

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (the ministry) reconsideration decision dated December 20, 2012 which found that the appellant did not meet three of the five statutory requirements of Section 2 of the Employment and Assistance for Persons with Disabilities Act for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that her impairment is likely to continue for at least two years. However, the ministry was not satisfied that the evidence establishes that:

- the appellant has a severe physical or mental impairment;
- 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; and,
- 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.

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

At the hearing, the appellant consented to the attendance of an observer from the advocate's office.

The evidence before the ministry at the time of the reconsideration decision included the following:

- 1) Person With Disabilities (PWD) Application comprised of the applicant information dated August 15, 2012, and the physician report and assessor report completed by the appellant's family physician of 7 years, both dated July 30, 2012; and,
- 2) Request for Reconsideration- Reasons.

Diagnoses

The appellant has been diagnosed by her general practitioner with chronic migraines, chronic back pain (degenerative), fibromyalgia, hyperthyroidism, and anxiety disorder. The appellant also reports having rheumatoid arthritis, osteoporosis, insomnia, spina bifida (mild), sleep apnea, tennis elbow, and carpal tunnel though these conditions are not confirmed by a medical practitioner as likely to continue for at least 2 years, as required by the legislation.

Physical Impairment

- In the physician report, the general practitioner indicated that the appellant suffers from chronic subjective and objective pain (mostly related to severe monthly migraines and ongoing partially disabling chronic mechanical back pain); investigations confirmed degenerative (illegible) back disorder; she is impaired by this due to the affect that it has on her productivity and workability.
- For additional comments, the physician indicated that the appellant "...tries to be diligent with her management of work and lifestyle choices but are (sic) restricted in some areas due to the nature of her ailments and job requirements."
- Functional skills reported in the physician report indicated that the appellant can walk 4 or more blocks unaided, she can climb 5 or more steps unaided, she can lift 5 to 15 lbs. and she can remain seated for 1 to 2 hours.
- The physician reported that the appellant has not been prescribed any medications or treatments that interfere with her ability to perform her daily living activities (DLA) and she does not require any aids for her impairment.
- In the assessor report, the appellant is reported as independent with walking indoors and walking outdoors and with climbing stairs with no assessment provided for standing. The appellant takes significantly longer than typical with lifting and carrying and holding, with no comments added by the general practitioner.
- In her self-report included with the PWD application, the appellant stated that her day starts with unbelievable pain, that she forces herself to move to the couch or tub, that she then has a chance to loosen up and she has learned how to work through the pain. Her back spasms and her wrist throbs. She works 24 hours a week as a cashier. She has migraines that last a week or more and she feels nauseous yet she goes to work as she cannot afford a sick day. She has no idea when she will get a migraine. She does not know what a pain-free day is. Walking is a challenge most days.
- In her Request for Reconsideration, the appellant added that she can climb about 10 stairs before she needs to stop because the pain becomes unbearable. Her chronic back pain makes it hard for her to lift her feet enough to walk on uneven ground. To walk about 5 to 6 blocks, she trips at least 3 times and it takes her a minimum of 20 minutes to walk that distance on a good day and 40 minutes on a bad day because she needs to take breaks. She requires the use of a cane to aid with walking.
- She suffers from cyclical migraines and extreme hormonal migraines and she cannot do anything except lie in bed with her eyes covered. This occurs about 6 days out of every month.

