

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (the ministry) reconsideration decision of May 14, 2012, which found that the appellant did not meet three of five statutory requirements of section 2 of the *Employment and Assistance for Persons With Disabilities Act* (EAPWDA) for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that in the opinion of a medical practitioner 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 help as defined in section 2(3)(b) of the EAPWDA.

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

With the consent of the parties the appeal hearing was conducted as a written hearing in accordance with EAA s. 22(3)(b).

The information before the ministry at the time of reconsideration included the following:

- The appellant's application for designation as a PWD. The application included a self report (SR) signed by the appellant on June 6, 2011, a physician report (PR) signed by the appellant's physician and dated July 18, 2011, and an assessor report (AR) signed by the appellant's physician and dated October 11, 2011.
- A letter from the ministry to the appellant, dated March 7, 2012 advising the appellant that she had been found ineligible for designation as a PWD.
- The appellant's Request for Reconsideration form signed by the appellant on April 4, 2012.
- A supplementary medical opinion, signed by the appellant's physician on May 10, 2012 (the SMO1).

Information subsequently put before the appeal panel included the following:

- The Notice of Appeal dated May 28, 2012.
- A second supplementary medical opinion, signed by the appellant's physician on June 25, 2012 (the SMO2).
- An undated written submission prepared by the appellant's advocate, received by the Employment and Assistance Appeal Tribunal on July 20, 2012.

The SMO2 contains new information that supplies more detail on the medical conditions that were before the ministry at the time of reconsideration. The ministry did not object to introduction of this information. The panel has admitted the SMO2 as written testimony in support of the information and records that were before the ministry at the time of reconsideration in accordance with s. 22(4) of the EAA. The written submission received July 20, 2012 is accepted as argument.

In her SR the appellant described her disability as "chronic abdominal wall strain" and "lower back strain". She described the pain as continuous and said she can't stand or sit for long periods, and can't lift. The appellant now takes all day to do housework which used to take her less than 2 hours. Putting laundry into the washer and dryer is OK but taking clothes out of the machines and folding is more difficult. Preparing meals and doing dishes take longer because the appellant can't stand for long periods and she has to lean into the counter – her back starts to seize and her abdominal area tightens. The appellant takes over the counter medications for her back pain, but has to be careful not to take too much because she has to stay alert for her young son who sleep-walks. Her disability limits the play activities she used to engage in with her son. The appellant has difficulty shaving her legs while showering, either having to use "Neet" or having her roommate assist her. She has to use a cart for grocery shopping and her roommate or son carries the bags into the home. Her son's school is less than a 5 minute walk from home and when the appellant drops him off the pain is so

severe she has to sit in the park until she can continue home. She drives him to school most of the time. She is looking for a truck as she is having difficulty getting in and out of the car. The appellant says she is depressed, frustrated, and has mood swings. She doesn't always sleep through the night because of discomfort and pain. Her legs tend to go numb when her back seizes.

In the PR the appellant's physician indicated the appellant had been her patient for 26 years and that she'd seen the appellant 2 to 10 times in the past 12 months. The physician diagnosed the appellant with chronic back pain, using the diagnostic code for degenerative disc disease. She also diagnosed abdominal muscle strain. In response to the question "What is the estimated duration of the impairment and are there remedial treatments that may resolve or minimize the impairment?" the physician responded "uncertain". In the "additional comments" section of the PR she referred to osteoarthritis at C7 and mild disc bulge at L4-5. In the "health history" portion of the PR which asks the physician to indicate the severity of the medical conditions relevant to the impairment, the physician wrote that the appellant has chronic daily back pain and that she finds it hard to do her daily activities such as housework and has to take frequent rests. She is unable to do any lifting and is unable to ride her bike due to pain. In terms of functional skills the physician said the appellant can walk 2 to 4 blocks unaided, climb 5+ steps unaided, can lift 5 to 15 pounds, and can remain seated less than 1 hour. The physician indicated the appellant has no difficulties with communication. She reported the appellant as having significant deficits in 2 of 11 categories of cognitive and emotional function – emotional disturbance (e.g. depression, anxiety) and motivation (loss of initiative or interest). Regarding DLA, the physician indicated the appellant's impairment does directly restrict her ability to perform 4 of 9 activities. Personal self care and meal preparation are continuously restricted and "take a long time." Basic housework is continuously restricted with the comment "slow, can't lift." Daily shopping is continuously restricted with the comment "someone else has to carry the bags." The other 5 categories of DLA are unrestricted (management of medications, mobility inside the home, mobility outside the home, use of transportation, management of finances, social functioning). Regarding assistance required by the appellant, the physician indicated that the appellant requires no prostheses or aids, but she needs help from her roommate with housework, carrying groceries etc.

