APPEAL #

PART C – Decision under Appeal

The decision under appeal is the ministry's reconsideration decision dated March 6, 2012 which found that the appellant did not meet three of the five statutory requirements of Section 2 of the Employment and Assistance for Persons with Disabilities Act for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that her impairment is likely to continue for at least two years. However, the ministry was not satisfied that the evidence establishes that she has a severe physical or mental impairment. The ministry was also not satisfied that the appellant's daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods. As the ministry found that the appellant is not significantly restricted with DLA, it could not be determined that she requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act (EAPWDA), Section 2
Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), Section 2

APPEAL #

PART E – Summary of Facts

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

1) Person With Disabilities (PWD) Application: applicant information dated November 28, 2011, physician report dated November 21, 2011, and assessor report dated November 29, 2011;
2) Letter dated January 17, 2012 from the ministry to the appellant denying person with disabilities designation and enclosing a copy of the decision summary;
3) Questionnaire dated March 6, 2012 completed by the appellant's physician which states in response to the question whether the appellant has a severe physical or mental disability- yes, she has a severe mental disability, she is unable to remember things and lacks motivation, she suffers from anxiety and depression and is incapable of sustained concentration, as stated in the application "anxiety limits social interaction", she experiences anxiety attacks when she is among people; her physical disability restricts her ability to manage in her daily living activities (DLA), her chronic foot/ankle pain makes her unable to perform most tasks; in response to the question whether the appellant is significantly restricted in the ability to perform DLA, the physician states- yes, she is significantly restricted as follows: as indicated in the application, 24 out of 28 DLA are periodically restricted, and walking, climbing stairs, and standing taking 5 times longer; in response to the question whether the appellant requires significant help with DLA as a direct result of her impairment, the physician states- yes, she requires assistance from family and friends; and,
4) Request for Reconsideration- Reasons prepared by an advocate on behalf of the appellant.

At the hearing, the appellant's advocate stated that the appellant was feeling very anxious and has asked the advocate to present her evidence, including reading some notes that the appellant had made. The advocate stated that the appellant also has scoliosis but that the physician did not address this as a diagnosis in the PWD application. The advocate stated that the appellant has a deformity in her right foot, and also has depression/ anxiety and hypertension. The advocate stated that the appellant takes a long time to get out of bed and sometimes she cannot get out of bed and sometimes does not eat. The advocate stated that the appellant has difficulty with decision making and concentration, and suffers panic attacks. The advocate stated that every day for the appellant is a struggle because of pain in her foot. The advocate stated that the appellant had a surgery on her foot in 2009 and she needs to have another surgery but a date has not yet been set. In response to a question, the advocate clarified that the appellant's difficulties with remaining seated are as a result of her scoliosis, which the advocate acknowledges was not included as a diagnosis by the physician. The advocate explained that the appellant uses a cane for support on her bad days. The advocate stated that the appellant has suffered from depression and anxiety for about 10 years and then the death of her boyfriend approximately a year ago made her condition much worse. In response to a question, the advocate explained that the appellant was working intermittently before her boyfriend's death and then she was no longer able to work. The advocate stated that the appellant has been attending counseling once a week, and that she takes Tylenol for her foot pain and has been taking Seroquel as an anti-depressant for some time, as well as medication for her blood pressure.

In her self-report, the appellant adds that her mental health is presently extremely unstable due to terrible circumstances that took place about a year ago when her long-time boyfriend passed away, that she is slowly recovering but finds it a very difficult time and sees the doctor regularly. The appellant states that her train of thought and her memory are very poor, that she is learning new skills and how to take care of herself. The appellant states that her severe depression from her boyfriend's death fills her mind most days. The appellant states that she has had two surgeries to replace bones in her foot with steel plates, that it is not corrected and it causes intense pain always. In some additional typewritten pages dated November 15, 2011, the appellant adds that she was diagnosed with scoliosis at 14 and she finds she is now leaning more and more to the left, her right hip sticks out and her pelvis is tilted and she has terrible back pain and she cannot lift things like grocery bags. The appellant states that she has high blood pressure that is controlled by medications. The appellant states that she had her first foot surgery at 14 for a bunion and it grew back and got much worse. The appellant explains that she has several surgeries on her right foot and the bunion got bigger and caused her toes to deform. The appellant states that she has trouble walking any distance and stairs are very hard as she must go slow and hang on. The appellant states that she has used assistive devices in the past but she is

not currently using any. The appellant states that she is supposed to have another surgery on her foot but she is not ready emotionally to go through another surgery. The appellant states that she suffers from depression and anxiety for which she takes Seroquel. The appellant states that she has not recovered from the death of her boyfriend, that she gets nightmares and cannot sleep. The appellant states that there are many days when she is so upset and depressed that she cannot get out of bed, that she will go without eating since she cannot be bothered to cook for herself.

