

PART C – Decision under Appeal

The decision under appeal is the Ministry's Reconsideration Decision dated December 4, 2011 which denied the Appellant's request for a Persons With Disabilities ("PWD") designation on the basis that the Appellant had not met three of the five statutory requirements found in section 2 of the Employment and Assistance for Persons with Disabilities Act ("EAPWDA"). The Ministry found that the Appellant was at least 18 years of age and that her impairment was likely to continue for two years or more. However, the Ministry determined that the evidence does not establish that the Appellant has a severe physical and/or mental impairment, that the Appellant's impairment does not, in the opinion of a prescribed professional, directly and significantly restrict her daily living activities ("DLA") continuously or periodically for extended periods and that the Appellant does not require an assistive device, the significant help of another person or the services of an assistance animal to perform the directly and significantly restricted 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 reconsideration included:

1. The Appellant's Request for Reconsideration dated November 23, 2011;
2. Written submissions prepared on behalf of the Appellant by an Advocate ("the Reconsideration Submissions");
3. A letter dated December 21, 2011 and prepared by the Appellant's family physician ("the Medical Letter");
4. An unsigned and undated medical form that provides a medical opinion of the Appellant's medical conditions, their duration and their impact on her daily living activities ("the Report");
5. The Appellant's PWD application dated September 28, 2011; and
6. The Persons with Disabilities Decision Summary dated October 31, 2011.

The Ministry did not provide any further evidence but rather relies on the Reconsideration Decision. The Appellant provided further written submissions dated February 7, 2012 and prepared by her advocate ("the Appeal Submissions").

The Appellant did not complete the Applicant self-report section of the PWD application. In the Physician Report of the PWD application, the Appellant's physician diagnoses the Appellant with seizure disorder with onset in 2001. The physician states that the Appellant suffers from absence seizures with aura and confusion sometimes for a few seconds but also as long as 30-40 minutes. These episodes usually occur around the Appellant's menstrual period according to her physician. The Appellant has been prescribed medication that interferes with her ability to perform DLA insofar as they cause occasional drowsiness, headaches, somnolence and insomnia. The Appellant's physician notes that the Appellant will have to take these medications for the rest of her life. The physician also notes that the Appellant does not require any prostheses or aids for her impairment. The physician confirms that the Appellant's impairment will likely continue for more than two years saying that she is on medication that they are trying to adjust in order that the Appellant's episodes can be controlled. Under the Functional Skills category, the physician notes that the Appellant can walk 4+ blocks unaided on a flat surface, climb 5+ steps unaided and that she has no limitations lifting or remaining seated. The physician notes that the Appellant has no deficits with cognitive and emotional functioning. Under Daily Living Activities, the physician notes that the Appellant's impairment does directly restrict her ability to perform DLA and that each of the 10 listed DLA are restricted. The Appellant's physician has not checked the corresponding boxes to indicate whether the restrictions on the Appellant's DLA are continuous or periodic but she does say, under the heading "If *Periodic* please explain:", that the Appellant's DLA are restricted only when the Appellant has an episode and that when this occurs, the Appellant cannot take care of herself for a few seconds to 30-40 minutes. With respect to social functioning, the physician says that the Appellant is afraid to leave home and afraid that an episode might happen when she's not safe. The physician makes no additional comments and does not indicate that the Appellant requires assistance with her DLA. The physician concludes the Physician Report by noting that the Appellant has been her patient since January 2011 and that she has seen her 2 - 10 times in the previous 12 months.