Mental Impairment

- The general practitioner reported that the appellant has no difficulties with communication and has a good ability to communicate in all areas.
- In the physician report, a significant deficit is reported in 1 of 11 listed aspects of cognitive and emotional function in the area of emotional disturbance, with the comment "anxiety disorder." In the assessor report, this area is identified as having a major impact on the appellant's cognitive and emotional functioning. Additionally, a major impact is identified in the area of motivation, with minimal or no impacts identified for the remaining areas. No descriptive narrative is provided by the general practitioner.
- The general practitioner indicated that the appellant independently manages all 5 listed aspects of social functioning, including making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others, dealing appropriately with unexpected demands, and securing assistance from others. She has good functioning with both her immediate and extended social networks, with no support or supervision required.
- In her self-report, the appellant stated that her part-time job comes with a lot of stress due to unhappy customers. In her Request for Reconsideration, the appellant stated that she experiences a lot of anxiety, agitation, stress or depression. She has anxiety attacks about twice per month for a couple of hours.
- The appellant stated that she has difficulty making decisions and planning ahead, making rational or good choices, interacting with friends and family, establishing and maintaining relationships with people, asking for help when she needs it and being able to deal with unexpected demands.
- The appellant stated that she has difficulty understanding what others say to her because she does not pick up on body language since she is preoccupied with her back pain and migraine pain. She feels anxious or scared when speaking to other people.

DLA

- In the physician report, the general practitioner indicated that the appellant is restricted on a continuous basis with personal self care, meal preparation and basic housework with the comment "...depends on the degree of exacerbation of pain." There is no comment regarding the degree of restriction, and in response to the question regarding the assistance needed with DLA, the physician wrote "N/A", or not applicable. The general practitioner assessed the appellant as not restricted with management of medications, daily shopping, mobility inside and outside the home, use of transportation, management of finances and social functioning.
- In the assessor report, the general practitioner reported that 6 out of 8 listed tasks of the DLA personal care are performed independently without any noted restriction while the remaining two tasks (dressing and grooming) take significantly longer than typical to perform, with an explanation that "...if pain, equals bad."
- The appellant does not require periodic or continuous assistance from another person with any aspect of any of her DLA.
- All listed tasks for the DLA shopping, meals, paying rent and bills, medications, transportation and social functioning are managed independently with no noted restrictions.
- While the appellant independently does her laundry, she takes significantly longer than typical with basic housework, with the comment that "...if pain, equals bad."
- In her self-report, the appellant stated that when she does dishes, she gets a jabbing pain in her spine. When she cleans or cooks, her neck and back hurt and she finds it hard to breathe.
- In her Request for Reconsideration, the appellant stated that she has difficulty with her personal care routines as a result of her degenerative back condition and being too tired. When her back pain is bad, she cannot bend over and therefore cannot put her pants on. This happens at least 3 times per week and she is forced to take pain medication which she has been using for about 20 years. It takes her 3

to 5 times longer to get dressed. Preparing and eating meals is difficult because of her back pain and fibromyalgia and it takes her 4 times longer to perform tasks that require standing.

- The appellant stated that for keeping her home clean, tasks that require standing take 4 times longer, that it took 3 to 5 times longer to clean her floors and caused excruciating pain. She does the vacuuming but needs to take breaks, and she does not do tasks that require bending or reaching. It takes her significantly longer to do her laundry.
- The appellant stated that shopping is difficult, that she usually has her mother's assistance with carrying her groceries home. When she does not have assistance, it is difficult but she carries her groceries from the bus stop which is half a block from her residence.
- The appellant stated that she has difficulty with managing her personal finances due to her anxiety and depression. She is overwhelmed by budgeting because there is not enough money for many of her medications, including pain medication, and the other things she needs.

Need for Help

- The general practitioner reported that the appellant does not require an aid for her impairment, and does not need or use an assistive device.
- When asked to describe what assistance is necessary where none is available, the general practitioner wrote "...periodic help from Mom."
- The appellant stated in her Request for Reconsideration that she uses a cane for walking and receives assistance from her mother for shopping and transportation, and her parents with managing her finances. She also gets help from community agencies and health professionals and emotional support from her friends.

In her Notice of Appeal, the appellant expressed her intention to dispute the reconsideration decision.