The physician who completed the physician report has confirmed that he has seen the appellant 2 to 10 times within the last 12 months. The physician diagnoses the appellant with right foot deformity (1989), depression (2010), anxiety (2010) and hypertension and notes that the appellant has a history of "...alcohol and crack addiction with multiple rehab sessions in the past, significant anxiety and depression symptoms impairing normal functioning and job/employment instability; two bunion surgeries on right foot cause chronic pain and limited mobility." The physician indicates that the appellant has been prescribed Seroquel for anxiety and insomnia and it causes some sedation, and the appellant requires a cane for climbing stairs. The physician also reports that Seroquel controls depression/anxiety to some extent. The physician reports that the appellant can walk 1 to 2 blocks unaided on a flat surface, she can climb 2 to 5 stairs unaided, she can lift under 5 lbs., and can remain seated for less than 1 hour. The physician reports that the appellant has no difficulties with communication. The physician indicates that there are significant deficits with cognitive and emotional function in the areas of executive, memory, emotional disturbance, and attention or sustained concentration. In response to the question whether the impairment directly restricts the appellant's ability to perform daily living activities (DLA), the physician checks off "yes", and reports that the appellant is continuously restricted with basic housework and daily shopping and periodically restricted with mobility outside the home and use of transportation ("intermittent foot/ankle pain limits mobility"). The physician reports that the appellant is not restricted in the areas of personal self care, meal preparation, management of medications, mobility inside the home and management of finances. Although the physician has not checked social functioning as restricted, he has noted "...anxiety limits social interaction."

The physician has also completed the assessor report and indicates that the appellant takes significantly longer than typical with all aspects of mobility and physical ability including walking indoors and outdoors, climbing stairs and standing, with a note that it takes plus or minus 5 times longer. The physician indicates that the appellant requires continuous assistance with lifting and carrying and holding ("need assistance from family and friends"). The physician indicates that the appellant requires periodic assistance from another person with all tasks of personal care, including dressing, grooming, bathing, toileting, feeding self, regulating diet, transfers in/out of bed and transfers on/off chair. The physician indicates that the appellant also requires periodic assistance from another person with laundry and basic housekeeping. The physician reports that the appellant is independent with 3 out of 5 tasks of shopping while requiring periodic assistance from another person with going to and from stores and carrying purchases home. The physician adds comments that the appellant "...needs periodic assistance from family and friends when she has a relapse of depression/anxiety symptoms." Further, the physician reports that the appellant requires periodic assistance from another person with most tasks of managing meals, including meal planning, food preparation, and cooking, while being independent with safe storage of food, with no other comments provided. The physician indicates that the appellant requires periodic assistance from another person with all tasks of paying rent and bills ("needs reminders"), and managing medications ("needs reminders") and transportation ("chronic foot pain"). In terms of social functioning, the assessor has assessed the appellant as requiring periodic support/supervision in all aspects, with marginal functioning in both her immediate and extended social networks, with the added comment that "...ex-partner passed away- grieving still." In the assessor report, the physician has indicated that there is a major impact to cognitive and emotional functioning in the area of attention/concentration, and moderate impacts in bodily functions, emotion , impulse control, executive, memory, and motivation. The assessor reports that the appellant has minimal impacts to her daily functioning in consciousness, insight and judgement, and motor activity, with no impacts in the remaining 4 areas.

APPEAL #

PART F – Reasons for Panel Decision

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

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

Section 2(1)(a) of the EAPWDR defines DLA for a person who has a severe physical or mental impairment as: prepare own meals, manage personal finances, shop for personal needs, use public or personal transportation facilities, perform housework to maintain the person's place of residence in acceptable sanitary condition, move about indoors and outdoors, perform personal hygiene and self care, and manage personal medication. In relation to a person who has a severe mental impairment, there are two additional activities, namely: making decisions about personal activities, care or finances, and relating to, communicating or interacting with others effectively.

