

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (ministry) reconsideration decision dated May 11, 2012 which found that the appellant did not meet four 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. However, the ministry was not satisfied that the evidence establishes that he has a severe physical or mental impairment that, in the opinion of a medical practitioner, is likely to continue for at least two years. 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 he 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

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 December 20, 2011, physician report dated January 11, 2012 and assessor report dated February 1, 2012;
- 2) Letter dated April 10, 2012 from the ministry to the appellant denying person with disabilities designation and enclosing a copy of the decision summary;
- 3) Question form dated May 8, 2012 signed by the appellant's physician and which states in part the responses to the following questions: whether the appellant's conditions are likely to continue for two years or more from today: "agree- the patient has diabetes which would continue lifelong, although his foot should heal"; the appellant states his amputation surgery was one year ago and still his foot has not healed due to the combination of where it is and his diabetes: "agree"; appellant states he is only able to walk less than one block unaided: "agree- patient told me the same, he says his foot becomes painful on walking with or without the cane"; the appellant states that he is unable to climb any stairs at all without the use of a handrail or his cane: "agree- patient states that since he struggles to balance when climbing stairs due to not putting weight on the ball of his foot, he can't do stairs"; the appellant states that he is able to lift up to 20 lbs. at one time: "agree- he (sic) shouldn't be any limitation in lifting"; the appellant states that he is unable to carry any weight due to his mobility issues: "agree- patient feels that he cannot balance and use the cane at the same time"; the appellant states that he is in need of continuous assistance or he is unable to do the following daily living activities (DLA) without the assistance of another person due to his limitations from his health condition: laundry- "disagree", going to and from store- "disagree", carrying purchases home- "agree", filling/refilling prescriptions- "disagree", using public transit- "disagree", transportation- "disagree" ["...patient difficulties is (sic) mainly as described as above, due to his healing wound all his activities is (sic) limited"], the appellant states that he is currently in need of an orthotic shoe or walking cast to help his foot heal- "agree- he is using an orthotic in the right shoe";
- 4) Summary of the court decision in Hudson v. EAAT, 2009 BCSC 1461; and,
- 5) Request for Reconsideration.

The appellant stated that although an advocate had assisted with obtaining the Question form from his physician, the advocate was not available to attend the hearing and the appellant wished to proceed and to represent himself.

In his Notice of Appeal, the appellant states that he has a foot wound that is not healing because he has no proper equipment since he cannot afford it, which would allow the foot to heal so he can walk again properly without an assistance device. The appellant states that he has no means to afford other expenses due to his medical conditions and resulting complications that have occurred.

In his self report included with the PWD application, the appellant states that he was told he has Type 2 Diabetes in 2001 and as of April 2011 complications began which resulted in a lengthy stay in hospital where he went through several operations. He had 2 toes amputated and skin grafts. Having an ulcer on his foot has lead to further issues, the healing process is extremely slow requiring special footwear which he is unable to afford and which would aid in his foot healing properly. The appellant states that the wound is located on the bottom of his right foot and walking is limited to a few steps required for simple daily functions within his home. The appellant states that he requires his mother's help for shopping and transportation as the little walking he can do is aided with a cane so that limits his ability to carry groceries.

At the hearing, the appellant stated that his mobility has been an issue from the beginning and the he has been informed recently that he is still at a high risk of losing his foot. The appellant stated that he is currently living on his own and after paying rent he only has \$10 left at the end of the month, and he has to rely on his mother who is on a fixed income. The appellant stated that he is trying to get his life back in order and that sitting around is very hard for him to do. The appellant stated that he had a diabetic ulcer on his foot and spent two months in hospital having two toes amputated and skin grafts. He was in hospital at the end of April 2011, had his first surgery in May 2011 and a skin graft in June 2011. The appellant stated that home health was

assisting him up to December 2011 with changing the dressings every other day and then two times per week. Now he sees his podiatrist every 6 weeks to have the wound cleaned. The appellant stated that the ball of his foot is not healing and any pressure on it re-opens the wound. The appellant stated that his podiatrist has told him to keep pressure off his foot and he has "...become a couch potato." The appellant stated that he has discussed getting an off-loading orthotic but the wound is still there and any pressure can make the condition worse. The appellant stated that there is a possibility that there is another ulcer in his foot and he will know more after he meets with his podiatrist this week, that he will be having an X-Ray done of his foot as well, and he may have to use a wheelchair to allow the wound to heal completely. The appellant stated that at least with a wheelchair he would have more mobility than he currently has with his cane. The appellant stated that he can make his meals but his mother has to do the shopping and that he only goes out for doctor appointments. The appellant stated that he used to get out 2 or 3 times per week to the library which is a block and a half away, but because of the podiatrist's advice, he can only go to appointments. The appellant stated that his mother has been the only person helping him and that works quite well except sometimes things have to be re-scheduled to accommodate her schedule too, that she helps as much as she can.

