

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

The decision under appeal is the Ministry of Social Development and Poverty Reduction (“Ministry”) reconsideration decision dated January 9, 2024, which determined the Appellant was not eligible for the Persons with Disabilities (“PWD”) designation because he did not meet three of the five criteria necessary for designation. The Ministry found that the age and duration requirements were met, but stated the following criteria were not met:

- severe physical or mental impairment;
- severe impairment directly and significantly restricts daily living activities; and
- assistance required with daily living activities as a result of a significant restriction.

Further, the Ministry found the Appellant was not one of the prescribed classes of persons eligible for PWD designation on alternative grounds. As there was no information or argument on this point, the panel considers it not to be an issue in this appeal.

### **Part D – Relevant Legislation**

*Employment and Assistance for Persons with Disabilities Act (“Act”), section 2.*

Employment and Assistance for Persons with Disabilities Regulation (“Regulation), section 2.

*Employment and Assistance Act, section 22(4).*

*Interpretation Act, section 29.*

Relevant sections of the legislation can be found in the Schedule of Legislation at the end of this decision.

**Part E – Summary of Facts**

An in-person hearing was held on February 2, 2024. The panel, the Appellant, and the Appellant's social worker (as advocate) attended the hearing in-person. A representative of the Ministry joined the hearing via telephone.

**Evidence Before the Minister at Reconsideration**

The Appellant is over 18 years of age and has applied for PWD designation. In support of the application, the Appellant submitted a PWD application that included the Medical Report completed by the Appellant's doctor, the Assessor Report completed by the Appellant's social worker, and a portion of the application form entitled Applicant Information that includes a hand-written self-report from the Appellant.

In addition to the application materials, upon Reconsideration the Ministry also received the following:

- Appellant's Request for Reconsideration, which included a detailed self-report from the Appellant; and
- a doctor's note from Rebalance MD, dated December 14, 2023.

This evidence is summarized below.

**Medical Report**

The Medical Report was completed by the Appellant's doctor. The doctor states that the Appellant has been a patient since 2020 and has been seen 2-10 times in the last year.

***Diagnosis:***

The doctor diagnosed the Appellant with insulin-dependent type II diabetes (onset 2018), recurring diabetic foot ulcers (onset 2018), chronic osteomyelitis, and right foot transmetatarsal amputation (June 2023).

***Health History***

The doctor describes the diagnosis and states that the amputation of the Appellant's foot resulted in limitations with mobility and limits in his ability to find employment. He states that the Appellant:

- requires regular dressings of his right foot and frequent medical appointments with a specialist team;
- requires crutches and/or cane to mobilize and requires specialized dressings for his foot; and
- has a permanent impairment (meaning that it is likely to continue for two years or more) but notes that mobility may slightly improve as the amputation site heals.

### *Functional Skills*

The doctor states that the Appellant can:

- walk unaided for 1 to 2 blocks;
- climb 5+ stairs unaided;
- lift 7 to 16 kg;
- remain seated without limitation; and
- communicate without difficulty.

The doctor notes the Appellant has no deficits with cognitive and emotional function.

### *Daily Living Activities*

The doctor states that the Appellant is independent in many areas of daily living activities. Continuous restrictions are noted with respect to mobility inside and outside of the home. The doctor states that this is because the Appellant's mobility is restricted on the right foot due to the above-noted amputation and recurrent infections. The doctor notes that the Appellant occasionally uses crutches and/or cane for walking/standing.

### Assessor Report

The Assessor Report was completed by a social worker. The social worker wrote that they had known the Appellant for 3 months at that time and that the Assessor Report was completed as part of a home assessment.

### *Mental or Physical Impairment*

The social worker stated that the Appellant is impacted by a partial amputation of the right foot caused by a wound from diabetes. This affects showering, walking, balance and being on his feet for any length of time.

*Ability to Communicate and Mobility and Physical Ability*

The social worker noted that the Appellant has good ability to communicate. With respect to mobility the social worker stated that the Appellant takes significantly longer than typical with all areas of mobility and physical ability, particularly:

- walking indoors (has to take breaks);
- walking outdoors (uses an assistive device and is waiting for a knee scooter);
- climbing stairs (much harder, 1 flight, and has to take breaks);
- standing;
- lifting (balance is off and makes it difficult); and
- carrying and holding (balance is off and makes it difficult).

