

PART C – Decision under Appeal

The decision under appeal is the Ministry's reconsideration decision, dated January 25, 2011 which held that the Appellant was not eligible for the Persons with Disabilities (PWD) designation. The Ministry determined that the Appellant met three of the legislated criteria in that the Appellant has reached 18 years of age and has a severe physical and mental 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 two criteria for the PWD designation: 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

There was a ministry observer at the hearing. As there was no objection to her presence, the hearing proceeded.

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

1. January 26, 2011. A PWD application. In the self-report the appellant indicates that he suffers from mild (petit mal) to severe (grand mal) seizures that occur at night or early in the mornings. While the grand mal seizures have been controlled by medication they are becoming more frequent. The appellant now has them every 2 months and has been hospitalized at least 6 times (or once a month) in the last 6 months for seizure related incidents. The appellant states he cannot be left alone and requires constant supervision. He has in the past suffered severe burns to his face and neck and other injuries while cooking through loss of consciousness. After seizures he is incapacitated for 3 days and cannot function and requires continuous assistance and supervision for personal hygiene, eating and reminders to take medication. The appellant's landlady does not allow him to do any cooking due to his poor concentration for fear of damage and he is at risk of eviction without constant assistance.
2. January 26, 2011 a letter from the appellant's landlady which notes his seizures and her view that the appellant cannot be left alone, particularly at night. She constantly has to remind the appellant to turn off the gas stove, close doors, turn off lights, flush the toilet and other small day to day tasks. Her work requires her to travel and she should not be responsible for the care of the appellant.
3. In the Physician's Report (PR) dated August 28, 2011 the physician diagnoses the appellant with Epilepsy. The physician comments "unpredictable and severe seizures. Loss of consciousness and self injury with seizures. Lives as a tenant, single man. Needs supervision and help when he has a seizure. Unemployed. Last seizure April 2011. Medication manipulation seems to have helped somewhat....Post seizure confusion and tiredness....mild sedation from all meds. Able to do all activities of daily living". With respect to functional skills it is indicated the appellant can walk unaided for 4+blocks, climb 5+ stairs, has no limitations lifting or seating. No difficulties are reported with communication. With respect to cognitive and emotional functions the physician reports deficits with consciousness, executive, motor activity and attention or sustained concentration and comments "significant in post seizure period." 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, the physician indicates no indication of restriction for the management of finances, but does note the appellant's restriction is periodic in 9 of the 10 aspects of daily living activities (DLA) listed. These include:
 - Personal self care
 - Meal preparation
 - Management of medications
 - Basic housework
 - Daily shopping
 - Mobility inside the home
 - Mobility outside the home
 - Use of transportation
 - Social functioning

The physician with respect to periodic restriction states "After seizures. Otherwise functional."
With regard to the degree of restriction the physician comments "he needs someone on hand to

recommended...may improve status.”

4. The Assessor Report (AR) dated September 21, 2011 was completed by a Registered Nurse. The nurse indicates it is her first contact with the appellant for the purpose of a disability assessment. In the Assessor Report, the appellant's physician reports that the appellant's ability to communicate is good in all aspect except writing which is satisfactory due to the appellant's difficulty with dexterity from previous hand injuries. The assessor indicates that the appellant is independent in all aspects of mobility and physical ability, but does use an assistive device to assist his climbing of stairs due to pain in his right knee. With regard to cognitive and emotional functioning no impacts are indicated for language, psychotic symptoms, other neuropsychological problems and other emotional or mental problems. Minimal impacts are indicated for impulse control, executive, memory and motor activity. Moderate impacts are noted for bodily functions, consciousness, emotion and insight and judgement. Major impacts are indicated for attention/concentration. The assessor's narrative concerning the impacts indicate they are present following the appellant's unpredictable seizures which leave him with no energy, confusion, disorientation, depression, loss of memory up to 5 days after and states “unable to go fishing or any activities due to inability to control seizures....unable to drive participate in outdoor activities.” With regard to the 33 aspects of DLA in the AR the appellant is reported to be independent in 25. The appellant requires periodic assistance with bathing as most seizures occur in the morning; laundry and basic housekeeping when using electrical appliances; going to and from stores in the morning when needs to have heavier items or spend a longer time at the store; food preparation and cooking as can manage light meals, but does not use stove due to previous injuries. Good functioning is reported with respect to immediate and extended social networks. The assessor also comments “inability to be unsupervised in home for personal care-meals laundry.”

