

PART C – Decision under Appeal

The decision under appeal is the Ministry's reconsideration decision, dated December 20, 2011 which held that the Appellant was not eligible for the Persons with Disabilities (PWD) designation. The Ministry determined that the Appellant met two of the legislated criteria in Section 2 of the Employment and Assistance for Persons with Disabilities Act (EAPWDA): the Appellant has reached 18 years of age and has an impairment that, in the opinion of a medical practitioner, is likely to continue for at least 2 years. However, the Ministry determined that the Appellant did not meet the remaining three criteria for the PWD designation: a severe mental or physical impairment; in the opinion of a prescribed professional a direct and significant restriction in an ability to perform daily living activities either continuously or periodically for extended periods and a requirement for significant help or supervision of another person, an assistive device or an assistance animal in order to perform daily living activities.

PART D – Relevant Legislation

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

PART E – Summary of Facts

The evidence at the time of the ministry's reconsideration decision was :

1. PWD application dated June 27, 2011. In the self-report the appellant indicates that she suffers from mid to late stage arthritis affecting most joints, but especially her spine and hips. She reports her pain is strong enough for her to cease walking. The appellant also reports that she has a heart condition that does not allow her to run, walk long distances, be exposed to heat for long periods of time and that she should never be stressed or startled. The appellant also indicates that she suffers from moderate to extreme asthma, stomach ulcers, scoliosis, ADHD and undiagnosed Autism/Aspergers syndrome. The appellant also notes that she requires daily aid with cooking, cleaning, navigation, picking items off the floor, shopping, getting in and out of bed, showering, using stairs, remembering birth control and vitamins nightly and appointments. Due to all her conditions she requires someone with her and the care of others at all times.
2. In the Physician's Report (PR) dated July 4, 2011 the physician diagnoses the appellant with mood and anxiety disorders, arthritis and asthma and comments "the collective of her disorders render her disabled." The physician reports that the appellant requires knee and ankle braces and spinal support. With respect to functional skills it is indicated the appellant can walk unaided for 1-2 blocks, climb 2 to 5 stairs, can lift 5 to 15 lbs and can remain seated for less than 1 hour. No difficulties are reported with communication. With respect to cognitive and emotional functions the physician reports significant deficits with executive, memory, emotional disturbance, impulse control and attention or sustained concentration. With regard to Daily Living Activities (DLA) the physician indicates "yes" to the question "Does the impairment directly restrict the person's ability to perform Daily Living Activities?" With respect to DLA in the PR the appellant is indicated to be continuously restricted in 8 of the 10 aspects listed. These include management of medications, basic housework, daily shopping, mobility inside and outside the house, use of transportation and management of finances. The appellant is reported to have no restrictions with regard to personal self-care and management of medications. No indication of restriction to the DLA related to social functioning (a category applied for persons with an identified mental impairment or brain injury) is provided, but a written comment indicates the appellant has difficulty with relationships. With regard to the appellant's degree of restrictions the physician comments "moderate to severe". He also notes that the appellant requires the assistance from family and friends. The physician further comments "...multiplicity of dysfunctions aggregate to disability".
3. The Assessor Report (AR) dated July 4, 2011 was also completed by the appellant's physician. In the Assessor Report, the appellant's physician reports that the appellant's ability to communicate is good and poor with respect to reading. The physician also in this report indicates that the appellant requires periodic assistance in 4 of 6 aspects of mobility and physical ability: walking indoors, walking outdoors, climbing stairs and standing. In 2 of 6 aspects of mobility and physical ability: lifting and carrying and holding the appellant requires continuous assistance. The physician comments "impaired by arthritis." With regard to cognitive and emotional functioning moderate impacts are noted for 5 of the 14 aspects listed: emotion, impulse control, insight and judgement, executive and motivation. A minimal impact is

noted for other emotional or mental problems and 8 aspects (bodily functions, consciousness, attention/concentration, memory, motor activity, language, psychotic

symptoms, other neuropsychological problems were left blank on the checklist). The physician provided comments "frustration with multiple health issues...requires continuous supervision socially...significant memory impairment and self directed navigator...requires assistance and supervision".