In the AR the physician described the appellant's ability to communicate as "good" in 4 of 4 categories. The appellant is described as needing assistance in 4 of 6 categories of "mobility and physical ability", requiring significantly longer than typical walking outdoors, the help of "rails" when climbing stairs, and "can't lift" with respect to lifting and carrying/holding. The physician noted no restrictions for walking indoors or standing. In terms of mental impairment the physician notes "no impact" in 11 of 14 categories of cognitive and emotional functioning. She indicates a "minimal" impact on bodily functions (commenting that bowel movements cause pain in her back), and "moderate" impact on emotions and motivation (commenting the appellant has depression due to difficulty managing with back pain and that she has poor motivation and is sleeping poorly). Regarding the appellant's ability to perform DLA, she is shown as being independent in 7 of 8 categories of personal care activities, with "bathing" taking significantly longer due to severe difficulties from the waist down. Basic housekeeping takes significantly longer than typical. The appellant is independent with respect to shopping except for carrying purchase home. She is independent with meals except for taking significantly longer than typical for food preparation. (The appellant has printed her own comments regarding meal preparation on this page of the AR, saying that she has to lean against the counter after about 20 minutes.) She is independent with paying rent and bills, and with managing medications. In terms of transportation she has difficulty getting in and out of a vehicle. The appellant is independent in terms of social functioning, having good functioning

with her immediate social network and marginal functioning in terms of extended social networks, her interactions being restricted due to back pain. In terms of assistance, the physician has indicated no use of assistive devices and that the appellant does not have an assistance animal.

The SMO1 and SMO2 are documents that appear to have been prepared by the appellant's advocate. They contain pre-printed "medical opinions" such as "It is my medical opinion that [the appellant] has severe medical conditions that are likely to continue for more than two years" and "[The appellant] is directly and significantly restricted in her ability to perform her daily living activities continuously as a result of the conditions noted above." There are boxes for the physician to "tick" and spaces for the physician to insert her own comments. There are inconsistencies among the PR, AR, and SMO1 and SMO2. For example with respect to mobility the PR indicates the activity is not restricted and the appellant can walk 2 to 4 blocks unaided, the AR indicates the appellant has difficulty getting in and out of her vehicle, the SMO1 indicates the appellant periodically walks with a cane, and that she doesn't use public transit but uses her truck because she has difficulty getting in and out of cars, and the SMO2 indicates the appellant is restricted to walking only 1 block (pre-printed) but uses a cane "if walking more than 1 block" (portion in quotes handwritten by physician). With respect to the motor activity category of cognitive and emotional function, the PR shows no significant deficit, the AR shows no impact, the SMO1 shows no restrictions, and the SMO2 shows "major impact". With respect to assistive devices, the PR indicates no aids or prostheses, the AR indicates no assistive devices, the SMO1 indicates periodic use of a cane, and the SMO2 indicates continuous assistance from a walking cane, back and abdominal braces, and grab bars for bathing, and use of a cart for laundry and groceries. In other material respects the SMO1 and SMO2 reflect the previous medical information.

In the panel's view the SMO1 and SMO2 are problematic. They contain pre-printed opinions which give the impression of "putting words in the mouth" of the physician. To the extent that there are inconsistencies between the SMO1 and SMO2 and the SR, PR and AR, those inconsistencies are not explained by the physician. The physician has provided no evidence by which the panel can determine whether the inconsistencies arise because the appellant's medical conditions are worsening, or whether the physician at first misapprehended the full extent of the appellant's restrictions, or because of some other factor. Accordingly, the panel has relied primarily on the SR, PR and AR, and has given little weight to the SMO1 and SMO2. The panel also has concerns with respect to the integrity of the AR since it is clear that the appellant has added some of her own narrative to the document. The panel has no way of knowing whether this information was added before or after the physician signed the document. This calls into question whether the rest of the information in the document is indeed the opinion of the physician or whether it is information inserted by the appellant. The panel has given the appellant the benefit of the doubt and made the assumption that the rest of the information in the AR was written by the physician.

The ministry relied on its reconsideration decision and did not submit any new evidence.

PART F – Reasons for Panel Decision

The issue on this appeal is whether the ministry's decision to deny the appellant designation as a PWD was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. In particular, was the ministry reasonable in determining that the appellant does not have a severe physical or mental impairment, and that in the opinion of a prescribed professional the appellant's impairments do not directly and significantly restrict her from performing DLA either continuously or for extended periods, and that as a result of those restrictions the appellant does not require help to perform DLA?