The physician who completed the physician report indicates the appellant has been his patient for 6 months and that he has seen the appellant 2 to 10 times in the past 12 months. In the physician report, the physician confirms a diagnosis of diabetes and amputations. The physician adds a comment regarding the severity of the medical condition relevant to the appellant's impairment "...patient has diabetic foot for which he had two toes amputated in 2011; surgery was in May, however he is still struggling with wound healing." The physician indicates that the appellant has not been prescribed medications or treatments that interfere with his ability to perform daily living activities (DLA). The physician reports that the appellant requires an aid for his impairment and notes "...he requires a foot prostheses to take some pressure off of pressure areas in order to aid in wound healing; he also uses a cane." In response to the question whether the appellant's impairment is likely to continue for two years or more, the physician indicates "no- several months, depending on blood sugar control/ wound healing."

The physician reports that it is unknown how far the appellant can walk unaided on a flat surface, how many steps he can climb unaided, or what his limitation is with lifting. The physician reports that the appellant has no limitation with remaining seated. The physician indicates that there are no difficulties with communication. The physician indicates that there are no significant deficits with cognitive and emotional function. In response to the question whether the appellant's impairment directly restricts his ability to perform DLA, the physician indicates "yes" and reports that the appellant is not restricted in the areas of personal self care, meal preparation, management of medications, mobility inside the home, use of transportation, management of finances, and with social functioning. The physician reports that the appellant is periodically restricted with basic housework, continuously restricted with daily shopping and that there are unspecified restrictions with mobility outside the home. With respect to the degree of restriction, the physician notes "...due to the poor wound healing on the foot, patient experiences restriction as to how long and how far he can walk." For assistance required with DLA, the physician comments "...he feels he cannot do the grocery shopping himself as this entails too much walking; he is limited as to what he can carry since he has to hold the cane in the one arm." Additional comments provided by the physician include that "...according to the patient he experiences difficulty ambulating due to [slow wound healing]; there is still healing wounds on his left foot which might take several weeks or months to completely heal."

The physician also prepared the assessor report and reports that the appellant has a good or satisfactory ability to communicate in all areas. The physician indicates that the appellant uses an assistive device ("cane") and takes significantly longer than typical with walking indoors and walking outdoors, that he requires continuous assistance from another person with climbing stairs ("uses elevators"), takes significantly longer with standing ("limited time, 5-10 min."), and requires periodic assistance with lifting and carrying and holding. The physician indicates that the appellant is independent with all tasks of personal care including dressing, grooming, bathing, toileting, feeding self, and regulating diet, while also taking significantly longer than typical with transfers in/out of bed and transfers on/off chair ("slower than usual due to foot"). The physician reports

that the appellant requires periodic assistance from another person with doing laundry and basic housekeeping with no explanation or description provided. The assessor indicates that the appellant is independent with most tasks of shopping, including reading prices and labels, making appropriate choices, and paying for purchases, while requiring continuous assistance from another person with going to and from stores ("someone needs to drive him") and carrying purchases home ("cannot carry because he is limited in the amount he can carry"). Further, the physician reports that the appellant is independent with all of the tasks of managing meals, including meal planning, food preparation, cooking and safe storage of food. The physician indicates that the appellant is independent with all tasks of paying rent and bills (including banking and budgeting), managing medications (filling/refilling prescriptions, taking as directed and safe handling and storage) and transportation, while taking significantly longer than typical with getting in and out of a vehicle, with a note that the appellant "...takes longer to do most things due to his limitation in movement." The physician has not completed the sections of the report for an appellant with an identified mental impairment or brain injury, namely the assessment of impacts to cognitive and emotional functioning and to social functioning.

