

PART C – Decision under Appeal

The decision under appeal is the ministry's reconsideration decision dated January 5, 2012 which found that the appellant did not meet three of the five statutory requirements of Section 2 of the Employment and Assistance for Persons with Disabilities Act for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that her impairment is likely to continue for at least two years. However, the ministry was not satisfied that the evidence establishes that she has a severe physical or mental impairment. The ministry was also not satisfied that the appellant's daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods. As the ministry found that the appellant is not significantly restricted with DLA, it could not be determined that she requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

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 before the ministry at the time of the reconsideration decision consisted of:

- 1) Person With Disabilities (PWD) Application: applicant information dated July 19, 2011, physician report dated September 6, 2011, and assessor report dated September 6, 2011;
- 2) Letter from the ministry to the appellant dated October 24, 2011 denying person with disabilities designation and enclosing a copy of the decision summary;
- 3) Letter from the appellant's physician dated November 18, 2011; and,
- 4) Request for Reconsideration- Reasons prepared by an advocate on behalf of the appellant.

Prior to the hearing, the appellant provided an additional document, being a statement by the appellant regarding her impairment, signed by her physician on January 31, 2012. The ministry did not object to the admissibility of this document. The panel reviewed the document and admitted it as being a further description of the appellant's diagnosed impairments and being in support of the information and records before the ministry on its reconsideration, pursuant to Section 22(4) of the Employment and Assistance Act.

The advocate for the appellant stated that the appellant's physician has expanded on the appellant's restrictions in his letter dated November 18, 2011 and sets out that the appellant has not had any success with medications and injections tried by her pain specialist. The advocate stated that the physician clarified in the original PWD application that the spinal cortisone injections only give the appellant partial temporary relief and that she continues to have ongoing daily back pain which greatly limits her physical activities. The advocate stated that the physician indicated in the physician report that the appellant's problem is not surgical and injections by the pain specialist have not been that helpful and, although the appellant can walk 4 or more blocks, she does this with pain. The appellant also pointed to the assessor report where the physician indicates that the appellant's back pain limits her physical function and that she needs continuous help of another person or she is unable to lift and carry and hold. The advocate stated that the physician has indicated that it takes the appellant significantly longer than typical doing physical work (cleaning floors, etc.) and that she needs occasional help with heavy household chores. The advocate stated that the physician comments that the appellant's basic AD's are "...generally okay if slowly but housework has become harder, more difficult for her and time consuming." The advocate stated that the physician has confirmed that the appellant receives assistance from friends.

The appellant stated that she went to see her pain specialist a week ago and she received 3 injections in her back because of the pain she was experiencing. The appellant stated that she drove to the hearing location and that her back is now killing her because she sat too long. The appellant stated that she does not go anywhere and she is unable to do anything because of her back. In response to a question, the appellant stated that the person she was living with moved out in September 2011 and she does not have anyone to help her, except her neighbour who will come over to lift anything heavy and will sometimes, reluctantly, vacuum for her. The appellant stated that any bending or twisting action is very painful, so she cannot do vacuuming. The appellant stated that she has been given Amitriptyline both for pain relief and as an anti-depressant, and she takes Tylenol 3. The appellant explained that stress aggravates the pain and when she feels pain, she gets stressed. In response to a question, the appellant stated that she can drive herself to get groceries as long as it's not too far, she can pick up her mail because it's not too heavy, and she gets the helpers at the grocery store to load her groceries into the car and her neighbour helps her get them into her house. The appellant stated that she went for physiotherapy treatments for 5 months but they did not help. The appellant stated that when the bones in her back pop over each other, that's when it gets very painful.

In her self-report included in the PWD application, the appellant adds that she cannot sit over 2 hours and cannot stand for more than 15 minutes. The appellant states that she cannot vacuum or wash the floor very often as it causes pain. The appellant says she cannot lift heavy objects and it is difficult even to carry groceries. The appellant states that some days she cannot bend to pick things up. The appellant states that her favourite things that she likes to do, such as boating, biking, hiking, and skating, she cannot do without

pain later. The appellant states that some days her legs ache so much she cries and some days she does not want to get out of bed. The appellant also states that some days she is too sore to go to the grocery store and to drive a car. The appellant states that she takes muscle relaxants combined with sleep medication and anti-depression medication. In her Notice of Appeal, the appellant adds that she cannot do all her home care, that she tries to do some when she feels good. The appellant states that she has someone carry groceries, that her neighbour helps her, but does not have anyone else to help her because she cannot pay someone to help. The appellant states that she does not cook meals 2 days out of the week.