The relevant legislation is as follows:

EAPWDA:

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.

EAPWDR section 2(1):

2 (1) For the purposes of the Act and this regulation, "**daily living activities**" ,

(a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:

- (i) prepare own meals;
- (ii) manage personal finances;
- (iii) shop for personal needs;
- (iv) use public or personal transportation facilities;
- (v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
- (vi) move about indoors and outdoors;
- (vii) perform personal hygiene and self care;
- (viii) manage personal medication, and

(b) in relation to a person who has a severe mental impairment, includes the following activities:

- (i) make decisions about personal activities, care or finances;
- (ii) relate to, communicate or interact with others effectively.

(2) For the purposes of the Act, "**prescribed professional**" means a person who is authorized under an enactment to practice the profession of

- (a) medical practitioner,
- (b) registered psychologist,
- (c) registered nurse or registered psychiatric nurse,
- (d) occupational therapist,
- (e) physical therapist,
- (f) social worker,
- (g) chiropractor, or
- (h) nurse practitioner.

Severe Mental Impairment

The appellant has not expressly stated a position on whether she has a severe mental impairment.

The ministry's position, as set out in the reconsideration decision, is that while the physician has indicated significant deficits with emotional disturbances and motivation in the PR, the physician has described the impact on emotion and memory as moderate in the AR, with an additional minimal impact on bodily functions. The remainder of the cognitive and emotional functions show no impact. Accordingly, the ministry was not satisfied the appellant's condition constituted a severe mental impairment.

The panel notes that the physician has not diagnosed a mental condition. Those few impacts on mental functioning as have been identified by the physician arise in response to pain and frustration due to the appellant's physical condition and are described as minimal or moderate. EAPWDR s. 2(1)(b) identifies 2 DLA that are relevant specifically to a person with a severe mental impairment – "make decisions about personal activities, care or finances" and "relate to, communicate or interact with others effectively." The evidence shows that the appellant is independent with respect to decision-making, that she has no difficulty with communication, and that she is functional in terms of interacting with others. In consideration of the evidence, the panel finds that the ministry reasonably concluded that the appellant does not have a severe mental impairment.

Severe Physical Impairment

The appellant argues that significant additional information has been provided to show that the appellant does have a severe impairment. The evidence of her limitations on standing and sitting demonstrates a severe impairment. She also says that the restriction of not being able to lift more than 5 pounds limits one's ability to do housekeeping, cooking, shopping and laundry. The appellant notes that on each page of the SMO1 the physician has signed off on the medical opinion that the appellant has severe medical conditions. The appellant says that the ministry did not adequately explain why it did not address the SMO1 in assessing the appellant's impairment. The appellant also points to the physician's evidence in the PWD application - the "health history" portion of the PR (that the appellant has chronic daily back pain, she finds it hard to do her daily activities, she has to take frequent rests, she is unable to do any lifting and she is unable to ride her bike due to pain) and comments in the AR (that bowel movements cause pain in her back, she has depression due to difficulty managing back pain, she has poor motivation and is sleeping poorly). The appellant says that if the appellant's only way of accessing the bank, pharmacy and shopping is by walking or biking but she cannot complete her daily activities in either of those forms of action, the ministry has a responsibility to consider that in assessing the severity of the medical conditions. The appellant urges the panel to be guided by principles she argues are set out in *Hudson v. Employment and Assistance Appeal Tribunal*, 2009 BCSC 1461: a) there is no statutory requirement that more than 2 DLA be restricted; b) there is no statutory requirement for a restriction to be confirmed by both the physician and the assessor, and both the PR and AR need to be read together; c) the evidence of the physician and assessor must be read in their entirety and in a broad way; d) significant weight must be placed on the evidence of the appellant, unless there is a legitimate reason not to do so; e) any ambiguity in the interpretation of the legislation must be resolved in favour of the appellant; f) the legislation must be interpreted with a benevolent purpose in mind. The appellant also says that the word "may" must be construed as being empowering, and that the ministry is not interpreting the legislation in an empowering manner in harmony with the *Interpretation Act*. Finally, the appellant says that she has experienced difficulty in communicating to her physician the restrictions she experiences and the amount of assistance she requires. She asks that the panel consider her SR to understand the true nature of her disability.

The ministry's position as set out in the reconsideration decision is simply that it is not satisfied that the evidence establishes that the appellant has a severe physical impairment. The ministry referred to the evidence but did not provide an analysis to explain its conclusion.

