

PART C – Decision under Appeal

The decision under appeal is the ministry's reconsideration decision dated February 9, 2012 which held that the appellant did not meet 2 of the 5 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 was satisfied that the appellant has reached 18 years of age and has a severe physical impairment that in the opinion of a medical practitioner is likely to continue for at least 2 years. However, the ministry was not satisfied that the appellant's severe physical impairment, in the opinion of a prescribed professional, directly and significantly restricts her ability to perform daily living activities (DLA) either continuously or periodically for extended periods and that as a result of those restrictions, the appellant requires help 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 reconsideration was a PWD application comprised of a Self-report (SR), a Physician Report (PR), and an Assessor Report (AR), and the Request for Reconsideration.

In the PR, completed by a respirology specialist ("the specialist") on September 15, 2011, the appellant is diagnosed with asthma – life threatening, gastrointestinal reflux, allergy environment and esophagitis. The physician reports that the appellant has been hospitalized twice since April 2011 and has required extensive steroid medications to try to control and treat the asthma. Atopic processes such as fridge propane and the appellant's septic system adversely affect her. The appellant has significant gastroesophageal reflux issues with documented recurrent aspiration, esophageal erosions and ulcerations. She is not employable at the current level of asthma and is having difficulty functioning at home. With respect to functional skills, the distance the appellant can walk unaided is reported as "unknown". The appellant can climb 5+ steps unaided and has no limitations in her ability to lift or remain seated. The appellant has no difficulties with communication or significant deficits with cognitive and emotional function. With respect to DLA, the appellant's impairment is reported to directly restrict her ability to perform basic housekeeping. The physician indicates "unknown" and writes "could" with respect to personal self care, meal preparation, and daily shopping with narrative that "anything that causes, perfume, dust allergen generation will [illegible] affect." The physician additionally comments that the appellant has had to make significant changes in her home environment because of the atopic triggers and has tried to quit smoking. Unfortunately, as there are chores to be done avoidance is not always feasible/possible. It is unclear how long it will take her to recover. She will be adversely affected by dusts, fumes, etc. in and out of the work place.

In the AR, completed by the appellant's general practitioner ("the general practitioner") of 11 years on October 28, 2011, the appellant is diagnosed with severe asthma and depression. The appellant is reported to have a good ability to communicate respecting speaking, reading, writing, and hearing. With respect to mobility and physical ability, the appellant independently manages walking indoors, standing, and carrying and holding. Periodic assistance is required for walking outdoors, climbing stairs, and lifting with no further narrative provided by the assessor. No major impact on daily functioning is reported for any of the listed aspects of cognitive and emotional functioning. A moderate impact is reported for emotion and impulse control. Either minimal or no impact is reported for the remaining 11 listed aspects. The assessor comments that the appellant is going through a prolonged separation causing extreme stress. She became severely depressed and has improved some with medication. With respect to DLA, the appellant is reported to independently manage all aspects of personal care, basic housekeeping, shopping, meals, paying rent and bills, medications, and transportation. Periodic support/supervision is required for all 5 listed aspects of social functioning with narrative that the appellant becomes easily anxious and stressed, is impulsive and makes poor decisions. The appellant has good functioning with extended social networks and marginal functioning with immediate social networks. The appellant receives help from her children, with whom she lives, and help from the public health nurse. The assessor concludes by noting that the appellant's severe asthma regularly flares up and that she has a very difficult home situation due to a recent separation from an abusive, threatening spouse.

In the SR, the appellant reports that her chronic life-threatening asthma is triggered suddenly and is made worse by reflux disease. She reports that she wheezes and has a chronic cough and is often tired and is restricted as to where she can go and what she can do. She fears contracting a cold from other people. She is on a CPAP machine which she reports makes getting a good night's sleep difficult and can cause panic attacks. She reports having days, more often than not, when she cannot get out of bed. Going out, cold weather, perfume, scents, second-hand smoke, and a cold can cause attacks. When hospitalized she requires care for herself and her children from other people. Each day is a struggle to breathe. She is unable to work and perform basic household chores, relying on others, which leads to depression and anxiety.

