellant has reported additional physical problems, including impaired vision, crippling arthritis in the knees and hips, and fractured C2 vertebra, the doctor has not included those conditions in their report.

Where the doctor has not confirmed the additional medical conditions reported by the appellant or provided an opinion about whether those conditions will last for at least two years, the panel finds that it is reasonable for the ministry not to consider those other medical conditions in determining whether there is a severe physical or mental impairment.

With respect to the impairment arising from chronic lung disease, the doctor indicates that the appellant can walk 2 to 4 blocks unaided and can sit for less than one hour. The appellant's ability to climb stairs and lift are 'unknown' to the doctor. The doctor states that the appellant is independent in all DLA except use of transportation.

In the assessor report, the social worker reports that the appellant gets extremely fatigued and

is constantly out of breath, needs to use a rail to climb a flight of stairs and needs to use available supports such as walls and armrests for transfers from chairs, bed, and vehicles. He is unable to carry and hold items. However, they also report that the appellant is independent for standing, lifting, and walking indoors and outdoors, though only for 15 minutes at a time. While the appellant may take somewhat longer to perform some tasks, he is noted to be independent in most DLA. The connection between the chronic lung disease and some of the DLA where he is noted to need assistance, is not clear – for example, the connection between chronic lung disease and the need for periodic assistance with medications and paying rent and bills.

Both the doctor and the appellant report that the appellant cannot work for more than 15 minutes without having to stop and rest. It is not clear if they are referring to paid employment. The social worker indicates that the appellant's ability to work is significantly impaired. However, the panel notes that employability is not a factor when determining eligibility for PWD designation.

Under the EAPWDA, the ministry must base its decision about severe physical or mental impairment on the evidence of a medical or nurse practitioner. Considering the evidence of physical impairment available at the appeal, which is limited to impairment due to chronic lung disease and hypertension as identified by the doctor, and the level of independence in daily functioning, the panel finds that the ministry was reasonable to conclude that the appellant's physical impairment is moderate rather than severe.

### *Mental Impairment*

While the doctor lists significant deficits in cognitive and emotional functioning in the section of the medical report titled "Degree and Course of Impairment - Functional Skills", they have not provided a corresponding diagnosis of a mental impairment or brain injury. The doctor also indicates that, apparently despite those deficits, the appellant is not restricted in his DLA, other than use of transportation. The appellant does not identify issues around mental impairment in his self-report.

The social worker identifies mental impairment impacting daily functioning, with major impact affecting 5 areas of cognitive and emotional functioning, and moderate impact in 3 areas. Again, the basis for the mental impairment is not stated, except for the comment that the appellant can become depressed and struggles with motivation due to his deteriorating physical condition. In terms of functioning, the social worker indicates that the appellant receives support from his spouse, a sibling, and a friend. The nature of the support is not explained. When asked to summarize the appellant's mental or physical impairment, the social worker notes fatigue and being constantly out of breath but does not specify a mental impairment.

The focus for disability in the medical and assessor reports, and the appellant's self-report, is on physical disability. While they mention emotional and cognitive deficits, those conditions do not appear to interfere significantly in the appellant's day-to-day functioning. Given the level of function and independence described in the medical and assessor reports, the panel finds that the ministry was reasonable in determining that a severe mental impairment was not established.

### Restrictions in Ability to Perform DLA

Under section 2 of the EAPWDA, the ministry must be satisfied that, in the opinion of a prescribed professional, a severe mental or physical impairment directly and significantly restricts the person's ability to perform DLA either continuously or periodically for extended periods. The ministry was not satisfied that the appellant had a severe mental or physical impairment, but the ministry did go on to consider whether the appellant's ability to perform DLA was significantly restricted and determined that a significant restriction had not been established.

Section 2(1) of the EAPWDR lists the DLA that the ministry can consider in making that determination; employment is not one of the activities in that list.

The panel notes that, in the doctor's opinion, the appellant can perform the DLA listed in the medical report, except for use of transportation; the doctor indicates no restrictions in any other DLA.