The ministry argues that the evidence does not show that the appellant has a severe physical impairment. The ministry argues that in terms of physical functioning, the physician indicates the appellant is able to walk 1 to 2 blocks and to climb 2 to 5 steps unaided (cane with stair climbing), to lift under 5 lbs. and to sit for less than 1 hour. The ministry argues that the appellant is independently able to do most aspects of mobility and physical abilities although these activities take plus or minus 5 times longer, with continuous help to lift/carry/hold. The ministry points out that no assistive devices are routinely used to help compensate for impairment though orthotics are recommended. The ministry argues that the functional skill limitations are more in keeping with a moderate degree of impairment. The appellant, through her advocate, argues that the evidence establishes that she suffers from a severe physical impairment as a result of a deformity of her right foot and hypertension. The advocate points to the Questionnaire dated March 6, 2012 completed by the appellant's physician in which the physician confirms that the appellant's chronic foot/ankle pain makes her unable to perform most tasks. The advocate argues that the physician confirms that the appellant is continuously restricted with lifting and carrying and holding and it takes her 5 times longer for walking indoors and outdoors, climbing stairs and standing, as set out in the assessor report and the Questionnaire. The advocate acknowledges that the limitation with remaining seated relates to the appellant's scoliosis which was not a diagnosis set out in the PWD application. The advocate argues that the physician and the appellant have both described chronic pain and limited mobility as a result of the appellant's right foot condition.

The panel finds that the evidence of a medical practitioner confirms diagnoses of right foot deformity and hypertension and notes that "...two bunion surgeries on right foot cause chronic pain and limited mobility." The appellant states that her high blood pressure is controlled by medications. The physician indicates that the appellant requires a cane for climbing stairs and the advocate explained that the appellant uses a cane for support on her bad days. The physician reports that the appellant can walk 1 to 2 blocks unaided on a flat

surface, she can climb 2 to 5 stairs unaided, she can lift under 5 lbs., and can remain seated for less than 1 hour (which restriction relates to another medical condition not included in the diagnoses). In the physician report, the appellant's physician also indicates that the appellant is restricted on a periodic basis with mobility outside the home and comments that "...intermittent foot/ankle pain limits mobility." In terms of the frequency of the impact, the panel finds that although the appellant states that she has used assistive devices in the past, she is not currently using any, and it is not clear how many bad days the appellant experiences as a result of her right foot pain, for which she takes Tylenol. In the assessor report, the physician indicates that the appellant takes significantly longer than typical with walking indoors and outdoors, climbing stairs and standing, with a note that it takes plus or minus 5 times longer, which also indicates a variation in symptoms. Although the physician indicates that the appellant requires continuous assistance with lifting and carrying and holding ("need assistance from family and friends"), the panel finds that it is not clear on the evidence how this restriction relates to the diagnosed medical conditions. Overall, the panel finds that the ministry was reasonable in its finding that the appellant's functional skill limitations, as a result of the diagnosed medical conditions, are more in keeping with a moderate degree of impairment. Therefore, the panel finds that the ministry's determination that the evidence does not establish a severe physical impairment, was reasonable.

The ministry argues that the evidence does not establish that the appellant has a severe mental impairment. The ministry points out that the physician has indicated that the appellant has significant deficits with cognitive and emotional functioning in the areas of executive, memory, emotional disturbance, and attention/ concentration, but the impacts to daily functioning are mostly minimal to moderate with one major impact on attention/concentration, and there are a number of aspects with no impact at all. The ministry points out that the appellant's physician reports that the prescribed medication, Seroquel, controls depression and anxiety to some extent. The ministry argues that the appellant's symptoms impact her to a moderate degree and do not severely limit her ability to function either continuously or periodically for extended periods. The appellant argues that the evidence establishes that she suffers from a severe mental impairment as a result of depression and anxiety. The advocate argues that the appellant's physician has indicated his agreement, in the Questionnaire dated March 6, 2012, that the appellant has a severe mental disability, that she is unable to remember things, lacks motivation, and is incapable of sustained concentration. The advocate argues that although there is only one major impact to daily functioning in the cognitive and emotional functioning assessment, it is with attention/concentration which includes that she is distractible, unable to maintain concentration and poor short term memory, all of which are important aspects of functioning. The advocate highlights that the physician has confirmed the statement in the PWD application that "...anxiety limits social interaction."