In the Request for Reconsideration, the appellant reiterates information she provided in the SR adding that at times she is unable to get out of bed and relies on friends to help with her children and is unable to attend school functions or after school activities for fear of an attack which most often ends in hospitalization for weeks at a time. Her life is very limited at times and she doesn't leave her house for weeks at a time.

In support of her Request for Reconsideration, the appellant submitted two letters dated November 9, 2011 and one letter dated December 19, 2011 from the specialist who completed the PR. In the November 9, 2011 letter, the specialist confirms life-threatening asthma aggravated by reflux for which the appellant intermittently requires aggressive medical interventions, therapy, and investigations. In the second November 9, 2011 letter, the specialist advises the appellant's general practitioner that the appellant has been having exacerbations, has been sick and has been having problems that are slowing her down and describes a change in the medication protocol. In the December 19, 2011 letter, the specialist writes that the appellant has been hospitalized several times due to life-threatening asthma including a recent re-admission for approximately 1-2 weeks after having been on Prednisone and antibiotics for approximately 4-6 weeks. The specialist writes that according to the Quebec Asthma Guide, an asthmatic individual who requires Prednisone on a regular basis is considered 100% disabled. The appellant has been unable to get off of the Prednisone and has had to use a seemingly inordinate amount of medication just simply trying to "get by."

On appeal, the appellant submitted a March 5, 2012 letter from the specialist, a February 26, 2012 letter from the general practitioner who completed the AR, a February 7, 2012 letter from a mental health counsellor, and a copy of *Hudson v. British Columbia (Employment and Assistance Appeal Tribunal)*, 2009 BCSC 1461.

In the March 5, 2012 letter, the specialist writes that the appellant has been unable to work for over a year due to asthma, reflux and nasal CPAP indication for sleep and reflux/aspiration state. In speaking with an advocate, the specialist understands that the appellant can only walk a block unaided on a flat surface, can climb 5 steps with the assistance of a railing, is having difficulty lifting in excess of 5 lbs, and can only remain seated for less than an hour. Because of some cognitive problems, she has some communication issues, difficulty staying focused, and decreased short term memory as well as anxiety over an acute asthma attack. She is unable to work or function and has difficulty with activities such as food preparation, basic housework and with getting around because of her breathing and other. The medications for her asthma alone, aside from stresses, make her completely unemployable and "disabled." "I fully support her application for PWD."

In the February 26, 2012 letter the general practitioner writes that the appellant is troubled by anxiety and depression but her major problem is severe asthma and has severely restricted lung capacity despite high doses of daily prednisone. She ends up in hospital with even the slightest exacerbation and has had several hospital admissions in the last year. The general practitioner makes the following changes to the AR:

- Walking indoors takes significantly longer
- Periodic assistance is required for carrying and holding
- Activities of daily living take significantly longer than usual and assistance from family and friends is required on a daily basis
- Respecting cognitive and emotional functioning, bodily functions, emotion, motivation, and attention/concentration have a major impact while memory has a moderate impact
- Due to severe physical and mental illness most of the activities of daily living such as sleep, concentration, motivation, and emotion are severely impacted
- She suffers from mood swings and is easily frustrated
- Most activities of daily living, including all meal activities, banking, paying rent and bills, filling/refilling prescriptions, take significantly longer
- Periodic assistance is required for basic housekeeping and laundry and all shopping activities
- The appellant reports being unable to use public transport because of severe asthma and sensitivities
- Functioning with extended social networks is marginal; periodic support is provided by once a week

- hour long counselling sessions and regular support from her closest friends 2-3 hours per week
- Severe asthma and depression/anxiety impact daily living to the extent that the appellant requires ongoing, periodic assistance from family and friends for normal activities of daily living and support and supervision from a mental health counsellor for social and cognitive functioning.