5. The appellant's Request for Reconsideration signed and dated December 7, 2011. The appellant points out that he suffers from uncontrolled epileptic seizures and that he continues to have grand mal seizures regularly from which he is incapacitated for at least 7 days out of a month, requiring continuous assistance from another person. The appellant refers to specific parts of the PR and AR to establish the severity of his impairment, his level of restrictions with DLA and his need for assistance and submits that he meets all the legislative criteria for designation as a Person with Disabilities (PWD). The appellant also refers to legal considerations and argument regarding the Interpretation Act and the need to interpret legislation in a large and liberal manner and excerpts from the case *Hudson v. Employment and Assistance Appeal Tribunal (2009, BCSC 1461)*. With the latter the appellant argues *Hudson* found there must evidence from a prescribed professional indicating a direct and significant restriction on at least 2 daily living activities and, that, in his case his physician determined his impairment is severe and directly and significantly restricts his ability to perform daily living activities and that significant weight must be placed on his evidence, unless there is a legitimate reason not to do so.

At the hearing, the panel noted the discrepancy of the Ministry's reconsideration decision with respect to the Summary of Facts portion and the complete reconsideration decision attached as Appendix A. The Facts portion noted the appellant had not met 3 of the 5 legislative criteria and specifically that the appellant did not have a severe mental or physical impairment; that his impairment in the opinion of a prescribed professional, does not directly and significantly restrict his ability to perform daily living activities either continuously or periodically for extended periods; and, that in the opinion of a prescribed professional, as a result of the restrictions, he does not need assistance. The Decision,

however, indicated the ministry found the information in the PR and AR established that the appellant had a severe physical and mental impairment. The ministry acknowledged the latter and confirmed that the decision conveyed that the appellant had not met the remaining the remaining 2 legislative criteria noted above.

At the hearing, the appellant's advocate argues the ministry's denial is based on frequency of seizures and noted the appellant's reference to 2 further seizures in his request for reconsideration that occurred since his PWD application. The advocate argues "frequency" is not a requirement of the legislation and that the ministry did not consider the appellant's evidence of additional seizures in its reconsideration decision. The advocate pointed out that the appellant is 61 years old and that as he gets older his seizures have become more frequent. The appellant cannot be left on his own for extended periods and cannot bath or shower and perform other basic DLA without assistance. The advocate referred to the physician's comments in the PR that state "unpredictable and severe seizures. Loss of consciousness and self-injury...post seizure tiredness and confusion"..... "[the appellant] needs someone on hand to help in the event of a seizure". She further reports that when the appellant has seizures he is admitted to the hospital and kept for several days as opposed to being immediately released in the past. The advocate also referred to relevant legal considerations and argument regarding the *Interpretation Act* and the case *Hudson v. Employment and Assistance Appeal Tribunal (2009, BCSC 1461)*.

At the hearing and in response to a question from the panel, the appellant reports that his physician has attended to him since 1992 and that he saw the nurse once regarding the AR. The appellant further clarified that the seizures since April 2011 were "grand mal" seizures that occurred sometime between August and October 2011 He also reports that it feels like he is having a seizure every 2 months and that while medications have worked the seizures still occur and the medications are being evaluated.

At the hearing, the appellant's landlady provided witness testimony. She testified the appellant has been a border for the past 6 years. She also reports that she works out of her home, but that it does require her to travel at times. Because of the appellant's uncontrollable and unpredictable seizures, no one will stay at her home in her absence. She reports the appellant's seizures have gotten worse and more frequent and he has suffered greater injuries as a result.

The panel admitted the oral testimony of the appellant and his landlady into evidence under Section 22(4) of the Employment and Assistance Act as being in support of the original information and records before the ministry, at the time of its reconsideration decision.

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 he did not meet two of the criteria for the PWD designation: in the opinion of a prescribed professional a direct and significant restriction in an ability to perform daily living activities 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 appellant's position is that his severe physical and mental impairments as confirmed by a prescribed professional, directly and significantly restrict his ability to perform DLA and confirm that he requires assistance to perform them. In this respect, he argues that as he gets older his seizures have become more frequent and cannot be left on his own for extended periods and cannot bath or shower and perform other basic DLA without assistance due to the risk of being injured.