The panel finds that the evidence of a medical practitioner confirms a diagnosis of depression and anxiety and notes that the appellant has a history of "...alcohol and crack addiction with multiple rehab sessions in the past, significant anxiety and depression symptoms impairing normal functioning and job/employment instability." The physician indicates that the appellant has been prescribed Seroquel for anxiety and insomnia and it causes some sedation. The physician also reports that Seroquel controls depression/anxiety to some extent. In the physician report, the physician indicates that the appellant's communication, overall, is good. The physician indicates that the appellant's anxiety limits social interaction, that she experiences anxiety attacks and, in the assessor report, that the appellant requires periodic support/supervision in all areas of social functioning, including making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others, dealing appropriately with unexpected demands and securing assistance from others. In the comments, the physician has written "ex-partner passed away- grieving still", with marginal functioning in both immediate and extended social networks. The physician reports that there are significant deficits with cognitive and emotional function in 4 out of 11 areas, namely executive, memory, emotional disturbance, and attention or sustained concentration, with no further comments provided. In the assessor report, the physician has indicated one major impact to attention/concentration, 6 moderate impacts to bodily functions, emotion, impulse control, executive, memory, and motivation, with minimal or no impacts to the remaining 7 areas. The advocate stated that the appellant has suffered from depression and anxiety for about 10 years and then the death of her boyfriend approximately a year ago made her condition much worse. In

response to a question, the advocate explained that the appellant was working intermittently before her boyfriend's death and then she was no longer able to work, and the appellant has been attending counseling once a week. The panel finds that the evidence demonstrates that the appellant is in a grieving period as a result of the sudden loss of her boyfriend approximately a year ago and that the duration or frequency of support and supervision required for social functioning has not been provided. The panel finds that the ministry reasonably concluded that these limitations are more in keeping with a moderate degree of impairment. The panel also finds that the ministry's decision, which concluded that the evidence does not establish a severe mental impairment, was reasonable.

The ministry's position is that the evidence does not establish that the appellant's impairment directly and significantly restricts her DLA continuously or periodically for extended period. The ministry argues that the physician indicates in the physician report that the appellant is restricted with basic housework, daily shopping, mobility outside the home, and use of transportation and the restriction is described as "intermittent foot/ankle pain limits mobility." In the assessor report, periodic assistance is reported with most DLA, described as "...needs periodic assistance from family and friends when she has a relapse of depression/ anxiety symptoms" but there is no information in the application to establish the frequency or duration of severe emotional symptoms to allow the ministry to determine whether significant restrictions limit functionality periodically for extended periods. The appellant argued, through her advocate, that the evidence establishes that the prescribed professional has provided sufficient evidence that the appellant's severe physical and mental impairments directly and significantly restrict her ability to perform 24 out of 28 DLA. The advocate also argued that the decision in Hudson v. B.C. (EAAT) 2009 BCSC 1461 is authority for the position that there must be evidence from a prescribed professional indicating a direct and significant restriction on at least 2 DLA and that there is no statutory requirement for a restriction on more than 2 DLA. The advocate highlighted the physician report that indicates the appellant is restricted continuously with basic housework and daily shopping, and periodically with mobility outside the home and use of transportation. The advocate argues that although most tasks are assessed as requiring periodic assistance, the appellant should not be denied because she has good days and gets things done even though she is experiencing pain. The advocate argues that in those areas where the physician has indicated that the appellant takes 5 times longer than typical, this indicates a periodic restriction for an extended period of time.

Regarding the appellant's ability to manage DLA, the panel has relied on the evidence of the physician provided in the PWD application, in both the physician and the assessor reports, as confirmed in the Questionnaire dated March 6, 2012. In terms of preparing her own meals, the physician indicates in the physician report that the appellant is not restricted and, in the assessor report, that the appellant is independent with one task of safe storage of food, while requiring periodic assistance from another person with meal planning, food preparation and cooking. Although the appellant has stated that there are many days when she is so upset and depressed that she cannot get out of bed, that she will go without eating since she cannot be bothered to cook for herself, the evidence of the physician does not indicate the frequency of these days or the duration of the assistance provided. For managing personal finances, the physician indicates that the appellant is not restricted in this area and, in the assessor report, that the appellant requires periodic assistance from another person with all tasks, including banking, budgeting and paying rent and bills, with the explanation that she needs reminders. Again, the frequency and duration of the requirement of reminders is not specified. In terms of shopping for her personal needs, the appellant's physician has reported that the appellant is continuously restricted with daily shopping and, in the assessor report, that she is independent with some tasks of shopping (reading prices and labels, making appropriate choices, and paying for purchases) while requiring periodic assistance from another person with going to and from stores and carrying purchases home. The additional comments provided by the physician are that the appellant "...needs periodic assistance from family and friends when she has a relapse of depression/ anxiety symptoms"; however, there is no further description of how frequently the appellant experiences the relapses.