In the appellant's statement dated January 31, 2012, she explains that she has been diagnosed with degenerative disc disease, arthritis and low back pain and, as a result of these conditions, it takes her significantly longer to complete tasks of daily living and requires assistance from another person periodically and continuously. The appellant states that although her doctor indicates that she is able to walk 4 or more blocks, she is unable to walk more than 2 blocks because her legs feel like they are burning and she is in pain and has to take Tylenol #3. The appellant states that although her doctor indicates that she can climb 5 or more steps unaided, she tries not to use stairs and will walk up a ramp where possible, and has to stop and take a break if using either. The appellant states that when she walks through stores she uses the cart for support and receives help loading groceries into her vehicle and into her house. The appellant states that she requires assistance with housework, that she is unable to vacuum as a result of the pain, and when her legs and back hurt from doing any housework she has to lie down for hours because of the pain. The appellant states that she is unable to do repetitive motions with her arms, she is unable to wash her floors and takes a long time to wash dishes and to fold laundry. The appellant states that she needs someone to help with lifting and it takes considerably longer to complete daily living tasks of cooking, cleaning, and laundry and she avoids shopping and doing laundry whenever possible. The appellant states that she experiences daily pain and discomfort which is severe, that she feels constantly exhausted from interrupted sleep and stressed from worry and having to cope with ongoing pain. The physician has signed a statement that he agrees that the appellant's statement is an accurate assessment of the appellant's overall physical condition and her current circumstances. The physician indicates that after reviewing the information, he can confirm that the appellant's disabling condition will continue to persist and "...is severe enough to restrict her daily living activities to the point where she requires significant assistance from other people and/or takes considerably longer than normal to perform."

The physician who completed the physician report has confirmed that the appellant has been his patient for 1 year and that he has seen the appellant 11 or more times in the past 12 months. In the physician report, the physician confirms a diagnosis of low back pain due to facet osteoarthritis plus some degenerative disc disease. The physician adds comments that the appellant "...continues to have ongoing daily back pain which greatly limits her physical activities. All her work experience has been physical jobs, but even a sitting now causes pain after a short time." The physician report indicates that the appellant has not been prescribed medication that may interfere with her ability to perform DLA, and she does not require an aid for her impairment. The physician reports that the appellant can walk 4 or more blocks unaided on a flat surface ("with pain"), she can climb 5 or more stairs unaided, she can lift under 5 lbs., and can remain seated less than 1 hour. The physician reports that the appellant has no difficulties with communication. The physician indicates that there are significant deficits with cognitive and emotional function in the area of emotional disturbance, with a note that "...she has depression which has been well-treated until recent relapse (many stressors)."

The physician has also completed the assessor report and indicates that the appellant is independent with walking indoors and walking outdoors, as well as with climbing stairs and standing, while requiring continuous assistance from another person with lifting and carrying and holding, and notes that the appellant "...needs help with any lifting or carrying." The physician indicates that the appellant is independent with all tasks of personal care including dressing, grooming, bathing, toileting, feeding self, regulating diet, transfers in/out of bed and transfers on/off chair. The physician reports that the appellant is independent with doing laundry but requires continuous assistance from another person with basic housekeeping with the note that it "...takes longer doing physical work (cleaning floors, etc.) and needs occasional help with heavy household chores."

The physician indicates that the appellant is independent with all of the tasks of shopping, including going to and from stores, reading prices and labels, making appropriate choices, paying for purchases, and carrying purchases home, with the additional comment that "...basic ADL's are generally okay, if slowly but housework has become much more difficult for her and time consuming." Further, the assessor reports that the appellant is independent with all of the tasks of managing meals, including meal planning, food preparation, cooking and safe storage of food. The physician indicates that the appellant is independent with all tasks of paying rent and bills (including banking and budgeting), managing medications (filling/refilling prescriptions, taking as directed and safe handling and storage) and transportation (getting in and out of a vehicle, using public transit, and using transit schedules and arranging transportation). In the assessor report, the physician has not completed the section applicable to an applicant with an identified mental impairment or brain injury, which details impacts to daily cognitive and emotional functioning. The physician has also not completed the section which details impacts to social functioning, which applies for an applicant with an identified mental impairment, including brain injury.