*Cognitive and Emotional Functioning*

The social worker stated that the Appellant's cognitive and emotional functioning is not impacted.

*Daily Living Activities*

The social worker assessed the Appellant as independent in most daily living activities, but noted that the Appellant takes significantly longer with the following activities:

- dressing (more than 30 minutes);
- basic housekeeping (more than 30 minutes);
- bathing (requires period assistance from girlfriend and takes significantly longer);
- going to and from stores (takes significantly longer and uses an electric cart in stores);
- carrying purchases home (takes significantly longer and can't carry due to balance);
- food preparation (takes significantly longer as cannot stand for long periods);
- cooking (takes significantly longer as cannot stand for long periods); and
- getting in and out of a vehicle (takes a longer time).

The social worker comments that the Appellant struggles with daily living activities and has been advised to stay off his foot completely.

The social worker notes that the Appellant is independent in all areas of social functioning.

*Assistance Provided for Applicant*

The social worker states that the Appellant needs help for daily living activities and receives such help from family and health authority professionals. The social worker also states that the appellant uses a cane and crutches and is waiting for a knee scooter.

### Self-Report

In the self-report section of the application form, the Appellant states that he has diabetes and part of his right foot was amputated. He states his balance is not the same, it is hard to walk long distances, and "if on foot too long [his] leg gets numb and in pain". The Appellant states that he was a painter most of his life (27 years) and with bad balance he will not be painting anymore. The Appellant notes that lifting things is harder with his balance off. He says that this affects his everyday life. Getting in and out of the shower is harder too.

The Appellant provided additional information in his Request for Reconsideration stating that he wished to have his PWD application reconsidered due to the progression of his disability. He states that it significantly impacts his daily living activities. He notes that he was not specific enough in his original application and that since his initial application for PWD was submitted, the wound on his foot has not healed and continues to impact his quality of life. The Appellant notes that it now impacts all areas of his life and daily activities as follows:

- he has been told to stay completely off of his foot by the doctors and surgeon with no weight bearing at all on his foot;
- there is a risk of further amputation;
- he must use a knee scooter and crutches to get around and relies on these devices 100% of the time;
- it takes longer to get around as he is slower with crutches and the knee scooter – for example it takes 30 minutes to walk a block that would have previously taken about 10 minutes;
- showering now takes about an hour as he has to wrap his foot and adjust all bathroom safety devices;
- getting from one room to another takes significantly longer, especially if he is carrying items such as food to eat as it takes multiple trips;
- he is unable to stand to cook and must rely on easy microwavable meals and neighbours;/friends;
- he is unable to bring firewood into the home for the fireplace (his main source of heat) and relies on neighbours or friends to do this for him;

- he relies on others to drive him to the grocery store and to appointments as he can no longer drive;
- shopping now takes much longer than it did previously as he needs to use a scooter or crutches. A 30-minute shop now takes over an hour due to limited mobility;
- he can no longer lift/carry things after shopping as he has no stable balance as he has to stay off his foot, he relies on others to carry, bring in and put away groceries;
- he is not able to climb stairs and must take an elevator or escalator instead;
- being unable to drive has impacted his social life and he now must rely on others to drive him around he cannot drive to see people as he did previously;
- he is unable to take public transportation as navigating the bus with a knee scooter or crutches has been very challenging;
- he is not able to walk his dogs anymore and must rely on friends/family to walk them; and
- feeding the dogs now takes 15-20 minutes for each meal when it previously took about only 5 minutes.

#### Doctor's Note

Along with the Request for Reconsideration the Appellant provided the Ministry with a doctor's note from Rebalance MD, dated December 14, 2023. In this note, the Appellant's doctor advised that the Appellant must avoid weight bearing on the right to promote healing.

#### **New Evidence Provided on Appeal**

Prior to the hearing, the Appellant submitted the following new evidence:

- a letter dated January 12, 2024 from a registered nurse who sees the Appellant for wound care; and
- a letter dated January 15, 2024 from the social worker that completed the Assessor Report providing an updated assessment of the Appellant.