With regard to the 33 aspects of DLA in the AR the appellant is reported to require periodic assistance with 6 aspects: going to and from stores, reading prices and labels, making appropriate choices, banking, budgeting, using public transit and continuous assistance with 1 aspect: carrying purchases home." With regard to the 4 DLA associated with social functioning (completed only if an applicant has an identified mental impairment, including brain injury) the appellant requires periodic support/supervision with all 4 aspects: appropriate social decisions, able to develop and maintain relationships, interacts appropriately with others and able to deal appropriately with unexpected demands. With regard to the remaining 23 aspects of DLA (includes all 8 aspects of personal care, all 2 aspects of Basic Housekeeping, all 4 aspects of Meals, 1 aspect of Pay Rent and Bills, all 3 aspects of Medications and 2 aspects of transportation) the physician provides no indications to the checklist. The physician indicates good functioning with immediate social networks and marginal functioning with extended social networks. The physician indicates assistance is provided to the appellant by family and friends and comments: "assistance by boyfriend and family frequently". He also notes the appellant's use of orthotics and comments "foot deformity"

4. The appellant's Request for Reconsideration signed and dated November 15, 2011. The appellant includes with her request 8 letters which are by and large form letters. The letters point out from the signatories the time they have known the appellant, their observations with respect to her impairments and restrictions, the help they provide or that they have observed the appellant requiring with DLA, her inability to be employed and their contention that she be approved for disability.

At the hearing, other documentation was admitted into evidence by the panel under Section 22(4) of the Employment and Assistance Act as follows:

- January 3, 2012 the appellant's Notice of Appeal in which she states the "ministry did not acknowledge my severe impairments fairly."
- A letter dated January 9, 2012 from the appellant's physician. The letter refers to similar information provided by the physician in the PR and AR, but does add clarification in his following statements:

- " [the appellant] has been my patient for two years and I am able to confirm that her disabilities are severe, will continue for more than 2 years and have direct impact on her daily living activities."

- "[the appellant] has severe mental impairments. [the appellant's] mood and anxiety disorders significantly restrict her cognitive and emotional function. [the appellant] suffers severely in these areas and finds it very difficult to plan, organize, sequence and sustain concentration,

restricting her ability to learn and retain information and her poor impulse control requires her to have continuous assistance and supervision socially.”

- “[the appellant] is severely impaired by her anxiety and depression and attests that she is supported by family to complete many daily living activities including meal preparation, housework, shopping, moving in and out of doors, use of public transportation, managing finances and interacting socially.”

- “ Regarding [the appellant’s] severe physical impairments she requires knee and ankle braces and spinal support for scoliosis and orthotics.....” she cannot(sic) independently lift, stand, walk or carry items without significant pain and/or excess fatigue. [the appellant’s] severe physical impairments directly impact her ability to independently complete daily living activities”

- “ I would like to confirm that [the appellant] has also been diagnosed with scoliosis and a heart condition that is akin to arrhythmia, which affects the hearts ability to compensate for stress load.”

At the hearing, and in response to a question by the panel regarding the more recent letter of January 9, 2012 from the appellant’s physician, the appellant’s advocate acknowledged that there had been assistance in its composition to clarify and assemble in a more coherent way the appellant’s original application. The advocate stated that the physician carefully reviewed the letter to clarify and support the appellant’s original application.

At the hearing, the appellant spoke about her conditions. She reports that she needs help always with meal preparation as she cannot stand for long periods, gets consistent help from friends regarding banking and budgeting. With respect to housework she gets constant help from her mother-in-law and husband and because of her physical limitations needs help getting out of bed and off and on the toilet and dressing herself. At other times she needs help showering. The appellant also notes with respect to shopping her difficulty navigating and understanding locations and her difficulties communicating and interacting with others.

The ministry stood by the record.

PART F – Reasons for Panel Decision

The issue under appeal is whether the Ministry's reconsideration decision was reasonably supported by the evidence and whether the Ministry reasonably determined that the Appellant was not eligible for the Persons with Disabilities (PWD) designation because she did not meet three of the criteria for the PWD designation: a severe mental or physical impairment; in the opinion of a prescribed professional a direct and significant restriction in an ability to perform daily living activities either continuously or periodically for extended periods and a requirement for significant help or supervision of another person, an assistive device or an assistance animal in order to perform daily living activities.

The relevant legislation is section 2 of the Employment and Assistance for Persons with Disabilities Act (EAPWDA) as follows:

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;

"health professional" repealed

"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 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).

Also relevant is section 2 of the Employment and Assistance for Persons with Disabilities Regulation (EAPWDR) which defines daily living activities and prescribed professional:

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 authorized under an enactment to practice the profession of

- (a) medical practitioner,
- (b) registered psychologist,
- (c) registered nurse or registered psychiatric nurse,
- (d) occupational therapist,
- (e) physical therapist,
- (f) social worker,
- (g) chiropractor, or
- (h) nurse practitioner.

