

PART C – Decision under Appeal

The decision being appealed is the Ministry's April 20, 2012 reconsideration decision denying the Appellant Persons with Disabilities (PWD) designation. The Ministry determined that the Appellant had not met all of the required criteria for PWD designation set out in section 2(2) of the Employment and Assistance for Persons with Disabilities Act. Specifically the Ministry was not satisfied that the Appellant has a severe mental or physical impairment that in the opinion of a prescribed professional:

(i) directly and significantly restricts his ability to perform daily living activities either continuously or periodically for extended periods; and,

(ii) as a result of those restrictions he requires help to perform those activities.

The Ministry was satisfied that the Appellant satisfied the other criteria; that is, he has reached 18 years of age and in the opinion of a medical practitioner his impairment is likely to continue for at least 2 years.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act (EAPWDA) Section 2(2) and 2(3).

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR) Section 2.

PART E – Summary of Facts

The Ministry did not attend the hearing. The Panel confirmed that the Ministry was notified of the hearing and then proceeded with the hearing under section 86(b) of the Employment and Assistance Regulation.

For its reconsideration decision the Ministry had the following evidence:

- Appellant's PWD application, but with no self-report
- Physician's Report (PR) dated February 2, 2012 completed by a doctor who indicated that he has known the Appellant for 4 months and had seen the Appellant between 2-10 times in the 12 months preceding the PR; and,
- Assessor's Report (AR) dated February 3, 2012 completed by a registered nurse who indicated that she has known the Appellant for 4 months and had seen him between 2-10 times in the 12 months preceding the AR.

In the PR the doctor described the Appellant's diagnosis as degenerative disc disease L4-5, L5-S1 onset 1997. He added the following narrative to describe the severity of the Appellant's medical conditions relevant to his impairment: "Severe degenerative disc disease L4-5, L5-S1 started with a work injury in 1997 while moving steel girders. He has had pain since then which has gradually gotten worse and become more disabling. He finally had to stop regular painting work in Sept. 2011. He is also impaired in walking (1-2 blocks), stairs (goes slowly, uses handrail and avoids when possible), lifting (over 10 lbs., not repetitively), carrying (can't carry purchases home, etc.), sitting (10 min. uncomfortably), standing (e.g. to do dishes is painful), forceful tasks (e.g. scrubbing), bending. He has had MRI 2 years ago confirming the disc disease. He saw neurosurgeon and saw a pain specialist but there were no effective long term treatment options."

As aids required for the Appellant's impairment the doctor wrote that the Appellant requires hand rails on stairs and shower, and pull cart to carry purchases. For functional skills the doctor indicated that the appellant can walk unaided on a flat surface for 1-2 blocks, climb 2-5 stairs with handrail, lift 5-15 lbs and remain seated for less than 1 hour. The doctor noted no significant deficits with cognitive and emotional function. Regarding the Appellant's ability to perform daily living activities, the doctor indicated that the following 4 activities are continuously restricted by the Appellant's impairment: meal preparation, basic housework, daily shopping, and mobility outside the home. The doctor indicated that the following daily living activities are not restricted: personal self care, management of medications, mobility inside the home, use of transportation, management of finances and social functioning. Regarding the degree of restriction the doctor added the following comments: "Meal prep and clean up is slow and painful due to pain with standing for over 10 minutes. Cannot do housework that is forceful (e.g. scrubbing) or involving bending. Cannot carry purchases home and cannot get around from place to place more than 1-2 blocks without pain. For assistance that the Appellant needs with daily living activities the doctor wrote: "Transportation (e.g. bus pass). Home support to assist with housework (e.g. 2-3 hrs/week), premade meals and home support for food prep/clean up (2-3hrs/wk)."

The doctor also provided the following additional comments in the PR: "In addition to his severe back problem [the Appellant] is carrying a substantial caregiver burden – his wife has advanced M.S. and he does everything that he can to support and care for her. She has been in hospital for four months and efforts are being made to bring her home."