Prior to the hearing, the appellant provided a letter dated December 19, 2012 from her physician which included the following :

- Asked whether the appellant has a severe physical or mental impairment, the physician wrote that she has chronic disabling migraines affecting quality of life, mechanical back pain affecting mobility and chronic pain due to rheumatoid arthritis.
- Asked if the appellant takes significantly longer than normal to perform many DLA, the physician agreed and commented that "...pain prevents her from doing tasks in an expedited fashion."
- The physician agreed that the appellant's ability to cope with the stresses of daily life, make appropriate decisions in a timely manner, and interact with other people is significantly restricted by her impairment and that "...pain causes underlying mood disorder with anxiety and reducing coping skills."
- Asked if the appellant's level of activity is significantly reduced, the physician responded "...yes, obviously noted previous, pain affecting mobility and activity and energy. The physician stated that the appellant is restricted in performing DLA "daily", or "ongoing."
- The physician agreed that the appellant's impairment significantly restricts her ability to perform a range of DLA continuously or periodically for extended periods and is "...exacerbated on days where she suffers from migraines" and "...medication prescribed will also affect alertness."
- In response to a question whether the physician can confirm that the appellant requires significant help or supervision with DLA, either by taking much longer than typical to complete routine tasks or needing other people or assistive devices for ongoing help and support, the physician wrote "...yes, confirmed."

The ministry did not object to the admissibility of the letter but pointed out that the ministry did not have this information before it when it made the reconsideration decision. The panel admitted the physician's letter, pursuant to Section 22(4) of the Employment and Assistance Act, as providing further detail relating to the appellant's diagnosed conditions and in support of information that was before the ministry on reconsideration.

At the hearing, the appellant provided the following oral evidence:

- The appellant stated that her migraines are a constant problem, that she gets no warning when she will get one but she tries not to take any days off work since she has no other source of income. If she is also throwing up, she will call in sick. During her migraines, she cannot take care of herself, she does not take a shower or do any housework, and she will lay in bed with her eyes covered. The affects are almost worse than her back issues because she has no idea when they will occur and it impacts her relationships as well. The appellant stated that she has a migraine today and that when the medications wear off, it will "hit" her.
- The appellant clarified that she gets hormonal migraines about 2 days before her period but she does not keep track of the timing of her period. She also gets migraines at other times and she has been referred to a neurologist to try to determine if there are dietary or stress triggers to these migraines. The appellant stated that she has also been followed by a rheumatologist for some time.
- The advocate stated that the appellant's evidence regarding her functional skills needs to be considered. The appellant stated that she has problems lifting her feet as a result of back pain, that she often trips and will do so even in a short 6 -block distance and it takes her 2 to 4 times longer to walk a short distance. The appellant is unable to carry a laundry basket, so although she can lift a certain amount of weight, she cannot carry the load anywhere.
- The advocate stated that the appellant's evidence regarding her ability to perform DLA also needs to be considered. The appellant stated that she avoids showering, for example, because of her degenerative back condition and pain. Basic housekeeping takes the appellant longer and some tasks are impossible for her to do.

The panel admitted the appellant's evidence, pursuant to Section 22(4) of the Employment and Assistance Act, as providing further detail of her diagnosed conditions and being in support of information that was before the ministry on reconsideration.

At the hearing, the ministry relied on its reconsideration decision.

PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry's decision, that the appellant is not eligible for designation as a person with disabilities (PWD) as she does not meet all the criteria in Section 2 of the EAPWDA, was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. The ministry found that the appellant does not have a severe mental or physical impairment and that her daily living activities (DLA) are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods and that, as a result of those restrictions, it could not be determined that the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

The criteria for being designated as a person with disabilities (PWD) are set out in Section 2 of the EAPWDA 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;
 - (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 Physical Impairment

The appellant's position is that a severe physical impairment is established by the evidence of her pain due to chronic migraines and back pain which persists despite taking pain medications and fatigue as a result of fibromyalgia and hyperthyroidism. The advocate argues that the evidence of the medical practitioner in the PWD application and the letter dated December 19, 2012, together with the appellant's evidence, establishes that the appellant has a severe physical impairment. The advocate argues that the court decision in *Hudson v. EAAT, 2009 BCSC1461* is authority for the position that the evidence must be read in its entirety and in a broad way and that significant weight must be placed on the evidence of the applicant, which does not require corroboration by the medical practitioner.

