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PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development's (the ministry) reconsideration decision of January 31, 2012, wherein the ministry decided that the appellant is not eligible for designation as a Person with Disabilities (PWD) on the basis that he has not satisfied three of the five legislated criteria as set out in section 2 of the *Employment and Assistance for Persons with Disabilities Act* and section 2 of the Employment and Assistance for Persons with Disabilities Regulation. In particular, the ministry found that the appellant satisfied the criteria with respect to age and duration of impairment, but held that the appellant does not have a severe mental or physical impairment, which in the opinion of a prescribed professional directly and significantly restricts the person's ability to perform daily living activities (DLAs) either continuously or periodically for extended periods, and further held that since DLAs are not significantly restricted it cannot be established that help is required as defined in the legislation. The reconsideration decision resulted in a refusal to provide disability assistance.

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

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PART E – Summary of Facts

The information that was before the ministry at the time of the reconsideration decision included the following:

- The ministry's original decision, dated August 15, 2011 denying the appellant PWD status;
- The appellant's application for PWD designation dated May 24, 2011, including the appellant's self-report, the Physician Report (PR), and the Assessor Report (AR). Both the PR and the AR were completed by the appellant's physician, who is a general practitioner.
- An unsigned "Certificate of Authority to Obtain Personal Information" form from the appellant's Member of the Legislative Assembly (MLA), dated November 23, 2011.
- The appellant's Request for Reconsideration, signed by the appellant December 1, 2011.
- A "Consent for Release of Information" form signed by the appellant December 1, 2011authorizing the appellant's advocacy agency to assist him.

For the written appeal hearing before this panel the appellant submitted 8 pages of argument prepared by his advocate, and evidence in the form of a "supporting medical opinion" (the SMO) consisting of a 6 page checklist provided by the appellant's advocate and completed by the appellant's physician on January 6, 2012. The appellant's submission is date-stamped as having been received by the Employment and Assistance Appeal Tribunal on March 7, 2012. In its submission dated March 9, 2012 the ministry took no position on admission of the SMO and for its own submission chose to rely on its reconsideration decision and summary.

The panel has some concerns with the timing of the appellant's SMO. The "Certificate" from the appellant's MLA reports that "Constituent has applied for PWD a few times...He has never gone through the appeal process and would like to do so." In its reconsideration decision the ministry wrote that "You requested and were granted an extension to your Request for Reconsideration (due date Jan. 31, 2012) in order to submit additional information in support of your PWD designation. As of Jan. 31, 2012, no additional information has been forwarded to the ministry." The reconsideration decision makes no mention of the SMO. Since the appellant has applied for PWD status "a few times" before and is presumably therefore familiar with the reconsideration process, and since the appellant's advocate was engaged on December 1, 2011 and the SMO was signed by the appellant's physician on January 6, 2012, the panel is concerned that it was not submitted to the ministry in time for its reconsideration decision on January 31, 2012, especially since it appears the ministry granted an extension of time specifically to allow the appellant to supply the additional information.

Despite our concerns that the ministry was not provided the opportunity of considering this previously existing evidence at the time of reconsideration, the panel finds that the appellant's SMO is in support of his application for PWD designation, and the panel admits it in accordance with section 22(4)(b) of the *Employment and Assistance Act*.

In his application for PWD status, the appellant's self-report stated that he has two herniated discs in his neck and severe lower lumbar pain. He said that in the summer of 2010 he explored the possibility of anterior dissection surgery, but the neurosurgeon was not confident that it would be successful. The appellant reported that his neck pain causes numbness in his arms and hands, and the lower lumbar pain causes numbness in his left leg. He feels as if there is a blowtorch on his neck, and consequently he cannot work or earn a living. He said he is often bedridden and unable to sit or even stand. He wrote that he is in constant pain which makes it difficult to sleep. His painkillers do

not deal with the pain adequately. He experiences depression and suicidal thoughts. The appellant reported that he is able to maintain his personal hygiene and to cook, but because of the intense pain he often skips meals as it is too painful to cook for himself.

At the time of completing the PR and AR, the physician had been attending the appellant about 6 weeks, and had seen him 2 to 10 times in that period. The physician diagnosed the appellant with cervical and lumbar degenerative disc disease with radiculopathy, and major affective disorder – depression. With respect to functional skills the physician reported the appellant can walk unaided on flat surfaces for 1 to 2 blocks (often with use of a cane), can climb 5+ stairs unaided, can lift 15 to 35 pounds, can remain seated for less than 1 hour, and has no difficulties with communication. The physician did indicate that the appellant has significant deficits in 5 of 12 categories of cognitive and emotional function, with the comment "significant depression".