In the AR the nurse described the mental or physical impairments that impact the Appellant's ability to manage daily living activities as: "degenerative disc disease L4-5, L5-S1, anxiety, asthma, hypothyroid". She indicated that the Appellant is independent walking indoors, but takes significantly longer walking outdoors, climbing stairs and standing. The nurse added; "chronic back pain is exacerbated by staying in one position too long". The nurse also indicated that the Appellant requires continuous assistance with lifting and with carrying and holding, adding "cannot lift anything repetitively due to pain. Bending unbearable." The nurse did not complete the section for impacts to cognitive and emotional functioning.

Regarding assistance the Appellant requires related to his impairments that directly restrict his ability to manage daily living activities, the nurse indicated that the Appellant is independent in all aspects of personal care; however, she added: "while he can manage his own self care, moving and bending very painful, so after grooming has to take at least a half hour to recover from periods of activity". The nurse noted that the Appellant needs continuous assistance with all aspects of basic housekeeping and she added: "cannot bend or lift heavy bucket of water. Can do light dusting and if washes dishes, pain exacerbated and needs rest". With respect to shopping the Appellant is independent with all aspects except he requires continuous assistance with carrying purchases home and the nurse added: "cannot carry heavy items – requires delivery". The nurse indicated that with respect to meals, the Appellant is independent in meal planning and safe storage of food, but he takes significantly longer with food preparation and cooking. For these activities the nurse added "can only stand to prepare food for up to 15 min. at a time. Cannot carry heavy pots filled with water". The nurse further noted that the Appellant is independent in all aspects of paying rent and bills and medications, and she did not complete the social functioning part of the AR form. As for transportation the nurse noted that in getting in and out of a vehicle the Appellant "moves carefully due to twisting motion of getting in car" and he takes significantly longer with using public transit adding "bus stop needs to be within 1 block of destination." The Appellant is independent using transit schedules and arranging transportation.

The nurse wrote that for assistance needed from other people: "requires help with housekeeping weekly, carrying heavier groceries weekly and some meal preparation". As for assistance provided by assistive devices and use routinely by the Appellant, the nurse noted bathing aids, specifically "grab rails and bench". She added "has bath bench, hand held". No assistance is provided by assistance animals. The nurse also wrote the following additional comments in the AR: "This man has significant physical pain, exacerbated with any activity. He also has a lot of stress from care giving for his partner with MS (currently in hospital). Partner has home support at home. Very worried about partner as he is no longer physically able to lift/care for her."

At the hearing the Appellant described how he has lived with his back condition for 15 years and he used to take pain killers but got very sick from them, so he no longer takes them. He said he lives with the pain and sometimes he cannot even walk, so he has to crawl along. He described one recent incident when lint from laundry fell on the floor and when he bent for it his back went out. He said he couldn't move for about 10-15 minutes and then was in real, severe pain for quite awhile afterwards. He said that even when he brushes his teeth, if he gags he blows his back out and then feels the effects for weeks. Small things impact his back, such as meal preparation and grocery shopping. He tries to do these things, but it is a trade off because he is impacted later. When he prepares a meal he cannot stand for any length of time and the pain can be so intolerable that he

[Redacted]

can't stand for long to do the dishes. He then lies down to get over the pain; even sitting bothers him. He said that he has good days and bad days.

The Appellant confirmed that he has the assistive devices noted by the doctor and the nurse in their reports, and he also has something to grab onto when using the toilet. The doctor recommended that he use a push cart for shopping. The Appellant said that when he grocery shops he takes his time and he drives home. He has learned to live independently and doesn't like to think he needs assistance. He said there is no support, but he has a need and it's just not there. His wife is now in a care home and a specialist is to see her to figure out how to get her home. The Appellant said there will be help for her if she returns home.