The Assessor Report was also completed by the Appellant's family physician. She notes that the Appellant lives with family, friends or a caregiver and under Ability to Communicate that the Appellant is good in speaking, reading, writing and hearing. The Appellant's physician comments further that it

is only when the Appellant has a seizure episode that she loses the ability to speak, read or write. Under Mobility and Physical Ability, the physician indicates that the Appellant is independent in all aspects but comments that she is unable to perform each of the categories when she has a seizure episode. With respect to Cognitive and Emotional Functioning, the physician says that the Appellant's mental impairment has no impact on bodily functions, impulse control, motivation, motor activity, psychotic symptoms, other neuropsychological problems or other emotional or mental problems. The physician goes on to note that the Appellant's mental impairment has a minimal impact on emotion, insight and judgment, attention/concentration, memory and language. Further, the physician says that the Appellant's mental impairment has a moderate impact on executive and a major impact on her consciousness. The physician concludes this section by commenting that it is only temporarily when the Appellant has a seizure that she presents with decreased alertness, drowsiness and confusion along with anxiety and depression. Under Daily Living Activities, the physician notes that the Appellant is independent in all 28 categories and she goes on to comment that it is only when the Appellant has a seizure disorder, usually once or twice per month, when she's confused and drowsy. Further, the physician says that the Appellant is aware of her condition and that when she feels sick, she doesn't go out and avoids being outdoors or away from a safe environment. The Appellant is also noted by the physician as being independent in all aspects of social functioning except for needing periodic support/supervision in making appropriate social decisions although no explanation or description of this support/supervision is provided. The Appellant is described as having good functioning with her immediate social network but marginal functioning with her extended social networks and in this respect, the Appellant's physician comments that the Appellant is socially isolated and relies on her ex-husband for help with her children. Under Additional Comments, the Appellant's physician says that safety is always a concern with seizure disorder. Under Assistance Provided for Applicant, the physician states that help required for DLA is provided to the Appellant by the her ex-husband who helps with her children. The Appellant receives no assistance through the use of any assistive device or from an assistance animal.

In the Medical Letter, the Appellant's physician writes that the Appellant has a severe medical condition that is likely to continue for more than 2 years. She goes on to say that the Appellant usually has seizures once or twice each month but has auras 2 or 3 times each week and that due to this, the Appellant experiences constant fear of having seizures, depression, difficulty sleeping, she has developed social isolation, avoidance of others and she has become socially withdrawn. The physician concludes by stating that for these reasons, the Appellant has become significantly restricted in her ability to perform DLA continuously such as preparing meals. She also comments that the Appellant is afraid of what might happen if she has a seizure while cooking with the oven or stove on.

The physician prepared the Medical Letter 3 months after completing the Physician Report in the PWD application. The PWD application provides a comprehensive body of evidence regarding the Appellant's physical and/or mental impairment and the impact of that impairment on her DLA. It also provides narrative comments by the physician as to the Appellant's impairment and the impact on her DLA. For example, in the Physician Report the physician notes that the Appellant's DLA are restricted but only periodically when she has a seizure episode and that when these occur, she cannot take care of herself for a few seconds to 30-40 minutes. Additionally, in the Assessor Report, the physician indicates that the appellant independently manages all aspects of mobility and physical ability and all but one of 33 listed aspects of DLA except when she has a seizure disorder. In the

physician's letter however, she says that the Appellant has become significantly restricted in her ability to perform DLA continuously such as preparing meals. The Medical Letter is inconsistent with and not supported by the PWD application. The PWD application addresses the legislative criteria comprehensively while the Medical Letter which was prepared 3 months after the PWD application does not. Further, there is no indication in the Medical Letter that the frequency or duration of the Appellant's seizures have changed. The physician provides no explanation for this inconsistency and as such, the Panel attaches little weight to the Medical Letter.

The Report indicates the following by way of checked boxes:

1. The Appellant suffers from severe medical conditions including epilepsy, sleeping disorder and depression.
2. These conditions will likely continue for at least two years.
3. The Appellant is directly and significantly restricted in her ability to perform her DLA continuously as a result of these conditions.

Of the 11 activities listed on this form, one is checked indicating that the Appellant is continuously restricted with walking outdoors (2-4 blocks). That activity is more specifically described as experiences dizziness, headaches and fatigue and experiences fear of having a seizure.