In his letter dated November 18, 2011, the appellant's physician adds that he has reviewed things with the appellant and "...it looks like she needs more help than I had initially realized and that on her bad days she is considerably more impaired over the past few months. The physician indicates that the appellant "...needs help now with most of her house work and the light duties she is able to do take considerably longer." The physician indicates that the appellant previously lived with her partner who did most of the housework but now that he is gone she realizes how limited she has become. The physician states that the appellant now notes most of her personal care has become more difficult and it takes her twice as long as normal. The physician indicates that on her bad days , which are now the majority of her days, the appellant forgoes most of her personal care, does no cooking , she is quite immobile and spends most of the day in bed and on the couch. The physician indicates that the appellant can no longer carry any of her groceries and always needs help shopping. The physician reports that the appellant's back condition is chronic and she has not had any success with physiotherapy, medications, and various injections tried by her pain specialist.

PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry reasonably concluded that the appellant is not eligible for designation as a person with disabilities (PWD) as she does not have a severe mental or physical impairment and that her daily living activities (DLA) are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods and that, as a result of those restrictions, it could not be determined that the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

The criteria for being designated as a person with disabilities (PWD) are set out in Section 2 of the EAPWDA. The minister may designate a person as a PWD when the following requirements are met. Pursuant to Section 2(2), the person must have reached the age of 18 and the minister must be satisfied that the person has a severe mental or physical impairment. Under Section 2(2)(a) the impairment must be likely, in the opinion of a medical practitioner, to continue for at least 2 years. The impairment must also, in the opinion of a prescribed professional, directly and significantly restrict the person's ability to perform DLA either continuously or periodically for extended periods, as set out in Section 2(2)(b)(i). As a result of those restrictions, the person must require help to perform DLA, pursuant to Section 2(2)(b)(ii). Section 2(3)(b) sets out that a person requires help in relation to DLA if, in order to perform it, the person requires an assistive device, the significant help or supervision of another person, or the services of an assistance animal.

Section 2(1)(a) of the EAPWDR defines DLA for a person who has a severe physical or mental impairment as: 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. In relation to a person who has a severe mental impairment, there are two additional activities, namely: making decisions about personal activities, care or finances, and relating to, communicating or interacting with others effectively.

The ministry argues that the evidence does not show that the appellant has a severe physical impairment. The ministry points to the physician report where it is indicated that the appellant is able to walk 4 or more blocks unaided (with pain), to climb 5 or more steps unaided, to lift less than 5 lbs., and to sit for less than an hour. The ministry argues that all mobility and physical abilities are performed independently without the use of assistive devices albeit continuous help is needed to lift/carry/hold. The ministry argues that the functional skill limitations described are more in keeping with a moderate degree of impairment and do not demonstrate an extraordinary functional limitation. The ministry points out that while low back pain limits movement, analgesics are available to ameliorate the pain and there is no information on how the appellant functions with daily analgesics. The appellant's advocate argues that the evidence establishes that the appellant suffers from a severe physical impairment as a result of low back pain due to facet osteoarthritis plus some degenerative disc disease. The advocate points to the notes by the physician that confirm that spinal cortisone injections only gave the appellant temporary relief and that she continues to have ongoing daily back pain which greatly limits her physical activities. The advocate highlighted the physician's note that although the appellant can walk 4 or more blocks, it is "with pain." The advocate points to the physician's assessment that the appellant requires continuous assistance from another person or she is unable to lift and to carry and hold.