It is clear that the appellant does have a physical impairment that imposes some limitations on her

ability to perform DLA, but it is also clear that she is able to perform most aspects of most DLA. In the PR the physician refers to a "mild" disc bulge. The physician has identified no treatment regime for the appellant's medical conditions. The appellant self-medicates at her discretion with over-the-counter analgesics. In the section of the PR where the physician is expected to provide a narrative description of the severity of the impairment, she has described chronic daily back pain, which makes it hard to do DLA and necessitating frequent rests. The appellant's ability to lift is limited to 5 pounds or less and she can't ride her bike. The AR indicates few impacts on the appellant's ability to function. The SR describes limitations to DLA that fall short of being "severe". Because of the concerns expressed previously by the panel regarding the weight to be given to the SMO1 and the SMO2, the panel finds that those documents do not add significantly to the appellant's position.

The appellant has argued that the appellant's transportation options with respect to bank, pharmacy and shopping are limited to walking and biking, both of which are restricted by her impairment, and that those limitations must be considered in assessing the severity of the appellant's impairment. The panel has considered those limitations but they must be considered in the context of all the evidence, and are not determinative on their own, particularly when on the appellant's evidence she is not limited just to walking or bicycling and is able to drive her own vehicle.

In the panel's view, the appellant's circumstances do not give rise to any ambiguity in the legislative language as suggested by the appellant.

Finally, the appellant seems to suggest that the word "may" in EAPWDA s. 2(2), which grants the minister the discretionary power to designate an applicant as a PWD, compels the ministry to exercise its discretion in favour of the appellant. Otherwise, the appellant seems to say, the ministry "is not interpreting the legislation in an empowering manner, in harmony with the *Interpretation Act*." In the panel's view, to construe "may" as "empowering" does not mean the ministry can ignore the plain meaning of the statutory language or the facts specific to the appellant's circumstances.

On balance, considering the evidence of the appellant and the physician (in her dual roles as medical practitioner and assessor), the panel concludes that the ministry's decision that the appellant does not have a severe physical impairment is reasonably supported by the evidence.

Direct and Significant Restrictions

The appellant's position is that the appellant's impairment directly and significantly restricts her ability to perform DLA. She periodically walks with a cane and is capable of minimal lifting or bending. She is limited in lifting and standing. The physician has signed every page of the SMO1 confirming that in her opinion the appellant is directly and significantly restricted in her ability to perform DLA. The appellant says that she has had difficulty communicating the extent of her restrictions to her physician.

The ministry's position is that the evidence does not demonstrate a severe mental or physical impairment that in the opinion of a prescribed professional significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods, and that accordingly the legislative criteria have not been met.

In the PR, the physician indicates that the appellant is unrestricted in 6 out of 10 DLA. She is restricted in personal self care and meal preparation ("takes a long time"), basic housework ("slow, can't lift"), and daily shopping ("someone else has to carry bags"). These restrictions are mirrored in the AR and SR. The AR provides more detail, showing that in terms of personal care the appellant experiences difficulty with 1 of 8 categories – bathing – from the waist down. With meal preparation, the appellant experiences difficulty with 1 of 4 categories – food preparation. With shopping, the appellant experiences difficulty with 1 of 5 categories – carrying purchases home. In the panel's view, assessing the totality of the evidence and the appellant's overall ability to function, it is difficult to assess the physician's opinion as confirming that any of these restrictions are "significant".

Given the appellant's high scores with respect to her ability to communicate, and the fact that she has a 20+ year relationship with her physician, it doesn't seem likely that failure to communicate is providing the physician with a skewed assessment of the appellant's restrictions.

Based on the evidence, the panel finds that the ministry reasonably concluded that this legislative criterion was not satisfied.

Help in Relation to DLA

The appellant's position is that the physician has confirmed that the appellant requires help with housekeeping and laundry.

The ministry's position is that it has not been established that DLA are significantly restricted, therefore it cannot be determined that significant help is required from other persons. Use of an assistive device such as a cane does not in itself establish a severe impairment.

Regarding the need for help with DLA, the legislation requires that the need for assistance must arise from direct and significant restrictions in the ability to perform DLA that are either continuous or periodic for extended periods in the opinion of a prescribed professional. The panel finds that the ministry reasonably determined that since it has not been established that DLA are directly and significantly restricted, it cannot be determined that help is required under section 2(2)(b)(ii) of the EAPWDA.

Conclusion

Having reviewed and considered all of the evidence and the relevant legislation, the panel finds that the ministry's decision declaring the appellant ineligible for PWD designation was reasonably supported by the evidence and therefore confirms the ministry's decision.