The Appellant also submitted a letter dated April 22, 2012 from the same doctor who completed the PR. The Appellant's advocate stated that the letter was supposed to be ready for the reconsideration review by the Ministry; however, the letter was not ready in time. In the letter the Appellant is described as having the same conditions as in the PR and that the "level of impairment that [the Appellant] experiences as a result of the impairment should be confirmed as severe as expressed in the initial application. Further it must be noted that [the Appellant] experiences a significant level of restriction on a frequent and ongoing basis that limits his ability to independently manage activities of daily living. [The Appellant] requires frequent and ongoing assistance in order to manage daily affairs".

In the letter the doctor described significant limitations in performing activities of daily living that require any application of pressure, bending, lifting and mobility. The Appellant experiences high levels of pain that limit his ability to keep his house at an adequate level of cleanliness, prepare nutritious meals and shop for daily groceries. In terms of basic mobility the doctor had indicated the Appellant is limited to walking distances beyond two blocks independently. When walking any distance the Appellant can take up to 5 times longer than the average individual and he often does so with excruciating pain. In the letter this level of impairment to basic mobility "should be described as severe in the context of his diagnoses". The doctor also indicated that the Appellant can lift a maximum of 15 lbs. When lifting items of this weight he often experiences pain and is only able to lift something this heavy for a short period of time on a good day. Typically the Appellant is "limited significantly from performing all activities requiring lifting." In terms of standing the Appellant is described as "significantly limited". He may be able to stand independently for 10 minutes, however, he experiences high levels of pain when doing so. The doctor also noted that as indicated in the initial application, the Appellant would benefit from regular home support and daily assistance with meal preparation, shopping and activities requiring basic mobility.

The doctor also described the Appellant's diagnosis as degenerative. He experiences a severe level of impairment at present and this level is likely to get worse in the future. He requires ongoing and frequent assistance on a daily basis to independently complete daily living activities and is incapable of continuing independent function at present.

The Panel finds that the Appellant's oral testimony at the hearing and the April 22, 2012 letter from the doctor both relate to the evidence of the Appellant's impairments that was before the Ministry at reconsideration. Therefore the Panel admits both the testimony and the letter as being in support of the evidence that was before the Ministry when it made its reconsideration decision pursuant to

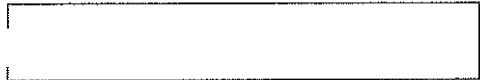
section 22(4) of the Employment and Assistance Act.

At the hearing the Appellant's advocate provided written and oral arguments supporting the Appellant's appeal to overturn the Ministry's reconsideration decision as unreasonable. The advocate argued that the Ministry failed to apply the principles of statutory interpretation and the Ministry failed to adequately consider and to give adequate weight to the evidence of the two medical practitioners – the doctor and the nurse.

The advocate submitted that section 8 of the *Interpretation Act* R.S.B.C. 1996 c.238 requires every enactment to be construed as being remedial and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its object. Therefore section 2 of the EAPWDA must be interpreted in a large and liberal manner for the benefit of those who are impaired. The advocate submitted that the Ministry's determination that the Appellant's functional skill limitations were in keeping with a moderate degree of physical impairment was not a fair, large and liberal interpretation of the EAPWDA, but rather a narrow and restrictive interpretation. This interpretation by the Ministry was also contradicted by the medically informed determination of the prescribed professional who described the Appellant's medical impairment as "severe" and significantly limiting independent performance of daily living activities on a continuous basis and as requiring continuous assistance. The advocate submitted that the Ministry relied only on a non-medical test of physical restrictions based on boxes ticked in the PR and this was a narrow definition not supported by the legislation or principles of statutory interpretation.