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 he does not have a severe mental or physical impairment that, in the opinion of a medical practitioner is likely to continue for 2 years, and that his 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 as follows:

Persons with disabilities

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).

Section 2(1)(a) of the EAPWDR defines DLA for a person who has a severe physical or mental impairment as follows:

Definitions for Act

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;

ATTACH EXTRA PAGES IF NECESSARY

- (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 ministry argues that the evidence does not show that the appellant's impairment is likely, in the opinion of a medical practitioner, to continue for at least two years. The ministry points out that in the original PWD application the appellant's physician reports that the estimated duration of his impairment is not likely to continue for two years or more. The ministry argues that the physician reports that the estimated duration of the appellant's impairments and the remedial treatments that may resolve or minimize the impairment are "...several months, depending on blood sugar control/ wound healing." The ministry argues that the additional information provided by the appellant's physician indicates that the appellant's foot should heal but that diabetes will be a lifelong condition. The ministry argues that the appellant's functional abilities and ability to manage DLA are based mainly on the appellant's foot impairment rather than his diabetic condition; although the diabetic condition may continue, the ministry questions whether the appellant's foot impairment will continue for two or more years. The appellant argues that the Question form dated May 8, 2012 includes a question to the physician whether his conditions are likely to continue for two years or more, and the physician agrees.

The panel finds that the two conditions diagnosed in the physician report are diabetes and amputations and the physician has also confirmed that the appellant has a "diabetic foot" and that the amputations are a result of his diabetes. The physician indicates that the impairment is not likely to continue for two years or more ("several months") and with respect to whether there are remedial treatments that may resolve or minimize the impairment, the physician notes "...depending on blood sugar control/ wound healing." The physician agrees in the May 8, 2012 form that the appellant had his amputation surgery one year ago and that his foot has still not healed due to a combination of where [the wound] is and his diabetes. In responses to the question whether the appellant's conditions are likely to continue for two years or more from today, the physician agrees and provides comments that "...the patient has diabetes which would continue lifelong, although his foot should heal." The panel finds that the evidence of the medical practitioner confirms that the appellant's diabetes is a lifelong condition and that there have been complications due to this condition, namely a diabetic foot, for which the resulting amputation of two toes is permanent but the amputation wound, which is causing the main impacts to functioning, is expected to heal within months. The panel finds that the ministry's determination that a medical practitioner has not confirmed that the appellant's impairment is likely to continue for two or more years is reasonable.

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 in the original PWD application that the appellant's ability to walk and climb stairs is unknown. The ministry argues that in the assessor report, the physician indicates that the appellant requires continuous assistance with climbing stairs however "uses elevator" does not explain why the appellant requires this level of assistance. The ministry points out that the physician reports that the appellant requires periodic assistance with lifting and carrying and holding, however in the functional assessment the physician indicates that the appellant has no limitation when it comes to lifting and the frequency and duration of help required with carrying and holding is unknown. The ministry argues that although the physician agrees, in the May 8, 2012 report, that the appellant states he is only able to walk less than one block unaided and is not able to climb any stairs at all without the use of a handrail or cane, these limitations have not been corroborated by a medical functional assessment by the physician. The

ministry points out that the physician agrees that the appellant can lift up to 20 lbs. and reports that the appellant should not have any limitations when it comes to lifting. The ministry argues that the functional skill limitations are more in keeping with a moderate degree of impairment and do not demonstrate an extraordinary functional limitation. The appellant argues that he has a severe physical impairment as a result of diabetes and amputations as a complication of diabetes. The appellant argues that his mobility has been an issue from the beginning and now he has been told to keep all pressure off his foot which means he only goes out for appointments. The appellant argues that walking is limited to a few steps required for simple daily functions within his home. The appellant points out that he has been informed recently that he is still at a high risk of losing his foot, that there is a possibility that there is another ulcer in his foot and he may have to use a wheelchair until the wound heals. The appellant points out that he sees his podiatrist every 6 weeks to have the wound cleaned, that the ball of his foot is not healing and that any pressure on it re-opens the wound.