Part E of the PR details DLAs. The instructions on the form indicate that if the physician is also completing the AR (as done in this case) the physician should not complete part E of the PR. The physician did not answer the question "Does the impairment directly restrict the person's ability to perform Daily Living Activities", but did indicate no restrictions on personal self-care, management of medications, or use of transportation. The physician indicated periodic restrictions on meal preparation, daily shopping, and mobility inside and outside the home. Restrictions were indicated for management of finances, but no notation as being periodic or continuous. Continuous restrictions were noted for basic housework and social functioning. In explaining the periodic restrictions the physician noted the appellant often gets help with meal preparation and shopping, and uses a cane for mobility periodically. The restriction on social functioning is explained as being due to pain and depression. When prompted to explain what assistance the appellant requires with DLAs, the physician wrote that he is helped with meals – he goes to a neighbor for "meals, shopping".

In the AR the physician reports the appellant as having good communication skills in 4 of 4 categories of activities, and as being independent in 8 of 8 personal care activities, 2 of 2 basic housekeeping activities, 3 of 3 medication management activities, and with one transportation activity - getting in and out of a vehicle. The other 2 transportation activities, dealing with aspects of public transit, are marked "N/A". 2 of 5 shopping activities are shown as independent, 1 is unmarked, and 2 show periodic assistance from another person, with the comment "friends buy groceries periodically". With respect to meals, the appellant is shown as being independent in meal planning and safe storage of food, and needing periodic assistance 50% of the time preparing food, and needing periodic assistance with cooking.

In section B.4. of the AR, which is only to be completed if the applicant has an identified mental impairment or brain injury, the assessor is asked to indicate to what degree the applicant's mental impairment restricts or impacts his functioning. The physician indicated no impact in 7 of 14 categories, and minimal impact in 3 additional categories. Moderate impacts are indicated with respect to bodily functions (sleep disturbance underlined), attention/concentration, and memory. A major impact is indicated regarding emotion (excessive or inappropriate anxiety, depression, etc.). The physician's written comment is "severe prolonged depression impacting above".

In the social functioning area of section C of the AR, which is only to be completed if the applicant has an identified mental impairment, the appellant is shown as independent in 4 of 5 social functioning activities, requiring periodic support in developing and maintaining relationships in the

form of informal counselling through church due to anxiety. The appellant functions marginally with his immediate and extended social networks, tending to isolate himself and having low self-worth.

Asked to describe the support/supervision required which would help to maintain the appellant in the community, the physician wrote "counselling and antidepressant meds". When asked what assistance is provided by other people the physician indicated "friends", and "community service agencies – financial – Salvation Army for lunch, etc.". With respect to assistive devices the physician indicates "cane – uses cane periodically", and no assistance provided by assistance animals.

In the SMO portion of the appellant's submission for this hearing, the appellant's physician has ticked a box indicating "IT IS MY MEDICAL OPINION that [the appellant] has severe medical conditions that are likely to continue more than two years. These conditions will likely continue for at least 2 years." He has left not ticked a box indicating "IT IS MY MEDICAL OPINION that [the appellant] is directly and significantly restricted in his ability to perform his daily living activities continuously as a result of the conditions noted above."

The rest of the SMO is a checklist that substantially mirrors the AR format used by the ministry, but with some differences. For example, in the section dealing with cognitive and emotional functioning there appear the same 14 categories of functions as appear in the AR, and there are columns denoting minimal, moderate and major impacts but there is no column denoting "no impact" as there is in the AR. Accordingly, there are significant inconsistencies between the forms (the SMO and the AR) with respect to cognitive and emotional functioning. Whereas 7 of the 14 functions in the AR were marked "no impact", those 7 functions are marked "minimal impact" in the SMO. Of the 3 functions marked "minimal impact" in the AR, 1 is marked "moderate impact" in the SMO and 2 (executive and motivation) are marked "major" in the SMO. Of the 3 marked "moderate" in the AR, only 1 (memory) remains "moderate" in the SMO, the other two (sleep disturbance and attention/concentration) have escalated to "major". Also within the cognitive and emotional functioning section of the SMO, there are 5 categories where the physician has crossed out and initialed his first entry related to degree of impact, and then reentered a higher value. Impact on sleep disturbance was first marked "minimal", then changed to "major". Consciousness was first marked "minimal", then changed to "moderate". Attention/concentration was first marked "moderate", then changed to "major". Executive was first marked "minimal", then changed to "major" with the notation "due to pain". Motivation was first marked "moderate", then changed to "major".