The advocate also cited two judicial decisions: the Supreme Court of Canada decision in *Abrahams v. Canada* (1983 142 D.L.R. (3d) 1) and the B.C. Supreme Court decision in *Hudson v. Employment and Assistance Appeal Tribunal* (2009 BCSC 1461). The advocate argued that the *Abrahams* decision requires that ambiguities arising from difficulties with legislative language should be resolved in favour of the Appellant where social welfare benefits are concerned and the Ministry's ambiguous definition of the term "severity" in this case was not resolved in favour of the Appellant. The advocate also cited the *Hudson* decision to support his argument that the disability legislation must be interpreted with a benevolent purpose in mind. The advocate submitted that also in the *Hudson* case the court found that the ordinary meaning of the plural "activities" dictates that there must be evidence from a prescribed professional indicating direct and significant restriction on at least 2 daily living activities. The advocate argued that there is no statutory requirement that more than two activities must be restricted. In fact the evidence from the Appellant's physician is that the Appellant is significantly restricted continuously in 4 of the 8 daily living activities relating to physical impairments set out in section 2(1) of the EAPWDR.

The advocate further submitted that the *Hudson* case found that the evidence of the physician and assessor must be read in their entirety and in a broad way; their evidence must be reviewed in full including narrative portions. In the Appellant's case the advocate argued that the Ministry's determination directly contradicted *Hudson*. The Ministry's narrow view of the disability legislation and erroneous application of the law was unreasonable. Also the Ministry failed to consider all of the evidence from the two medical practitioners. For example the nurse provided narrative evidence confirming a significant level of physical impairment and assistance required, but the Ministry only relied on ticked boxes in the AR. The physician also provided narrative descriptions about the restrictions and the help that the Appellant needs. Therefore the advocate submitted that the



Ministry's determination regarding the Appellant's restrictions to daily living activities was wrong on the evidence and therefore it was unreasonable.

Because the Ministry did not appear at the hearing the Panel will consider the Ministry's reconsideration decision to be its submissions for the appeal hearing.

PART F – Reasons for Panel Decision

The issue in this appeal is whether the Ministry reasonably determined that the Appellant is ineligible for PWD designation because he did not meet all the requirements in section 2(2) of the EAPWDA, and specifically that: he does not have a severe mental or physical impairment that in the opinion of a prescribed professional directly and significantly restricts his ability to perform daily living activities either continuously or periodically for extended periods; and, also that in the opinion of a prescribed professional, as a result of the restrictions, he does not require help to perform those activities.

The eligibility criteria for PWD designation are set out in the following sections of the EAPWDA:

2(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.

The "daily living activities" referred to in EAPWDA section 2(2)(b) are defined in the following section of the EAPWDR:

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.

The Panel will consider each party's position regarding the reasonableness of the Ministry's decision under the applicable PWD criteria at issue in this appeal.

Severe Impairment

In its reconsideration decision the Ministry indicated that it was not satisfied that the information provided established a severe impairment. It noted the doctor's report about the Appellant's functional skills walking unaided, climbing stairs, lifting and sitting ability. The Ministry stated that the Appellant is independently able to walk indoors and outdoors, climb stairs and stand with the comment "chronic back pain is exacerbated by staying in one position too long". The Ministry also noted that continuous help is required to lift/carry/hold with the comment "cannot lift anything repetitively due to pain, bending unbearable". It also wrote that no assistive devices are routinely used to ambulate and the Ministry concluded that the Appellant's functional skill limitations are in keeping with a moderate degree of physical impairment. Therefore the Ministry was not satisfied that

the information provided is evidence of a severe physical impairment.

The Appellant argued that the Ministry unreasonably applied a narrow interpretation of section 2 of the EAPWDA contrary to the *Interpretation Act* and it also unreasonably failed to consider all of the evidence before it as required by the *Hudson* decision. The Ministry limited its assessment to just part of the doctor's report and did not consider the doctor's descriptions of the Appellant's restrictions or the nurse's either. The doctor described the Appellant's medical impairment as "severe" and as significantly limiting independent performance in daily living activities requiring physical functioning. The doctor and nurse both described specific limitations experienced by the Appellant which were not cited by the Ministry and which are evidence that the Appellant's physical impairment is severe.