The panel finds that the evidence of a medical practitioner has confirmed a diagnosis of diabetes and amputations. The physician adds a comment regarding the severity of the medical condition relevant to the appellant's impairment "...patient has diabetic foot for which he had two toes amputated in 2011; surgery was in May, however he is still struggling with wound healing." The physician reports that the appellant has not been prescribed medications or treatments that interfere with his ability to perform daily living activities (DLA) but he does require aids for his impairment, specifically "...he requires a foot prostheses to take some pressure off of pressure areas, in order to aid in wound healing; he also uses a cane." In the physician report, the physician indicates that it is unknown how far the appellant can walk unaided on a flat surface, how many steps he can climb unaided, or what his limitation is with lifting. In the assessor report, the physician indicates that the appellant uses an assistive device ("cane") and takes significantly longer than typical with walking indoors and walking outdoors, that he requires continuous assistance from another person with climbing stairs ("uses elevators"), takes significantly longer with standing ("limited time, 5-10 min."), and requires periodic assistance with lifting and carrying and holding.

In the additional Question form dated May 8, 2012, the physician agrees that the appellant states he is only able to walk less than one block unaided, noting "...patient told me the same, he says his foot becomes painful on walking with or without the cane." The physician agrees that the appellant states that he is unable to climb any stairs at all without the use of a handrail or his cane, and notes "...patient states that since he struggles to balance when climbing stairs due to not putting weight on the ball of his foot, he can't do stairs", and also agrees that the appellant states that he is able to lift up to 20 lbs. at one time, "...shouldn't be any limitation in lifting." The physician agrees that the appellant states that he is unable to carry any weight due to his mobility issues ("patient feels that he cannot balance and use of the cane at the same time.") In his Notice of Appeal, the appellant states that he has a foot wound that is not healing because he has no proper equipment since he cannot afford it, which would allow the foot to heal so he can walk again properly without an assistance device. The appellant stated that he has been told to keep all pressure off his foot and that he may need to use a wheelchair to do so to allow the wound to heal completely. The appellant also stated that he may have another diabetic ulcer on his foot and he has been told that there is still a high risk that he may lose his foot. The panel finds that the evidence currently available demonstrates that the appellant has experienced complications as a result of his diabetes and that the amputation wound has been slow to heal and has resulted in restrictions to the appellant's mobility and physical ability, however these restrictions are expected to be temporary and necessary in order to allow the wound to heal completely. The panel finds that there was no evidence presented that the amputations, as opposed to the wound from surgery, have resulted in impacts to the appellant's functioning, and it is currently unknown whether the appellant will be experiencing further complications from his diabetes. 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 show that the appellant has a severe mental impairment. The ministry argues that the appellant's physician indicates that the appellant does not have a significant deficit in his cognitive and emotional functioning. The appellant did not argue that he has a severe mental impairment.

The panel finds that the evidence of a medical practitioner does not confirm a diagnosis of a mental disorder. The physician indicates that the appellant has no significant deficits with cognitive and emotional function. The physician has not completed the sections of the assessor report for an appellant with an identified mental impairment or brain injury, namely the assessment of impacts to cognitive and emotional functioning and to social functioning. The panel finds that the ministry's decision, which concluded that the evidence does not establish a severe mental impairment, was reasonable.

The ministry argues that the evidence does not establish 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. The ministry points out that the appellant's physician indicates that the appellant is not restricted in his ability to manage the majority of his DLA. The ministry argues that although the physician indicates that the appellant requires periodic assistance with basic housekeeping, the frequency and duration of this assistance has not been documented. The ministry points out that in the additional information provided, the physician disagrees that the appellant requires continuous assistance or he is unable to do laundry, go to and from stores, use public transit and transportation. The ministry acknowledges that the appellant is restricted in his ability to shop as he requires assistance for carrying purchases home, this limitation in and of itself does not indicate a significant restriction to the appellant's ability to manage his DLA. The appellant argues that the evidence of his family physician establishes that he is directly and significantly restricted in his ability to perform his DLA, either continuously or periodically for extended periods of time. The appellant provided a copy of the court decision in *Hudson v. EAAT* 2009 BCSC 1461 as authority for the position that there must be evidence from a prescribed professional indicating a direct and significant restriction on at least two DLA and that there is no statutory requirement that more than two DLA be restricted.