The letter from the mental health counsellor describes the counselling services received by the appellant and a description of symptoms of depression and anxiety the appellant reports experiencing.

At the hearing, the appellant stated that she had been unclear as to what information was required by the PWD application and had not considered discussing with her physician that most DLA take longer to perform. The appellant stated that she requires continuous assistance with lifting, carrying/holding due to a lifting limit of 5 lbs as well as with shopping and managing her medications. She does banking online and is unable to use public transportation. Additionally, she requires periodic assistance walking indoors, climbing stairs which is limited to a maximum of 4 stairs, and with housekeeping. The appellant stated that she takes 3-4 times longer walking outdoors, preparing meals, and with medications. She is extra cautious in public and lives in isolation and constant fear due to her asthma. Social functioning is impacted by safety issues and the associated stresses. She has had several hospitalizations, which in response to questioning the appellant clarified has happened twice in the last six months and lasted for 7-14 days. The appellant stated that she has poor memory and concentration, decreased patience, is easily frustrated, and has mood swings. She is extremely dependent on prednisone.

At the hearing, the appellant's advocate reiterated that the appellant did not know how the PWD application should be filled out and that the information provided by the general practitioner in the AR simply reported DLA as being performed without considering the time frame or the assistance required.

The panel determined that the letters submitted on appeal from the physicians and counsellor and the appellant's oral testimony are additional evidence respecting the appellant's previously diagnosed medical conditions and functioning and are therefore admissible under s. 22(4) of the Employment and Assistance Act as written testimony in support of the information and records before the ministry at reconsideration. The case law was accepted as argument.

PART F – Reasons for Panel Decision

The issue under appeal is whether the ministry reasonably concluded that the appellant has not met the all of the eligibility criteria for designation as a PWD because it was not satisfied that as a result of her severe physical impairment the appellant is, in the opinion of a prescribed professional, directly and significantly restricted in her ability to perform DLA either continuously or periodically for extended periods and that as a result of those restrictions she requires help to perform DLA. The ministry was satisfied that the appellant has reached the age of 18 and has a severe physical impairment that has been confirmed by a medical practitioner as being likely to last for 2 years.

The criteria for being designated as a person with disabilities (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.

Restrictions in the ability to perform DLA

With respect to her ability to perform DLA, the appellant's position is that the most recent information from the specialist and general practitioner confirms that most DLA take longer to perform and/or require either periodic or continuous assistance due to the appellant's limited physical capacity and risk of being exposed to asthma triggers.

The ministry's position, based on the evidence before it at reconsideration, is that the evidence of the specialist that the appellant is restricted in her ability to manage her basic housework does not in and of itself confirm a direct and significant restriction in the ability to manage DLA. Additionally, the ministry contends that although the general practitioner reports the need for periodic support with social functioning, a direct and significant restriction is not established as the specialist reports no restrictions in the ability to manage social functioning, there is no evidence of a severe mental impairment, and the general practitioner reports all DLA are managed independently.

The legislation requires that the minister be satisfied that, as a result of a severe physical or mental impairment, in the opinion of a prescribed professional a person be directly restricted in the ability to perform DLA and that the restriction must be "significant" and either continuous or periodic for extended periods. In this case, both the specialist and the general practitioner are prescribed professionals under the legislation.

Reviewing the information provided by both the specialist and the general practitioner, the panel finds that some of the new information is consistent with the information before the ministry, such as the general

practitioner's confirmation that social functioning requires periodic support/supervision and that some information may be considered clarification of the information before the ministry, such as the specialist's confirmation that the appellant has difficulty with activities including food preparation which were previously identified as possibly being restricted. However, much of the prescribed professionals' information provided on appeal conflicts with the information from them that was before the ministry. In particular, the specialist now reports functional limitations with the appellant's ability to lift, climb stairs, and remain seated when none were previously identified. Additionally, in the PR, the general practitioner reported that the appellant independently managed her DLA with the exception of requiring periodic support for social functioning and periodic assistance for aspects of moving about indoors and outdoors (walking outdoors, climbing stairs, and lifting), whereas he now reports that the appellant has various restrictions in her ability to perform all DLA. The appellant's explanation for the discrepancy is that she had been unaware of what information was required and as such, did not provide her general practitioner with the relevant information or details when he completed the AR.