The ministry's position is that the appellant does not have a severe physical or mental impairment that directly and significantly restricts his ability to perform DLA continuously or periodically for extended periods, and, that as a result, the appellant does not require help performing DLA. It found that the physician indicated the appellant was restricted in his ability to manage all his DLA, but that the restrictions were evident "after seizures otherwise functional" as stated by the physician. It further contends that the appellant's last seizure was in April 2011. The ministry also argues that the physician in the PR states the appellant is "able to do all activities of daily living" and that no additional medical reports confirm that his ability to manage his DLA have been impacted by seizures since April 2011. It further argues that although the appellant requires periodic assistance with some DLA, this is only required when the appellant has a seizure. The ministry contends that although the AR indicates continuous assistance is required with food preparation and cooking due to previous injuries suffered when a seizure occurred, the assessor does not indicate that at the present time his seizures significantly restrict his ability to manage these DLA. Further because it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required from other persons. 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.

The first 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 reviewing the PR and the AR the panel notes in the PR the physician states the appellant's impairment "may lessen with medication..changes". In the PR he answered yes to the question does the impairment directly restrict the person's ability to perform daily living activities, and then indicated that personal self-care, meal preparation, management of medications, basic housework, daily shopping, mobility inside and outside the home, use of transportation and social functioning were periodically restricted (9 out of the 10 aspects of DLA listed)" needs someone on hand to help in the event of a seizure." In the AR the assessor notes the appellant's periodic assistance with bathing and comments "will occasionally wait until someone home to shower or bath; that the appellant is periodically restricted with basic housekeeping but is "under supervision when using electrical appliances"; that his periodic restriction from going to and from stores applies to the morning when he "needs to have heavier items or spend more time than 10-15 minutes in the store". With regard to the appellant's continuous restriction regarding 2 DLAs: food preparation and cooking the assessor comments "Does not use microwave." and "Does not do any cooking using stove due to prevent injuries that occurred when seizures have happened". The panel finds with respect to food preparation and cooking that the restriction is continuous because of the risk of having a seizure and subsequent injuries. The appellant's limitation here is very significant in that he cannot engage in food preparation and cooking and has a complete restriction from using a stove for fear of injury.

With respect to the DLA performing basic housework, the narrative of the assessor indicates that the appellant requires constant supervision when using electrical appliances related to basic housework. Additionally, the appellant's worry of seizures, particularly in the morning, and sustaining injuries requires aid in other DLAs such as bathing and showering and the appellant is limited to 10-15 minutes for shopping. Because the appellant's physician has attended to the appellant over 6 years as compared to the assessor that saw the appellant once, the panel places significant weight on his comments in the PR regarding the appellant's degree of periodic restriction with 9 of 10 DLAs that the appellant "needs someone on hand to help in the event of a seizure" to demonstrate a direct and significant restriction from engaging in certain DLAs. It also considers the assessor's comments "inability to be unsupervised in home for personal care-meals laundry" as evidence supporting the position of the physician. Therefore, based on all the evidence in the PR and AR, the panel finds that it was not reasonable for the ministry to determine that the appellant's severe impairments do not directly and significantly restrict his ability to perform daily living activities either continuously or periodically for extended periods.

The final criteria at issue are 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. Regarding the significant help or supervision of another person, the panel notes that the physician indicates in the PR that all aspects of DLA are impacted and restricted when the appellant has seizures which are unpredictable and severe except the management of finances. The panel also notes further the physician's comment that the appellant "needs someone on hand to help in the event of a seizure". The assessor also notes that the appellant gets help from friends and a "landlady who also reluctantly serves as a caregiver." The panel finds the appellant requires continuous help and supervision with DLAs such as food preparation, cooking, laundry, basic housekeeping and going to and from stores. Therefore, based on all the evidence the panel finds that it was not reasonable for the ministry to determine that the appellant does not require help with his DLAs, particularly those he cannot perform using electrical appliances.

Based on the whole of the evidence, the panel finds that the reconsideration decision was not reasonably supported by the evidence and rescinds the decision in favour of the appellant.