The advocate presented a submission on behalf of the appellant. The submission referred to relevant legal considerations and argument regarding the Interpretation Act and the need to interpret legislation in a large and liberal manner; *Abrahams v. Canada* (1983, 142 D.L.R. (3d) 1) where social welfare benefits are concerned ambiguities in the legislation should be resolved in favour of the claimant; and the case *Hudson v. Employment and Assistance Appeal Tribunal* (2009, BCSC 1461). With the latter the appellant argues *Hudson* noted:

1. "evidence of the physician and assessor must be read in their entirety and in a broad way"... including narrative portions, to see if eligibility confirmation can be found elsewhere" and "significant weight must be placed on the evidence of the applicant unless there is a legitimate reason not to do so."
2. that the plural of "activities" in the legislation dictates that there must be evidence from a prescribed professional indicating a direct and significant restriction on at least 2 daily activities.

The appellant's position is that her severe mental and physical impairments as confirmed by her physician, directly and significantly restricts her ability to perform DLA and confirms that she requires assistance to perform them. In this respect, the appellant notes that the basis of the ministry's decision is that the information provided does not establish severity and that the nature, frequency and duration of her periodic assistance are undefined. However, the appellant argues support is required for all DLA as confirmed by the physician in his recent letter and that most mental and physical impairments and resulting symptoms cannot be quantified or generalized to have a consistent, measured or expected rate of occurrence and, therefore, reasonable that medical professionals would not and cannot provide definitive measurements. That the nature, frequency and duration of assistance are not a criterion of the legislation. The appellant also argues that the evidence and information provided by her in its entirety establishes that her impairments directly and significantly restrict her performance of DLA either continuously, or periodically for extended periods, and as a result of those restrictions, she requires help to perform those activities.

The ministry's position is that the appellant does not have a severe physical or mental impairment and that her ability to perform DLA are not directly and significantly restricted by a severe physical or mental impairment continuously or periodically for extended periods, and, that as a result, the appellant does not require help performing DLA. In terms of physical functioning, the ministry found that the appellant's report that she needs help "99% of the time" with many of her DLA including that she cannot run, type, navigate and will never be able to drive a car are not DLA considered by the legislation. Further that a prescribed professional has not confirmed the level of assistance or severity described in the Self Report portion of her PWD application. It found that her physician indicates she can walk 1-2 blocks, climb 2-5 stairs, lift 5 to 15 pounds and remain seated for less than 1 hour and requires periodic assistance with walking outdoors, climbing stairs and standing and continuous assistance with lifting, carrying/holding. The ministry determined with these restrictions that the nature, frequency and duration were not defined. As a result, it could not establish that the appellant was impaired to a severe degree. With regard to a severe mental impairment, while the appellant's physician reports significant deficits with executive, memory, emotional disturbance, impulse control and attention or sustained concentration, the ministry found the impacts to her cognitive and emotional functioning are moderate in degree. Further, that the physician's comments that she requires "continuous supervision socially" is not reflected in the PWD application and, that although her mental health conditions may impact her daily functioning, it is not severely impacting her

cognitive and emotional functioning. With regard to significant restrictions, it determined that although the physician in the PR reports continuous assistance with meal preparation, basic housework, daily shopping, and mobility inside and outside of the home, use of transportation and management of finances, he also describes the degree of restrictions as " moderate to severe". However, because it has no information to outline the frequency or duration of when the restrictions are severe, it could not confirm that the appellant is significantly and directly restricted in her ability to perform DLAs. It also found that there was no description as to the frequency and or duration regarding her need for periodic assistance with DLA as reported in the AR including: going to and from stores, reading prices and labels, making appropriate choices, banking, budgeting and using public transit and with the periodic support with all aspects of social functioning. The ministry argues the appellant's medical conditions represent a moderate impairment and minimal to moderate restrictions that affect her ability to perform DLA. The ministry argues, therefore, that the information does not establish that the appellant's impairment significantly restricts DLA either continuously or periodically for extended periods and that the appellant requires the significant help to perform them.

As noted in the issue under appeal there are 3 legislative requirements that the ministry determined were not met and the panel's reasons and findings will be focused and based on these. With respect to the physician's subsequent letter dated January 9, 2012, the panel determined that the letter added clarification and further detail to his findings in the PR and AR and, therefore, was given more weight as evidence from a prescribed professional regarding severity of the appellant's impairments and her limitations regarding DLAs. This is discussed further in the panel's reasons below. The panel also found the appellant's physician had turned his mind to the prepared letter in order to clarify his earlier findings.