While the panel notes the conflict in the evidence respecting DLA before the ministry, most notably the evidence of the general practitioner, with that provided on appeal, the panel has placed greater weight on the information respecting DLA provided on appeal for the following reasons. (1) The new information is supported by the specialist's narrative available at reconsideration that the appellant: is having difficulty functioning at home, is affected by anything that causes perfume, dust, fumes, or allergen generation in and out of the work place; was, as of November 9, 2011, experiencing exacerbations of her asthma; is considered 100% disabled in accordance with the Quebec Asthma Guide given her use of prednisone; and, has been hospitalized several times due to life-threatening asthma. (2) The newly admitted information respecting the appellant's ability to perform DLA is supported by accompanying narrative from the specialist that the appellant's medications alone make her disabled and from the general practitioner that the appellant's severely restricted lung capacity, despite high doses of medication, results in hospitalization with even the slightest exacerbation. (3) The new information is consistent with the appellant's testimony respecting restrictions in her ability to perform DLA.

Based on the information provided on appeal by the specialist and general practitioner, the panel finds that the specialist confirmed restrictions in the appellant's ability to mobilize, prepare meals, and perform basic housework. Additionally, the general practitioner confirmed that as a result of her impairment the appellant requires ongoing periodic assistance with the DLA social functioning, moving about indoors and outdoors, basic housekeeping, and shopping and that the appellant requires continuous assistance with transportation as she is unable to use public transportation. Additionally, as a result of reduced lung capacity and sensitivity to allergens, the appellant takes significantly longer, which the appellant clarifies as being 3-4 times longer, to perform personal care, shopping, meals, and management of finances and medications. The panel further finds that the evidence of the prescribed professionals is that the appellant's breathing problems are ongoing with regular flare-ups and are impacted by allergens inside and outside the home. In view of the prescribed professionals' evidence respecting the ongoing nature of the appellant's impairment, the ongoing difficulties the appellant has leaving her home to perform DLA as well as difficulties performing DLA inside the home due to allergens and reduced breathing capacity, the panel finds that the ministry unreasonably determined that a direct and significant continuous restriction in the appellant's ability to perform DLA in the opinion of a prescribed professional was not established under 2(2)(b)(i) of the EAPWDA.

Help performing DLA

Regarding the need for help with DLA, the appellant argues that the evidence establishes that she requires ongoing assistance from another person with basic housework, shopping, transportation, moving about indoors and outdoors, and social functioning.

The ministry argues that it has not been established that DLA are significantly restricted and therefore, it

cannot be determined that significant help is required from other persons.

The legislation respecting the need for help with DLA requires that the ministry be satisfied that in the opinion of a prescribed professional an applicant requires an assistive device, the significant help or supervision of another person, or the services of an assistance animal as a result of direct and significant restrictions in the ability to perform DLA that are either continuous or periodic for extended periods. The evidence of the general practitioner is that the appellant requires ongoing periodic assistance from family and friends with basic housekeeping and shopping which is also described as being on a daily basis as well as periodic assistance with walking outdoors. Additionally, the general practitioner reports the need for ongoing weekly support and supervision from a mental health counselor for cognitive and emotional functioning and both prescribed professionals identify periods of hospitalization during which the appellant requires assistance. Based on the above evidence, the panel finds that the ministry unreasonably determined that the criterion respecting the need for help under section 2(2)(b)(ii) of the EAPWDA was not met.

The panel finds that the ministry's decision was not reasonably supported by the evidence and rescinds the decision.