For use of public or personal transportation facilities, the physician reports that the appellant is periodically restricted ("intermittent foot/ankle pain limits mobility") and, in the assessor report, that she requires periodic

assistance from another person with all tasks, including getting in and out of a vehicle, using public transit, and using transit schedules and arranging transportation ("chronic foot pain"). For performing housework to maintain the appellant's place of residence in an acceptable sanitary condition, the physician indicates that the appellant is continuously restricted in this area and, in the assessor report, that the appellant requires periodic assistance from another person with both laundry and basic housekeeping, being a function of when she has a relapse of depression/anxiety symptoms. With respect to moving about indoors and outdoors, the physician indicates that the appellant is independent with mobility inside the home and periodically restricted with mobility outside the home, as a function of intermittent foot/ankle pain. The physician indicates that the appellant takes significantly longer than typical with walking indoors and outdoors (can walk 1 to 2 blocks unaided on a flat surface) and with climbing stairs (2 to 5 steps unaided), and with standing, and that this takes plus or minus 5 times longer.

With respect to performing personal hygiene and self care, the physician indicates that the appellant is not restricted in this area, and, in the assessor report, that the appellant requires periodic assistance from another person with all tasks of personal care, as a function of when she has a relapse in depression/anxiety symptoms. The physician reports that the appellant is not restricted with management of medications and, in the assessor report, that she requires periodic assistance from another person with all tasks of medication, including filling/refilling prescriptions, taking as directed, and safe handling and storage, with a comment that the appellant needs reminders. In terms of a restriction to social functioning, the physician has noted that "anxiety limits social interaction." For making decisions about personal activities, care or finances, and relating to, communicating or interacting with others effectively, the physician has assessed the appellant's communication as good overall, but as requiring periodic support/supervision with making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others, dealing appropriately with unexpected demands and securing assistance from others ("ex-partner passed away- grieving still").

Looking at the evidence as a whole, the panel finds that it demonstrates that the appellant experiences periodic restrictions in most of the identified DLA, with the exception of 3 out of 5 tasks of shopping and 1 out of 4 tasks of managing meals, for which the appellant is assessed as independent. However, the panel finds that the physician has defined the periodic restrictions to be a function of intermittent foot/ankle pain for mobility outside the home and use of transportation, and to be a function of the appellant's relapse of depression/anxiety symptoms for the remaining DLA, for which there is no indication of the frequency or duration of these episodes to establish that the appellant is periodically restricted for extended periods of time, as required by the legislation. The appellant's advocate argues that the Hudson decision is authority for the position that only 2 DLA need to be restricted, however the evidence of a prescribed professional must establish that the severe impairment "directly and significantly" restricts the person's ability to perform DLA, either continuously or periodically for extended periods of time, which the panel finds the ministry reasonably concluded was not shown in the appellant's case. Therefore, the panel finds that the ministry's determination that the evidence of a prescribed professional does not establish a direct and significant restriction on the appellant's ability to perform DLA either continuously or periodically for extended periods, as required by Section 2(2)(b)(i) of the EAPWDA, was reasonable.

In determining whether the ministry reasonably concluded that the appellant does not require the significant help or supervision of another person or the use of an assistive device, the panel relies on the information from the physician that the appellant lives with family/friends/caregiver and uses a cane for climbing stairs. The advocate argued that the physician provided information that the appellant receives help from family and friends. However, as it has not been established that DLA are significantly restricted, the panel finds that the ministry's conclusion that the requirement for significant help or supervision of another person, an assistive device, or the services of an assistance animal to perform DLA, under Section 2(2)(b)(ii) of the EAPWDA, has not been met was reasonable.

The panel finds that the ministry's reconsideration decision was reasonably supported by the evidence and confirms the decision.