The panel finds that the evidence of a medical practitioner confirms a diagnosis of low back pain due to facet osteoarthritis plus some degenerative disc disease. The physician report indicates that the appellant does not require an aid for her impairment and that she can walk 4 or more blocks unaided on a flat surface ("with pain") and she can climb 5 or more stairs unaided. The appellant states in her written statement that she is unable to walk more than 2 blocks because her legs feel like they are burning and she is in pain and has to take Tylenol 3. The appellant states that although her doctor indicates that she can climb 5 or more steps unaided, she tries not to use stairs and will walk up a ramp where possible, and has to stop and take a break if using

either. In the assessor report, the physician indicates that the appellant is independent with walking indoors, with walking outdoors and with climbing stairs. However, the physician indicates that the appellant can lift under 5 lbs. and, in the assessor report, that she requires continuous assistance from another person with lifting and with carrying and holding. In her self-report, the appellant says she cannot lift heavy objects, it is difficult even to carry groceries and some days she cannot bend to pick things up. The appellant states that some days her legs ache so much she cries and some days she does not want to get out of bed. The ministry points out that while low back pain limits movement, analgesics are available to ameliorate the pain and argues that there is no information on how the appellant functions with daily analgesics. However, the physician reiterates that the appellant's back condition is chronic and she has not had any success with physiotherapy, medications, and various injections tried by her pain specialist. In his letter, the physician adds that he has reviewed things with the appellant and "...it looks like she needs more help than I had initially realized and that on her bad days she is considerably more impaired over the past few months" and that her bad days are now the majority of her days; however the appellant states that she does not cook 2 days out of the week and that "some" days she experiences increased pain, and the panel finds that the evidence regarding the frequency of the bad days and the specific impacts on those days is not consistent. Overall, the panel finds that the evidence demonstrates that the appellant experiences daily restrictions to her ability to lift 5 lbs. or more, and otherwise has a moderate level of independent mobility and physical functioning. Therefore, the panel finds that the ministry's determination that the evidence does not establish a severe physical impairment, was reasonable.

The ministry argues that the evidence does not show that the appellant has a severe mental impairment. The ministry argues that the physician has identified one deficit to cognitive and emotional functioning, i.e. emotional disturbance described as "...depression which has been well treated until recent relapse- many stressors." The ministry points out that the physician has not indicated any impacts to daily functioning associated with a mental impairment or brain injury. The ministry argues that the physician reports there are no difficulties with communication. The ministry highlights that there is no indication that social functioning requires support or supervision. The appellant argues that the evidence establishes that she suffers from a severe mental impairment as a result of depression. The appellant argues that she takes anti-depressant medications and explained that it helps to reduce the stress she experiences, as stress adds to the pain from her physical impairment. The appellant stated that she does not go out anywhere and that she feels constantly exhausted from interrupted sleep and stressed from worry and having to cope with ongoing pain.

The panel finds that the evidence of a medical practitioner confirms that the appellant has depression, but it does not include a prognosis that the depression is likely to continue for at least 2 years. In the physician report, the appellant's physician indicates that the depression has been well-treated until a recent relapse with many stressors, with no further information provided. Although the physician indicates that there is a significant deficit with cognitive and emotional function in the area of emotional disturbance, the physician does not go on to identify any daily impacts to cognitive and emotional functioning. The physician also reports that the appellant has no difficulties with communication. The physician has not completed the section of the assessor report to indicate impacts to social functioning where there is an identified mental impairment including a brain injury. Therefore, the panel finds that the ministry's decision, which concluded that the evidence does not establish a severe mental impairment, was reasonable.

The ministry argues that the evidence does not establish that the appellant's daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods. The ministry points out that the physician reports that the appellant independently performs all DLA including social functioning with the exception of continuous help required with basic housekeeping described as "...takes longer doing physical work (cleaning floors, etc.) and needs occasional help with heavy household chores." The ministry refers to the November 18, 2011 letter from the physician and argues that although low back pain limits the appellant's physical abilities, especially lifting, the condition is conducive to improvement with medication. The ministry further argues that while the appellant has bad days which impact her ability to do personal care, housework and cooking, she is able to perform these duties on

days that she is in less pain. The advocate for the appellant argues that the decision in Hudson v. B.C. (EAAT) 2009 BCSC 1461 is authority for the position that there must be evidence from a prescribed professional indicating a direct and significant restriction on at least two DLA and there is no statutory requirement that every one of the DLA listed must be affected. The advocate points out that the physician has indicated that the appellant is restricted in more than two areas of DLA, in lifting, carrying and holding and with basic housekeeping. The advocate argues that the physician has indicated in his November 18, 2011 letter that the appellant has not had any success with medications tried by her pain specialist. The advocate also points to the January 31, 2012 statement by the physician that the appellant's condition restricts her DLA to the point where she requires significant assistance from other people and/or takes considerably longer than normal to perform her DLA.