The Panel notes that the Ministry did not consider all of the evidence about the Appellant's physical impairments not only in the PR but also what the nurse described in the AR. It also misstated some of the evidence. For example, the Ministry stated that the Appellant is independently able to walk indoors and outdoors, climb stairs and stand. However, the doctor's evidence is that the Appellant is continuously restricted in mobility outside the home as he cannot get around more than 1-2 blocks without pain, he needs a handrail to climb 2-5 steps and he avoids stairs. The doctor also wrote that the Appellant is impaired because he cannot carry purchases home, sitting for 10 minutes is uncomfortable, standing for dishes or meal preparation is painful and he is also restricted in physical aspects of meal preparation, basic housework and daily shopping and bending is impaired. The doctor provided additional narrative describing the range of restrictions and also indicated that the Appellant uses assistive devices when showering and recommended a pull cart for carrying purchases. The nurse also noted that continuous assistance is needed for carrying and holding. She also wrote that the Appellant's chronic back pain is exacerbated by staying in one position too long and bending is very painful. It takes the Appellant a half an hour to recover from periods of activity and he is restricted with physical aspects of basic housekeeping and carrying purchases home.

The Appellant's evidence at the hearing was consistent with the descriptions of the severity of his physical impairments provided by the two medical practitioners. He described his attempts at bending, grooming and cooking and how he is incapacitated afterwards. In addition, in the April 22, 2012 letter the doctor confirmed his previous descriptions of the Appellant's significant limitations in performing daily living activities that require any application of pressure, bending, lifting and mobility, and his high levels of pain limiting his ability to perform certain daily living activities. The doctor noted that the Appellant's level of impairment in basic mobility should be described as severe and he experiences a significant level of restriction on a frequent and ongoing basis. Based on the totality of the evidence the Panel finds that the Ministry was unreasonable in not considering all of the evidence about the Appellant's medical condition and how it impairs his ability to function on a daily basis and the Ministry unreasonably determined that a severe physical impairment was not established.

In terms of a mental impairment the Ministry noted that there is no diagnosis by the doctor of a mental health disorder and no evidence of a severe mental impairment. Although the nurse referred to the Appellant's anxiety, neither the doctor nor the nurse described any mental health conditions or cognitive or emotional functioning issues. Also the Appellant did not present any evidence or argument regarding a severe mental impairment. Therefore the Panel finds that the Ministry reasonably determined that the Appellant does not have a severe mental impairment.

Restrictions to Daily Living Activities

In the reconsideration decision the Ministry noted that the doctor reported continuous restrictions to meal preparation, basic housework, daily shopping and mobility outside the home, and no restriction was reported to 6 of the 10 other daily living activities listed in the PR. The Ministry also noted that the degree of restriction was described as slow meal prep & clean up, cannot do housework that is forceful (scrubbing) or bending, cannot carry purchases home and cannot walk more than 1-2 blocks without pain. The Ministry also referred to the nurse's report and indicated that she reported the majority of the activities are performed independently; i.e., 25 out of 28. However, the Ministry did note that continuous help is needed with laundry, basic housekeeping and carrying purchases home, and that food preparation is limited to 15 minutes at a time; cannot carry heavy pots of water. The Ministry concluded that as the majority of daily living activities are performed independently or require little help from others mostly with lifting heavier items, the information from the Appellant's prescribed professionals does not establish that impairment significantly restricts daily living activities either continuously or periodically for extended periods.