The ministry's position is that the information provided by the general practitioner indicates that the appellant is able to walk 4 or more blocks unaided, to climb 5 or more steps unaided, to lift 5 to 15 lbs. and to remain seated for 1 to 2 hours. Although the appellant stated that she suffers from fatigue and her day starts with "unbelievable pain" due to back spasms and migraines, she also stated that she has to move around to get ready for work and she works 24 hours per week as a cashier at a grocery store. The general practitioner indicated that the appellant takes significantly longer with lifting and carrying and the remainder of the appellant's mobility and physical abilities are independent. Although the ministry acknowledges that the appellant's impairments may impact her physical functioning, the available evidence is not sufficient to establish a severe physical impairment.

Panel Decision

The legislation clearly provides that the determination of severity of impairment is at the discretion of the minister, taking into account all of the evidence including that of the appellant. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a prescribed professional respecting the nature of the impairment and its impact on daily functioning.

The medical practitioner, the appellant's general practitioner of 7 years, has diagnosed the appellant with chronic migraines and back pain (degenerative), fibromyalgia and hyperthyroidism. The general practitioner described the appellant's pain as both subjective and objective and that it is mostly related to severe monthly migraines and ongoing partially disabling back pain. The appellant stated that she has been referred to specialists, including a neurologist and a rheumatologist, but no further reports were provided. The general practitioner indicated that the appellant is impaired by the pain due to the affect that it has on her productivity and workability. The appellant stated that she has migraines that last a week or more and she feels nauseous yet she goes to her part-time job of 24 hours per week as she cannot afford to take a sick day, that she has no other source of income. The appellant is assessed by the general practitioner as able to walk 4 or more blocks unaided and to climb 5 or more steps unaided and to lift 5 to 15 lbs., without the use of an assistive device or

the assistance of another person. The appellant stated that she can climb about 10 stairs before she needs to stop because the pain becomes unbearable, that her chronic back pain makes it hard for her to lift her feet enough to walk on uneven ground and to walk about 5 to 6 blocks takes her significantly longer than typical because she needs to take breaks. While the appellant also stated that she requires the use of a cane to aid with walking and that her physician has seen her with a cane, the general practitioner did not refer to the requirement for the use of a cane either in the PWD application or in his recent letter dated December 19, 2012. As well, in the assessor report, the general practitioner indicated that the appellant is independent with walking indoors and walking outdoors and with climbing stairs and that she takes significantly longer than typical with lifting and carrying and holding, with no comments added regarding how much longer this takes her. Asked whether the appellant has a severe physical impairment, the physician wrote in the December 19, 2012 letter that the appellant has chronic disabling migraines affecting her quality of life and mechanical back pain affecting mobility. The panel finds that the ministry reasonably determined that while the appellant's conditions affect her quality of life and mobility, the appellant's level of independent physical functioning does not establish that the appellant has a severe physical impairment as required under section 2(2) of the EAPWDA.

Severe Mental Impairment

The appellant's position is that a severe mental impairment is established by the general practitioner's diagnosis of anxiety disorder and evidence of her anxiety, agitation, stress or depression. The appellant argues that she has difficulty making decisions and planning ahead, making rational or good choices, interacting with friends and family, establishing and maintaining relationships with people, asking for help when she needs it and being able to deal with unexpected demands. The appellant also argues that she has difficulty understanding what others say to her because she does not pick up on body language since she is preoccupied with her back pain and migraine pain.

The ministry's position is that a severe mental impairment has not been established. The ministry relies on the evidence that the general practitioner reports a significant deficit in cognitive and emotional functioning in the area of emotional disturbance and indicates a major impact on daily functioning for emotion and motivation; however, there is a minimal or no impact to the remaining 12 areas of functioning. The ministry points out that the appellant has maintained a part-time job and that this is indicative of a relatively high level of social functioning. The ministry argues that there is insufficient information to establish a severe mental impairment.