At the hearing, the Appellant provided further oral evidence of his present medical condition, restrictions on his daily living activities, and details regarding the amount of assistance needed. The Appellant also provided the following documentary evidence:

- letter dated January 25, 2024 from the Appellant's doctor; and
- two photographs dated February 2, 2024 of the Appellant's unhealed foot wound.

The Ministry made a brief statement explaining its reconsideration decision, but also stated that in light of the new evidence provided on appeal that the Appellant may now qualify for PWD designation.

This evidence is summarized below.

### Appellant's Evidence

Much of the information that the Appellant provided was the same as that set out in his Request for Reconsideration, mentioned above. He added to this information that he will be having a further skin graft mid-February and if that does not work to heal his wound then they may need to amputate further. He stated that it is imperative that he stay off his right foot.

In response to a question from the panel, the Appellant stated that his doctor completed the Medical Report without him present, but he met with the social worker when the Assessor Report was completed.

### Letter from registered nurse

In a letter dated January 12, 2024, the registered nurse that sees the Appellant for wound care states that the Appellant has been a client at her health unit for approximately two years and has a complicated medical history that affects his wound healing. They state that the ongoing plan for wound care requires the Appellant to stay off his foot. They also note the Appellant's impairment causes him significant stress and impacts his life mentally and financially.

### Letter from social worker

In a letter dated January 15, 2024, the social worker who completed the Assessor Report provided an update on the Appellant's physical condition. She writes that the Appellant's ability to be independent significantly declined and he is now primarily reliant on the generosity of family/friends/neighbours. She states that this significantly impacts all areas of the Appellant's daily life. In particular, she notes that the Appellant:

- requires ongoing care by a team of specialized care providers, including infectious disease, orthopedics, and rehab medicine;
- must attend frequent medical appointments;

- must be off his foot 100% of the time and relies on crutches and knee scooter to move, even within his own home;
- takes significant time to do simple tasks;
- moving around the house, that used to take mere seconds, now takes several minutes;
- cannot prepare meals or wash dishes as he is unable to stand on his own;
- has a compromised ability to carry or lift items, is not able to carry groceries or firewood into his home, and needs the help of others to put groceries away;
- takes significantly longer to grocery shop, something that previously took 20 minutes now takes over an hour;
- takes over 30 minutes to walk one block and the Appellant can no longer walk his dogs;
- is no longer able to drive and relies on others to take him to appointments and grocery shopping;
- cannot take the bus as it takes at least 20 minutes to get to the stop and he is not able to navigate the steps onto the bus with his scooter or crutches;
- takes significantly longer to shower as the Appellant must make sure that the wound stays dry and covered, this now takes over 30 minutes when it used to take 10 minutes;
- has challenges getting dressed as it now takes significantly longer;
- is isolated and his inability to get around has restricted his ability to see friends and socialize, which has negatively impacted his mood; and
- relies on family and friends to do the tasks he cannot do.

The social worker asks that the Ministry reconsider the Appellant's application for PWD designation.

#### Letter from doctor

The Appellant's doctor provided a letter dated January 25, 2024, that states that the Appellant has significant medical issues that prevent him from working. The doctor questions why the application was rejected and asks that the Appellant's PWD application be reconsidered.

#### Photographs

The two photographs submitted are dated February 2, 2024 and show a foot wound that is open and clearly unhealed.



### Ministry's Evidence

The Ministry explained the reconsideration decision but noted that with the new evidence provided on appeal that the Appellant likely qualifies for PWD designation. The Ministry stated that the additional information shows a severe physical impairment and explains how often assistive devices are used and provides more extended restrictions on the Appellant's daily living activities.

### **Admissibility of Evidence**

Neither party objected to the submission of new evidence submitted at the hearing.

The panel finds that much of the oral testimony of the Appellant summarized evidence already before the Ministry at reconsideration and in submissions in support of the Appellant's appeal. However, where the testimony provided further detail, the panel finds that the testimony was reasonably required for a full and fair disclosure of all matters related to the decision under appeal. Likewise, the panel finds the new documentary evidence provided was also reasonably required for a full and fair disclosure of all matters related to the decision under appeal.