With respect to the issue of a severe mental impairment, the panel finds that the physician in the PR reports significant deficits with cognitive and emotional functions with executive, memory, emotional disturbance, impulse control and attention or sustained concentration. While the physician with regard to DLAs in the PR provided no indication for social functioning that applies to persons with identified mental impairment, in the AR, he reports with regard to cognitive and emotional functioning moderate impacts with emotion, impulse control, insight and judgement, executive and motivation and minimal impacts with other emotional or mental problems. The physician also provided narrative "requires continuous supervision socially.....significant memory impairment and self-directed navigation" and reports periodic support/supervision with all aspects of DLA associated with social functioning and marginal functioning with respect to her extended social networks. In his subsequent letter the physician states "[the appellant] has severe mental impairments. [the appellant's] mood and anxiety disorders significantly restrict her cognitive and emotional function. [the appellant] suffers severely in these areas and finds it difficult to plan, organize, sequence and sustain concentration, restricting her ability to function independently. [the appellant's] memory deficit limits her ability to learn and retain information and her poor impulse control requires her to have continuous assistance and supervision socially.....[the appellant] is severely impaired by her anxiety and depression...". The panel finds the overall evidence from the physician as supporting a severe mental health condition that severely limits the appellant's ability to function. Consequently, the panel finds that the ministry was not reasonable in its determination that the appellant does not have a severe mental impairment.

With respect to the issue of a severe physical impairment, the new letter from the physician has also been considered in conjunction with that presented with the original application. In the PR the physician reports the appellant can walk 1 to 2 blocks, climb 2 to 5 steps, lift up 15 pounds and remain seated less than 1 hour. He comments "impaired by arthritis" and that the appellant's degree of restrictions are "moderate to severe." In the AR the assessor indicates the appellant requires periodic assistance walking indoors and outdoors, climbing stairs and standing and requires continuous assistance lifting and carrying and holding. In his subsequent letter the physician clarifies in his comments "regarding [the appellant's] severe physical impairments she requires knee and ankle braces and spinal support for scoliosis and orthotics." [the appellant's] significant physical impairments restrict her from walking unaided for more than 2 blocks or climb more than 5 steps. In addition, [the appellant's] severe arthritis limits her ability to sit for more than 1 hour. Further she cannot independently lift, stand, walk or carry items without significant pain and/or excess fatigue. [the appellant's] severe physical impairments directly impact her ability to independently complete daily living activities." The panel considered and finds the newer evidence in the physician's letter consistent with that in the PR and collectively sufficient to demonstrate a severe physical impairment due to the appellant's severe arthritis and scoliosis. The panel finds, therefore, that the ministry was not reasonable in its determination the appellant does not have a severe physical impairment.

The second criteria at issue is whether the Ministry reasonably determined that the Appellant did not have a severe mental or physical impairment which, 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. In the PR the physician responded "yes" to the question "does the impairment directly restrict the person's ability to perform daily living activities?" In the PR, the physician indicates the appellant to be continuously restricted in 7 aspects of DLA: meal preparation, basic housework, daily shopping, mobility inside and outside the home, use of transportation and management of finances. Although the physician only partially completed the AR and omitted indications regarding DLA associated with personal care, basic housekeeping and meal preparation, the panel relies on the comments of the physician in the PR that the "multiplicity of dysfunctions aggregate to disability"; that the degree of restriction is "moderate to severe". It also relies on the comments in the physician's subsequent letter that indicate the appellant's disorders significantly restrict her cognitive and emotional function "restricting her ability to function independently" and that her physical impairments "directly impact her ability to independently complete daily living activities." Therefore, based on all the evidence from the physician, the panel finds the ministry was not reasonable in its determination that the appellant's impairment does not directly and significantly restrict her ability to perform DLA either continuously or periodically for extended periods.

The final criteria that is at issue is whether the appellant requires an assistive device, the significant help of another person or the services of an assistive animal to perform the directly and significantly restricted daily living activities. The panel finds there is need of an assistive device in the form of knee and ankle braces and spinal support for scoliosis and orthotics. Regarding help from another person, the physician in the PR indicates continuous restrictions in 7 aspects of DLA and specifically notes the appellant needs assistance of family and friends and in the AR indicates the appellant "requires continuous supervision socially". The panel also applies significant weight to the physician's subsequent letter that states "As a result of [the appellant's] severe physical and mental impairments

she needs continuous supervision and assistance from family and friends with daily living activities including housecleaning, using public transit, food preparation, shopping, planning, organizing, managing finances and social/emotional support." The panel, therefore, finds that the Ministry did not reasonably conclude that the Appellant does not require the significant help of another person or use of an assistive device.

The panel finds that the ministry's decision is not reasonably supported by the evidence before it and rescinds the ministry's decision in favour of the appellant.