In reviewing the Report, the Panel is unable to determine who prepared it. The report is unsigned and undated. There is nothing on the report to assist in identifying who completed it and it is not referred to in the Medical Letter. Given the unidentifiable nature of the report, the Panel attaches no weight to it.

In the Appellant's Notice of Appeal, she states that the tasks that she has the most difficulty with are those that she performs outside of her home. She says that she has two convulsions per month but that the symptoms are for several days each week. Further, the Appellant notes that she needs to be careful as she does not know when the convulsions will come. She can't drive, can't go outside and requires a taxi to return home quickly. She has to look for help as she does not have family or friends in Canada and while she does have her daughters' father, he is not always nearby.

The Panel finds the following facts from the information submitted:

1. The Appellant has been diagnosed with seizure disorder; and
2. The Appellant has been prescribed medication to manage her seizure disorder.

PART F – Reasons for Panel Decision

The issue to be decided is whether the Ministry reasonably concluded that the Appellant is not eligible for a PWD designation on the basis that the Appellant had not met three of the five statutory requirements found in section 2 of the EAPWDA. The Ministry found that the Appellant was at least 18 years of age and that her impairment was likely to continue for two years or more. However, the Ministry determined that the evidence does not establish that the Appellant has a severe physical and/or mental impairment, that the Appellant's impairment does not, in the opinion of a prescribed professional, directly and significantly restrict her DLA continuously or periodically for extended periods and that the Appellant does not require an assistive device, the significant help of another person or the services of an assistance animal to perform the directly and significantly restricted DLA.

The criteria for a PWD designation are set out in section 2 of the 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).

Section 2 of the EAPWDR states as follows:

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.

(B.C. Reg.196/2007)

With respect to whether the Appellant has a severe physical impairment, the Ministry takes the position that the evidence does not support such a finding insofar as the functional skill limitations described in the PWD application are more in keeping with an intermittent and moderate degree of impairment and do not demonstrate an extraordinary functional limitation. The Appellant submits that the Ministry interpreted the meaning of the word "severe" too narrowly which defeats the purpose of the disability assistance program and that the evidence as a whole demonstrates that the Appellant has a severe restriction in her ability to function independently, effectively or for a reasonable duration.

The Panel notes in the PWD application that according to the Appellant's physician, her functional skills are not affected, her ability to communicate is good and she is independent in all aspects of mobility and physical ability other than when she has a seizure episode, which occurs once or twice each month and lasts for a few seconds to 30-40 minutes. The Medical Letter refers only to a severe medical condition as opposed to a severe physical impairment as required by the legislation. The Panel finds that the Ministry's decision that the Appellant does not suffer from a severe physical impairment was reasonable based on the evidence.

With respect to whether the Appellant has a severe mental impairment, the Ministry takes the position that the Appellant does not have any significant deficits with her cognitive and emotional functioning and that her mental impairment has a moderate or minimal to no impact on her cognitive and emotional functions and that in the one function that has a major impact, the impact is temporary in nature and occurs only when the Appellant has a seizure which occurs about twice each month for short periods of time. The Appellant submits that the cumulative nature of the impacts on her cognitive and emotional functioning render her severely mentally impaired and that significant weight should be given to the Medical Letter and in particular the physician's use of the word severe, the Appellant's need for medication and the continuous restrictions that impact her on a daily basis. Again, the Appellant submits that the Ministry has interpreted the meaning of the word "severe" too narrowly thus defeating the purpose of the disability assistance program.

The Panel considered the evidence of the physician in the PWD application in that she diagnoses the Appellant with seizure disorder. However, the diagnosis of seizure disorder in and of itself does not satisfy the legislative requirement of a severe mental impairment. The evidence respecting the degree of impairment that arises from the seizure disorder must be considered in view of the legislative requirement that a person be severely impaired by his or her medical condition.