The panel finds the new information provided by the Ministry is also reasonably required for a full and fair disclosure of all matters related to the decision under appeal. Accordingly, the panel admits all the new information as evidence pursuant to section 22(4) of the *Employment and Assistance Act*.

**Part F – Reasons for Panel Decision****Issue on Appeal**

The issue on appeal is whether the Ministry's decision that the Appellant was ineligible for PWD designation was reasonably supported by the evidence or was a reasonable application of the legislation in the circumstances of the Appellant. The evidence considered includes new evidence accepted by the panel. That is, was the reconsideration decision reasonable, considering the previous evidence and new evidence not previously available to the Ministry? The question to be answered is whether the reconsideration decision is reasonable noting that the Ministry held that the requirements of section 2(2) of the Act were not met because:

- a severe mental or physical impairment was not established;
- the Appellant's daily living activities were not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and
- it has not been established that daily living activities are significantly restricted and therefore it cannot be determined that significant help is required from other persons or a device to complete restricted activities.

**Appellant's Position**

The Appellant states that he meets the criteria for PWD designation. He states that his condition has worsened since he applied for PWD as evidenced by the various letters, doctors note and photographic evidence he has provided on appeal. He says that:

- his impairment should be considered a severe physical impairment because he cannot bear weight on his foot and must use crutches or knee scooter for all mobility;
- he meets the criteria regarding restrictions on daily living activities because he either requires assistance or takes significantly longer than normal to perform all daily living activities; and
- based on the new evidence, he should qualify for PWD designation.

**Ministry Position**

The Ministry explained on its reconsideration decision stating that the Appellant does not meet 3 of the 5 required criteria for designation as a person with disabilities under the Act. However, as noted above, the Ministry also stated that the new evidence provided that the

Ministry's decision would likely be different if they had this new information when making its decision as the Appellant now meets all 5 of the necessary criteria.

## **Panel Decision**

### PWD Designation – Generally

The legislation provides the Ministry with the discretion to designate someone as a person with disabilities if the requirements are met. In the panel's view, PWD designation is for persons who have significant difficulty in performing regular self-care activities. If the inability to work is the major reason for applying for designation, the panel encourages applicants to speak to the Ministry about other potential programs such as Persons with Persistent Multiple Barriers to Employment (PPMB) or explore federal government programs such as Canada Pension Plan disability benefits.

Some requirements for PWD designation must have an opinion from a professional, and it is reasonable to place significant weight on these opinions. The application form also includes a Self Report. It is appropriate to also place significant weight on the Self Report and evidence from the Appellant, unless there is a legitimate reason not to do so.

The panel will review the reasonableness of the Ministry's determination and exercise of discretion.

### Severe Physical or Mental Impairment

The panel finds that the Ministry was not reasonable when it determined that the Appellant did not have a severe mental or physical impairment.

#### *Physical Impairment*

The panel finds that the updated medical evidence provided on appeal shows that the Appellant has a severe physical impairment. The Ministry representative agreed with this assessment. The updated evidence from the Appellant's social worker and photographic evidence of the Appellant's wound is particularly helpful in reaching this conclusion. The social worker explained that the Appellant's physical condition has worsened since the initial PWD application was completed. The Appellant cannot stand on his right foot at all and this restricts most, if not all, of the Appellant's day-to-day activities. The Appellant will be undergoing further procedures to heal the wound, but it is anticipated that the

Appellant will continue to experience ongoing impairment. Accordingly, the panel finds that the Ministry's decision that the Appellant did not have a severe physical impairment is not reasonable when one considers the new evidence provided on appeal.

### *Mental Impairment*

The panel finds that there is no evidence of any mental impairment and notes that neither the Appellant nor his doctor or social worker raised this issue. Accordingly, the panel finds that the Ministry was reasonable when it determined that the Appellant does not have a severe mental impairment. However, as noted above, this criterion for PWD designation is to have either a severe mental or physical impairment; and because the panel has found that the Appellant does have severe physical impairment, this criterion is satisfied.

### *Daily Living Activities*

A prescribed professional must provide an opinion that the applicant's severe physical impairment restricts the ability to perform the daily living activities listed in the legislation. The activities that are considered are listed in the Regulation. With respect to a physical impairment, those daily living activities are:

- prepare own meals;
- manage personal finances;
- shop for personal needs;
- use public or personal transportation facilities;
- perform housework to maintain the person's place of residence in acceptable sanitary condition;
- move about indoors and outdoors;
- perform personal hygiene and self care; and
- manage personal medication.