The panel finds that the legislation requires that the opinion of a prescribed professional confirms that the appellant's ability to perform DLA is directly and significantly restricted either continuously or periodically for extended periods, although the appellant's evidence is considered, when it is consistent, for clarification. In terms of preparing her own meals, the physician has indicated the appellant is independent with all tasks, including meal planning, food preparation, cooking and safe storage of food. In the November 18, 2011 letter, the physician indicates that the appellant does no cooking on her bad days, which are now the majority of her days, and she is quite immobile and spends most of the day in bed and on the couch. In her Notice of Appeal, however, the appellant states that she does not cook meals 2 days out of the week. For managing personal finances, the physician indicates in the assessor report that the appellant is independent with all tasks of banking, budgeting and paying rent and bills. In terms of shopping for her personal needs, the physician indicates that the appellant is independent with all of the tasks of shopping, including going to and from stores, reading prices and labels, making appropriate choices, paying for purchases, and carrying purchases home. The advocate points out that the physician has also indicated that the appellant requires continuous assistance from another person with lifting and carrying and holding and, in the November 18, 2011 letter, that the appellant can no longer carry any of her groceries and always needs help shopping. The appellant stated that she does not have difficulty getting herself to and from the grocery store but that she needs help carrying the groceries both at the store and at home.

For use of public or personal transportation facilities, the physician indicates that the appellant is independent with all tasks, including getting in and out of a vehicle, using public transit, and using transit schedules and arranging transportation. The appellant stated that she can drive but if she sits too long, she will be in pain. With respect to performing housework to maintain the appellant's place of residence in an acceptable sanitary condition, the physician has reported that the appellant requires continuous assistance from another person with basic housekeeping while being independent with doing laundry, with the additional comment that the appellant "...takes longer doing physical work (cleaning floors, etc.) and needs occasional help with heavy household chores." In the November 18, 2011 letter, the physician indicates that the appellant "...needs help now with most of her house work and the light duties she is able to do take considerably longer." For moving about indoors and outdoors, the physician has indicated that the appellant is independent and does not use an assistive device. Regarding performing personal hygiene and self care, the physician indicates in the assessor report that the appellant is independent with all tasks of personal care, including dressing, grooming, bathing, toileting, feeding self, regulating diet, transfers in/out of bed and transfers on/off a chair. In his letter, the physician states that the appellant now notes most of her personal care has become more difficult and it takes her twice as long as normal, although no further information is provided by the physician regarding the tasks impacted. With respect to managing her personal medications, the physician again indicates that the appellant is independent with all tasks including filling/refilling prescriptions, taking as directed and safe handling and storage.

Looking at the evidence as a whole, the panel finds that the prescribed professional has confirmed that the appellant is continuously restricted in 1 out of 5 tasks of the DLA of shopping, relating to an inability to carry 5 lbs. or more, and with the heavier chores of housekeeping, but is able to perform her remaining DLA independently. Although the evidence shows an impact as well to 1 out of 4 tasks of the DLA of managing

meals (cooking), this occurs only 2 days out of the week according to the appellant. The evidence of the prescribed professional does not show a direct and significant restriction with two or more DLA. Therefore, the panel finds that the ministry's determination that the evidence of a prescribed professional does not establish a direct and significant restriction on the appellant's ability to perform DLA either continuously or periodically for extended periods, as required by Section 2(2)(b)(i) of the EAPWDA, was reasonable.

In determining whether the ministry reasonably concluded that the appellant does not require the significant help or supervision of another person or the use of an assistive device, the panel relies on the information from the physician and the appellant that she lives alone and receives assistance from friends, and does not use an assistive device. As it has not been established that DLA are significantly restricted, the panel finds that the ministry's conclusion that the requirement for significant help or supervision of another person, an assistive device, or the services of an assistance animal to perform DLA, under Section 2(2)(b)(ii) of the EAPWDA, has not been met was reasonable.

Overall, the panel finds that the ministry's reconsideration decision was reasonably supported by the evidence and confirms the decision pursuant to Section 24(2)(a) of the Employment and Assistance Act.