In the PWD application, the Appellant's physician confirms in the Physician Report that she has no significant deficits with cognitive and emotional functioning. In the Assessor Report, the physician comments that the Appellant's ability to communicate is good in all respects other than when she is having a seizure. The Appellant's mental impairment has a major impact on consciousness but only temporarily when she has a seizure. Her mental impairment has a moderate impact on her executive functions, a minimal impact on emotion, insight and judgment, attention/concentration, memory and language and no impact on the remaining 7 categories of daily functioning. The Appellant is also independent in all but one aspect of social functioning. While the physician notes in the Medical

Letter that the Appellant has auras 2 to 3 times per week, the physician does not describe these or indicate how they contribute towards the Appellant's mental impairment. In addition, while the existence of auras is referred to in the Physician Report of the PWD application, they are tied to the Appellant's seizures which the physician has described as periodic in nature.

Considering the evidence as a whole, the Panel finds that the Ministry's decision that the Appellant does not suffer from a severe mental impairment was reasonable.

With respect to whether the Appellant's physical and/or mental impairment directly and significantly restricts her ability to perform her DLA either continuously or periodically for extended periods of time, the Ministry submits that the Appellant is only periodically restricted in managing her DLA and that this occurs when she has seizures twice each month. The Appellant submits that a literal interpretation of section 2(1) of the EAPWDA only requires that the Appellant demonstrate that she is restricted in more than one DLA and that such an interpretation is supported by the decision of *Hudson v. British Columbia (Employment and Assistance Appeal Tribunal)*, (2009) BCSC 1461 as authority. Further, the Appellant submits that the Appellant has restrictions with all her DLA during seizures and that the Medical Letter supports a finding that the Appellant is significantly restricted in her ability to perform DLA continuously.

The Panel finds that in completing the Physician Report, the Appellant's physician notes that her impairment does restrict her ability to perform DLA but that the restriction is periodic in nature and only occurs when the Appellant has a seizure episode. When this occurs, the Appellant's physician says that she cannot take care of herself for a few seconds to 30-40 minutes. In the Assessor Report, the physician notes that the Appellant is independent in all DLA and she clearly comments again that it is only when she has a seizure, usually once or twice a month, when she is confused and drowsy. While the physician notes in the Medical Letter that the Appellant is significantly restricted in her ability to perform DLA continuously, this is inconsistent with and not supported by the previously completed PWD application. Similarly, while the physician in the Medical Letter comments on the Appellant experiencing auras, there is a lack of evidence of their severity or duration or impact on her DLA. The Panel concludes that there is insufficient evidence to support a finding that the Appellant's DLA are directly and significantly restricted either continuously or periodically for extended periods and as such, the Panel finds that the Ministry reasonably determined that the evidence does not establish that the Appellant's mental impairment directly and significantly restricts her ability to perform DLA continuously or periodically for extended periods.

The Ministry takes the position that as it has not been established that the Appellant's DLA are significantly restricted, it cannot be determined that the Appellant requires significant help from other persons or the services of an assistance animal in performing those activities and that the evidence in the PWD application does not support such a finding. The Appellant submits that she requires support from her family as well as continuous support from her doctor and medication use.

In the Physician Report, the Appellant's physician notes that the Appellant does not require any prostheses or aids for her impairment. In the Assessor Report, the physician notes that the help required for her DLA is provided by family but that this is limited to her ex-husband helping with her children. The physician further notes that the Appellant does not require the assistance of any equipment, devices or assistance animals. While the evidence demonstrates that the Appellant does require some assistance restricted to taking care of her children due to her impairment, that support

is only periodic in nature in keeping with the frequency and duration of her seizure episodes as described by the Appellant's physician in the PWD application. There is no evidence in the Medical Letter to support the Appellant's claim that she requires significant help from others in performing her DLA.

The Panel therefore finds that the Ministry reasonably determined the Appellant does not require an assistive device, the significant help of another person or the services of an assistance animal to perform her DLA.

The Panel finds that the Ministry's reconsideration decision denying the Appellant's application for PWD status was reasonably supported by the evidence. The Panel therefore confirms the Ministry's decision.