After the cognitive and emotional functioning section, the remainder of the SMO is a list of 14 activities or functions, with boxes to indicate no restrictions, restrictions, assistive device, continuous assistance, periodic assistance. Under each activity or function except the last (social functioning) is a space to describe the duration and frequency of periodic assistance.

Under basic mobility a box is ticked indicating restrictions in mobility outside the home due to pain and depression. Standing is shown as restricted to 10 minutes, due to the onset of pain. Sitting is shown as restricted to 1 hour, due to pain. Climbing stairs is shown as restricted when there is onset of pain in the appellant's back. Lifting/carrying/holding including shopping purchases is shown as restricted to 30 lbs approx. 2 days a week. Personal care including grooming, feeding self and regulation of diet is shown as restricted because unable to get out of bed 4 days a week due to pain In his neck. Basic housework is shown as restricted due to severe pain levels – has not cleaned floor in 4 months and restricted to washing dishes once a week. Laundry is shown as restricted to 2 times

a month. Shopping is shown as restricted to 1-2 times per month due to pain. Meal planning is shown as restricted from planning, preparing and cooking meals due to physical limitations and depression. Banking, budgeting and paying rent and bills is shown as restricted due to pain from standing in line. Managing medications is shown as restricted from following through with appointments when pain increases. Using public transit and understanding transit schedules is shown as restricted from standing and sitting on a bus due to pain. Social functioning is shown as restricted – socially withdrawn due to depression.

With respect to assistance and assistive devices, 7 of the 14 categories/functions show no assistance or assistive device required. Lifting/carrying/holding shows periodic assistance required to help lift shopping bags. Personal care shows an assistive device required in the form of a railing in the shower. Laundry shows the appellant would benefit from someone to help with laundry loads. Shopping shows periodic assistance would be helpful "on his bad days". Meal planning shows periodic assistance – "goes to [charitable organization] daily for lunch. Eats 1 meal/day because of financial situation". Banking/budgeting/paying rent and bills shows continuous assistance needed from someone who reminds the appellant to pay the bills as he reports he becomes easily overwhelmed. Using public transit shows periodic assistance required – "needs rides from friends".

While some elements of the SMO are reflective of the evidence that was before the ministry, many other elements are significantly different. Of particular note is the evidence with respect to "self-grooming". In his self-report the appellant said that "I am able to maintain my personal hygiene…", he is shown as independent in all categories in the AR, unrestricted in the PR, but in the SMO is shown as "unable to shower on days when he is unable to get out of bed 4 days a week because of the pain in his neck". Left unexplained in the SMO is why all the appellant's other DLAs would not also be significantly affected if the appellant is bedridden 4 days a week. With respect to transportation the AR shows use of public transportation as N/A, the PR shows the appellant as independent with respect to transportation, and the SMO shows the appellant as restricted from standing and sitting on a bus due to severe pain.

It may be that the differences reflect a worsening of the appellant's condition between the time of PR/AR and the SMO, or it may reflect the fact that as the new physician/patient relationship matured the physician simply got to know the appellant better. However, the appellant and the physician have offered no explanation for even the most significant of the differences between the SMO and the other evidence. Placed in context with the new assertion that the appellant is bedridden up to 4 days a week, the ratcheting upwards of virtually all of the cognitive and emotional impacts between the PR/AR and the SMO, and 5 of the 14 categories of cognitive and emotional functioning being crossed out and re-entered at a higher level of impact even within the SMO, the panel is left with the impression that the changes and inconsistencies are more likely due either to the physician being confused by the subtle differences between the SMO form and the AR form or being unsure as to the appropriate assessment. In the absence of any explanation for even the most significant inconsistencies, the panel has decided to give limited weight to the SMO.

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PART F – Reasons for Panel Decision

The issue under appeal is whether the ministry's decision that the appellant has not met the all of the eligibility criteria for designation as a PWD because the ministry was not satisfied that the appellant has a severe physical or mental impairment that, in the opinion of a prescribed professional, directly and significantly restricts his ability to perform DLA either continuously or periodically for extended periods resulting in the need for help to perform DLA was reasonably supported by the evidence or was a reasonable application of the legislation in the appellant's circumstances.

The criteria for being designated as a PWD are set out in s. 2 of the EAPWDA and s. 2 of the EAPWDR which are set out below.

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 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).

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.

Severe Physical or Mental Impairment

Section 2(2) of the EAPWDA gives the minister discretion with respect to whether he is satisfied that the appellant has a severe mental or physical impairment. The ministry considered the appellant's self-report in context with the physician's evidence from the PR and AR. The ministry found that in terms of physical impairment, the functional skill limitations described by the physician are more in keeping with a moderate degree of impairment rather than severe physical impairment. In terms of mental impairment, the ministry found that as the PR and AR indicate the appellant can independently manage the majority of his DLAs and can independently manage the majority of his social functioning, a severe mental impairment had not been established.