The Appellant's position is that the Ministry's determination was unreasonable because it did not apply the *Hudson* decision and it did not correctly apply the definition of daily living activities provided for in section 2(1) of the EAPWDR which defines 8 daily living activities. The Appellant argued that the applicable standard for this PWD criteria is the regulatory list of 8 daily living activities, not the Ministry's 28 sub-activities listed in its AR form. The Appellant also argued that the Ministry did not consider all of the evidence from the doctor and from the nurse. The Appellant pointed out that the doctor's evidence is that 4 of those 8 legislatively defined daily living activities are continuously restricted and the doctor provided descriptions of those restrictions and help needed. The nurse also noted that continuous assistance is needed for certain daily living activities, others take significantly longer and she also provided narrative descriptions of those restrictions and the help the Appellant needs. In the April 22, 2012 letter the doctor also confirmed the Appellant's impairment results in significant restrictions on a continuous basis for daily living activities which have physical aspects.

Section 2(2)(b) of the EAPWDA requires the opinion of a prescribed professional to satisfy the requirements in section 2(2)(b)(i) and (ii). In this case there are two prescribed professionals, the doctor and the nurse. The Panel notes that the Ministry did acknowledge that in the doctor's report 4 daily living activities are continuously restricted and the Panel finds that those 4 activities are listed in the definition of daily living activities in section 2(1) of the EAPWDR. These restrictions were also confirmed by the doctor and described as significant and ongoing in his April 22, 2012 letter. In addition the nurse indicated continuous assistance is required by the Appellant in certain aspects of mobility, other aspects of mobility take significantly longer, continuous assistance is required for basic housekeeping and carrying purchases home, and aspects of meal preparation and transportation involving physical activity take significantly longer. Also even though the Appellant is independent in personal care, the nurse wrote of restrictions in moving and bending. Both the doctor and nurse described assistive devices used by the Appellant and wrote about the ongoing help he needs with daily living activities. Therefore based on the applicable legislative criteria and definitions and based on the whole of the evidence the Panel finds that it was not reasonable for the Ministry to determine that in the opinion of a prescribed professional the Appellant's severe impairment does not directly and significantly restrict the Appellant's ability to perform daily living activities either continuously or periodically for extended periods.

Help Performing Daily Living Activities

The Ministry decided that because it determined that the Appellant's daily living activities are not significantly restricted by a severe impairment, it could not determine that significant help is required from other persons. The Ministry noted grab rails and a bench are used to bathe.

The Appellant's position is that he does require significant help from other people. Both the doctor and the nurse described the type and extent of help he needs on an ongoing basis. Also both prescribed professionals noted the assistive devices that the Appellant uses and needs.

Section 2(3)(b) of the EAPWDA states that for the purposes of subsection (2) 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. In this case the Panel notes that neither prescribed professional noted help being provided by an assistance animal. However, both prescribed professionals did report that the Appellant uses assistive devices to help with his impairment. He uses grab rails and a bench for bathing, and a push cart was recommended for carrying purchases. The Appellant also reported that he uses a grab device in the bathroom. In addition both prescribed professionals described the type and frequency of help that the Appellant needs from other people. Specifically in the PR the doctor wrote that the Appellant needs assistance as follows: transportation (e.g. bus pass), home support to assist with housework, clean up and meal preparation. In the April 22, 2012 letter the doctor indicated that the Appellant requires ongoing and frequent assistance on a daily basis to independently complete daily living activities. He would benefit from regular home support and daily assistance with meal preparation, shopping and activities requiring basic mobility. The nurse wrote that the Appellant needs help with housekeeping weekly, carrying heavier groceries weekly and some meal preparation. Therefore based on all of the evidence and the applicable enactments, and given the Panel's finding above that the Ministry's determination that the Appellant's daily living activities were not directly and significantly restricted was not reasonable, the Panel further finds that the Ministry's determination that the Appellant does not meet the requirements of section 2(2)(b)(ii) of the EAPWDA was also not reasonable.

The Panel finds that the Ministry's reconsideration decision was not reasonably supported by the evidence and was not a reasonable application of the applicable enactments in the Appellant's circumstances. Therefore the Panel overturns and rescinds that decision in favour of the Appellant.