Not all daily living activities, or even the majority, need to be restricted. As decided in *Hudson v. British Columbia (Employment and Assistance Appeal Tribunal)*, 2009 BCSC 1461, at least two daily living activities must be restricted in a way that meets the requirements. The inability to work and financial need are not listed as daily living activities and are only relevant to the extent that they impact the listed activities.

The restrictions to daily living activities must be significant and caused by the impairment. This means that the restriction must be to a great extent and that not being able to do the

activities without a lot of help or support will have a large impact on the person's life and that the restriction is because of the impairment.

The restrictions also must be continuous or periodic. Continuous means the activity is generally restricted all the time. A periodic restriction must be for extended periods meaning frequent or for longer periods of time. For example, the activity is restricted most days of the week, or for the whole day on the days that the person cannot do the activity without help or support. To figure out if a periodic restriction is for extended periods, it is reasonable to look for information on the duration or frequency of the restriction.

The Medical Report and Assessor Report also have activities that are listed, and though they do not match the list in the Regulation exactly, they generally cover the same activities. The Medical Report and Assessor Report provide the professional with an opportunity to provide additional details on the applicant's restrictions.

The panel finds that, considering the updated medical evidence provided on appeal, there is no question that the Appellant's impairment restricts his ability to perform daily living activities. That evidence shows that the Appellant must stay off one foot 100% of the time. This restriction means that the Appellant either requires help to perform most activities or takes significantly longer than normal to perform them himself. This is explained in detail in the letter from the Appellant's social worker that updates the findings set out in the Assessor Report. The social worker stated that the Appellant is restricted with all daily living activities. While much of this information was also provided by the Appellant in his request for reconsideration, and adds weight; a social worker is a prescribed professional and having this evidence from the prescribed professional is required to satisfy the criterion that daily living activities are restricted.

In light of the new evidence provided on appeal, the panel finds the Ministry's decision that the Appellant's impairment did not directly and significantly restrict the Appellant's ability to perform daily living activities unreasonable.

### Need for Help

A prescribed professional must provide an opinion that the person needs help to perform certain daily living activities. Help means using an assistive device, the significant help or supervision of another person, or using an assistance animal to perform the activities. An assistive device is something designed to let the person perform restricted activities.

The panel finds that the updated evidence shows that the Appellant needs the help and supervision of others to complete most, if not all, of his daily living activities. As explained by the Appellant and his social worker, the Appellant relies on friends and family regularly. Further, he also requires assistive devices such as crutches and a knee scooter for all mobility. The evidence of the social worker, as a prescribed professional, satisfies the requirement for proving that the Appellant needs help to perform the restricted activities. Accordingly, the panel finds that the Ministry decision that this criterion was not met is unreasonable.

### **Conclusion**

For the reasons set out above, the panel finds that the Ministry's decision, that the Appellant was not eligible for PWD designation, was not reasonably supported by the evidence and therefore rescinds the decision.

The Appellant's appeal is successful.

Schedule – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act

**Persons with disabilities**

s. 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

s.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.

### Employment and Assistance Act

s. 22 (4) A panel may consider evidence that is not part of the record as the panel considers is reasonably required for a full and fair disclosure of all matters related to the decision under appeal.

### Interpretation Act

s. 29 In an enactment:

....

**"medical practitioner"** means a registrant of the College of Physicians and Surgeons of British Columbia entitled under the *Health Professions Act* to practise medicine and to use the title "medical practitioner";

....

**"nurse practitioner"** means a person who is authorized under the bylaws of the British Columbia College of Nurses and Midwives to practise nursing as a nurse practitioner and to use the title "nurse practitioner";

....

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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

**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

Emily Drown

Signature of Chair

Date (Year/Month/Day)

2024/February/26

Print Name

Corrie Campbell

Signature of Member

Date (Year/Month/Day)

2024/02/26

Print Name

Kent Ashby

Signature of Member

Date (Year/Month/Day)

2024/February/26