The social worker reports additional aspects of DLA where the appellant needs continuous or periodic assistance, stating that the appellant:

- is independent in using public transit but needs to use the door or rails to get in and out of vehicles and needs a taxi to go shopping;
- cannot hold or carry items, so needs support to carry purchases home;
- uses a shower seat when bathing;
- uses nearby supports, such as walls, armrests, or sink, when transferring from bed, chair, or toilet.

The social worker also indicates that the appellant takes longer to dress or do laundry and needs help from his spouse to prepare meals, pay rent and bills and remember to take medication. They indicate that the appellant gets extremely fatigued, needs breaks and assistance.

The ministry determined that the restrictions were "not reported nor demonstrated to be severe and are not significantly impacting [the appellant's] ability to perform [his DLA] overall on a day-to-day basis." In *Hudson v. British Columbia (Employment and Assistance Appeal Tribunal)*, 2009 BCSC 1461 the court held that section 2(2) of the EAPWA requires that there must be evidence from a prescribed professional that indicates "a direct and significant restriction on at least two daily living activities" [para. 43]. It is unclear in the reconsideration decision if the ministry was looking for an overall impact on all DLA, or if it was considering the restriction on each DLA to determine if at least two DLA were significantly restricted.

The panel has considered whether the evidence establishes a direct and significant restriction on at least two DLA. The doctor identifies only one of the DLA that is restricted – use of transportation. The social worker indicates that only one aspect of that activity, getting in and out of a vehicle, is restricted, in that the appellant needs to use the door or rails to get in and out. While the social worker identifies major impacts in four areas of cognitive and emotional functioning and moderate impact in three areas, the doctor reports that the appellant has no



restrictions in social functioning. The social worker indicates that the appellant needs periodic support for some aspects of DLA, but the assessor report does not describe the nature and extent of that support, to assist the panel, or the ministry, in determining if the restriction is significant.

Where the panel has found that the ministry was reasonable in determining that a severe mental or physical impairment was not established, it follows that the ability to perform DLA cannot be restricted by such an impairment. However, the panel also finds that the evidence does not establish significant restrictions in 2 or more DLA, and therefore finds that the ministry reasonably determined that a significant restriction in the appellant's ability to perform DLA was not established.

#### Help to Perform DLA:

Under section 2(b)(ii) of the EAPWDA, the ministry must be satisfied that, as a result of direct and significant restrictions in the ability to perform DLA, a person requires help to perform those activities. Under section 2(3)(b), a person requires help if, in order to perform the DLA, they require an assistive device, the significant help or supervision of another person, or the services of an assistance animal.

"Assistive device" is defined as "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." Ordinary stair rails, walls and armrests are not "assistive devices" under the EAPWDA because they are not designed specifically to assist people with impairments. In the assessor report, the social worker recommends that the appellant have an assessment for mobility devices and rails in the home and says he may need a scooter. An assessment may have established that the appellant requires assistive devices, which may have indicated a greater degree of impairment, however that evidence was not available at the appeal.

The panel has found that the ministry reasonably determined that the evidence did not establish that a severe impairment directly and significantly restricts the appellant's ability to perform DLA. Therefore, it follows, and the panel finds, that the ministry was reasonable in concluding that it cannot be determined that the appellant requires help to perform DLA that are significantly restricted.

#### 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.

## Schedule of Legislation

### Employment and Assistance for Persons with Disabilities Act

#### Persons with disabilities

Section 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).

## **Employment and Assistance for Persons with Disabilities Regulation**

### **Definitions for Act**

Section 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.

**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  
Susan Ferguson

Signature of Chair

Date (Year/Month/Day)  
2022/09/08

Print Name  
Jennifer Armstrong

Signature of Member

Date (Year/Month/Day)  
2022/09/08

Print Name  
Kenneth Smith

Signature of Member

Date (Year/Month/Day)  
2022/09/08