From an evidentiary perspective the appellant relies heavily on the SMO, arguing that the SMO "must be heard, as it confirms the legislative requirement for [PWD] designation", and that the "legislative requirements [are] satisfied for [PWD] designation with [the SMO]". The appellant says that the restrictions on the appellant's ability to stand and to sit directly impact the appellant's ability to perform all DLAs as they all require either standing or sitting. He also refers to evidence from the SMO with respect to the appellant's limitations on doing his laundry, shopping and other DLAs. For the reasons given above, the panel has accepted the SMO as evidence but has given it little weight. The evidence taken as a whole presents a picture of a person who certainly has physical and mental impairments, but impairments that cannot be described as "severe".

With respect to mental impairment, in the AR 10 of 14 categories of cognitive and emotional functioning show no or minimal impact, 3 show moderate impact, and 1 shows a major impact. Respecting physical impairment, other than describing the appellant's symptoms as "severe" and his pain as "chronic" in the PR, there is nowhere else in the AR, PR or even the SMO (except for places where the words were pre-typed into the advocacy agency form) where the physician has described the appellant's pain in terms of being severe or intense.

From a statutory interpretation perspective, the appellant argues that the panel should broadly interpret the word "may", to construe "may" as permissive and empowering in accordance with the

Interpretation Act, and to consider the intended meaning of the words "severe" and "significant". The panel has taken these principles into consideration.

Finally, the appellant argues that the panel is bound by the decision of the Supreme Court of British Columbia in *Hudson v. British Columbia (Employment and Assistance Appeal Tribunal)*, 2009 BCSC 1461 with respect to reading all the evidence together, to giving appropriate weight to the evidence of the appellant, to interpreting any ambiguity in the legislation in favour of the appellant, and to interpreting the legislation with a benevolent purpose in mind. The panel acknowledges the principles articulated in *Hudson*.

After considering all the evidence and the appellant's arguments, and for the reasons identified above, the panel finds that the ministry was reasonable in determining that the appellant does not suffer from either a severe mental or severe physical impairment.

Restrictions on DLAs

PWD designation requires that, in the opinion of a prescribed professional, severe impairments directly and significantly restrict the person's ability to perform DLAs continuously or periodically for extended periods. The evidence overwhelmingly, even in the SMO, points to almost all restrictions being periodic in nature, rather than continuous. Physically the appellant experiences pain and does have limitations with sitting and standing, but they are not sufficient to unduly limit him from living on his own, cooking his own meals, from getting out daily for lunch at the charitable organization and to his neighbours for meals, or to restrict him from being largely independent in his other DLAs. Mentally the appellant is able to independently manage most of his social functioning.

Other than the statement in the AR that the appellant requires periodic assistance 50% of the time with meal prep and shopping, there is little to indicate that the periodicity of the restrictions is "extended", or to show that these restrictions are "significant".

The appellant argues that the *Hudson* case establishes that there is no statutory requirement for more than 2 DLAs to be restricted. However, neither is 2 DLAs a "magic number" which automatically satisfies the legislative criteria. The evidence must be considered as a whole and in context. Given the significant degree of independence exhibited by the appellant and the limited evidence with respect to the frequency or duration of the periodic restrictions, the panel finds that the ministry was reasonable in determining that, in the opinion of a prescribed professional, the appellant's impairments do not significantly restrict his ability to perform the DLAs continuously or periodically for extended periods.

Help in Performing DLAs

"Help" for the purposes of PWD designation means that the appellant requires an assistive device, the significant help or supervision of another person, or the services of an assistance animal. The evidence is that the appellant requires a cane "often" or "periodically" for mobility, and uses a grab rail in the shower. He does not require the services of an assistance animal. While the appellant relies

frequently on meals prepared by others, relies on friends for transportation, often gets help with carrying purchases, and may require prompting to pay his bills, the panel cannot conclude that in the opinion of his physician the appellant requires the "significant help or supervision of another person" to perform his DLAs. The ministry held that "...as it has not been established that [DLAs] are significantly restricted...it cannot be determined that significant help is required...". On the whole of the evidence, the panel finds the ministry's decision on "help" is reasonable.

Conclusion

For the reasons given above, the panel finds that the ministry's reconsideration decision is reasonably supported by the evidence and is a reasonable application of the applicable enactment in the circumstances of the appellant.

Accordingly, the panel confirms the ministry's decision.