The panel finds that the legislation requires that the ministry must be satisfied that the opinion of a prescribed professional confirms that the appellant's ability to perform DLA is directly and significantly restricted either continuously or periodically for extended periods. In terms of preparing his own meals, the physician indicated in the physician report that the appellant is not restricted in the area of meal preparation and, in the assessor report, that the appellant is independent with all tasks, including meal planning, food preparation, cooking, and safe storage of food. The appellant stated at the hearing that he makes his own meals. For managing personal finances, the physician indicated, in the physician report, that the appellant is not restricted and, in the assessor report, that the appellant is independent with all tasks including banking, budgeting and paying rent and bills.

In terms of shopping for his personal needs, the physician indicated that the appellant is continuously restricted in this area and the physician comments "...he feels he cannot do the grocery shopping himself as this entails too much walking; he is limited as to what he can carry since he has to hold the cane in the one arm." In the assessor report, the physician indicates that the appellant requires continuous assistance with going to and from stores ("someone needs to drive him") and carrying purchases home ("cannot carry because he is limited in the amount he can carry") and is independent with the tasks of reading prices and labels, making appropriate choices, and paying for purchases. In the May 8, 2012 Question form, the appellant states that he is unable to carry any weight due to his mobility issues, and his physician agrees and notes "...patient feels that he cannot balance and use of the cane at the same time" and the appellant states that his in need of continuous assistance with going to and from store and the physician disagrees, but for carrying purchases home the physician agrees and comments "...due to his healing wound all his activities is (sic) limited". The panel finds that the physician has clarified that the appellant experiences difficulty with carrying due to his use of a cane, which is being used to facilitate the healing of his wound.

For use of public or personal transportation facilities, the physician indicates, in the physician report, that the appellant is not restricted in this area and, in the assessor report, that the appellant is independent with most tasks including using public transit, and using transit schedules and arranging transportation, while taking significantly longer than typical with getting in and out of a vehicle and using public transit. In the May 8, 2012 report, the physician disagrees with the appellant's statement that he is in need of continuous assistance or he

is unable to use public transit or transportation. With respect to performing housework to maintain the appellant's place of residence in an acceptable sanitary condition, the physician indicated, in the physician report, that the appellant is periodically restricted and, in the assessor report, that the appellant requires periodic assistance from another person with basic housekeeping, with no other explanation or description provided. In the May 8, 2012 report, the physician disagrees with the appellant's statement that he is in need of continuous assistance or he is unable to do his laundry.

For moving about indoors and outdoors, the physician reported that the appellant is not restricted with mobility inside the home but has unspecified restrictions with mobility outside the home. With respect to the degree of restriction, the physician notes "...due to the poor wound healing on the foot, patient experiences restriction as to how long and how far he can walk." Additional comments provided by the physician include that "...according to the patient he experiences difficulty ambulating due to [slow wound healing]; there is still healing wounds on his left foot which might take several weeks or months to completely heal." Regarding performing personal hygiene and self care, the physician indicated that the appellant is not restricted with personal self care and, in the assessor report, that the appellant is independent with all tasks, including dressing, grooming, bathing, toileting, feeding self, regulating diet, transfers in/out of bed and on/off chair ("slower than usual due to foot"). With respect to managing his personal medications, the physician has indicated that the appellant is not restricted and, in the assessor report, that the appellant is independent with all tasks, including filling/refilling prescriptions, taking as directed and safe handling and storage. In the May 8, 2012 report, the physician disagrees with the appellant's statement that he is in need of continuous assistance or he is unable to fill/refill prescriptions.

The panel finds that the appellant's physician reported that the appellant is not restricted in 7 out of 10 areas of DLA and noted, with respect to the degree of restriction, that "...due to the poor wound healing on the foot, patient experiences restriction as to how long and how far he can walk." The physician also assessed the appellant as independent with most of his DLA, or 23 out of a total of 28 tasks. The panel finds that the ministry reasonably determined that for the tasks that were assessed as requiring periodic assistance (laundry, basic housekeeping), there was not sufficient information to establish that the assistance is required for extended periods of time. The appellant points out that there is no statutory requirement that more than 2 DLA be restricted, however the panel finds that the ministry reasonably determined that the evidence does not establish a direct and significant restriction on a minimum of two DLA on either a continuous basis or periodically for extended periods of time. 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 and the appellant that he currently lives alone and receives assistance from his mother and that he uses a cane as an assistive device. As it has not been established that the ability to perform DLA is 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.