Panel Decision

The panel finds that although a significant deficit is identified by the general practitioner in the area of emotional disturbance, which is assessed as having a major impact on the appellant's daily functioning, the only other major impact identified is in the area of motivation and there is no further explanation or description provided by the general practitioner. All other areas of cognitive and emotional functioning are assessed as having minimal or no impact from a mental impairment. The appellant stated that she experiences a lot of anxiety, agitation, stress or depression and that she has anxiety attacks about twice per month for a couple of hours. The appellant stated that she has difficulty making decisions, interacting with friends and family, establishing and maintaining relationships with people, asking for help when she needs it, and being able to deal with unexpected demands. However, the general practitioner assessed the appellant as independently able to manage all 5 listed aspects of social functioning and that she has good functioning with both immediate and extended social networks, with no support or supervision required. While the physician agreed in the December 19, 2012 letter with the statement that the appellant's ability to cope with the stresses of daily life, make appropriate decisions in a timely manner, and interact with other people is significantly restricted by her impairment, he also added a comment that "...pain causes underlying mood disorder with anxiety and reducing coping skills." The appellant stated that she has difficulty understanding what others say to her because she does not pick up on body language since she is preoccupied with her back pain and migraine pain. The panel finds that the evidence demonstrates that the appellant's anxiety is associated primarily to her experience of

pain from her physical conditions rather than to a mental impairment. For these reasons, the panel finds that the ministry reasonably determined that a severe mental impairment was not established under section 2(2) of the EAPWDA.

Restrictions in the ability to perform DLA

The appellant's position is that her physical and mental impairments directly and significantly restrict her ability to perform DLA to the point that she takes significantly longer than typical with various areas of DLA, including personal care, meal preparation, basic housekeeping and laundry, and that she requires assistance with carrying her purchases home when shopping and with managing her personal finances due to her anxiety and depression. The appellant's advocate argues that the evidence of the appellant's physician seen together with the appellant's evidence shows that the appellant's DLA are directly and significantly restricted either continuously or periodically for extended periods. The advocate argues that the court decision in *Hudson v. EAAT, 2009 BCSC1461* is authority for the position that there must be evidence from a prescribed professional indicating a direct and significant restriction on at least two DLA, that there is no statutory requirement that more than two DLA be restricted. The advocate argues that the physician indicated that the appellant is restricted in DLA in the areas of personal self-care, meal preparation, and basic housework, daily shopping, and social functioning (decision making and interacting with others).

The ministry's position is that the evidence of the prescribed professionals establishes that although some DLA are assessed as restricted on a continuous basis and some of the tasks of these DLA take longer to carry out, the majority of the aspects of DLA are still performed independently. The ministry points out that while the physician commented that the appellant receives periodic assistance from her mother, it is not clear what type of assistance is required or how often the appellant requires this assistance. The ministry argues that the physician indicates that the appellant is independent with all aspects of social functioning and that she has good functioning with her immediate and extended social networks.

Panel Decision

The evidence of a prescribed professional, the appellant's general practitioner, is that the appellant is not restricted with walking indoors and outdoors and she can independently manage distances of 4 or more blocks. The general practitioner reported that the appellant is restricted on a continuous basis in the areas of personal self care, meal preparation and basic housework and that she is not restricted in the balance of DLA. The general practitioner commented that the restriction depends on the degree of exacerbation of pain and goes on to assess the appellant as independent with the majority of the listed tasks for all DLA, or 25 out of a total 28 tasks. In the December 19, 2012 letter, the physician agreed with the statement that the appellant's impairment significantly restricts her ability to perform a range of DLA continuously or periodically for extended periods and added a comment that it is "...exacerbated on days where she suffers from migraines" and "...medication prescribed will also affect alertness." Asked if the appellant takes significantly longer than normal to perform many DLA, the physician agreed and commented that "...pain prevents her from doing tasks in an expedited fashion" and that this restriction is "daily", or "ongoing." In the assessor report, the general practitioner specified that the appellant takes significantly longer than typical with dressing, grooming and basic housekeeping, with the note that "...if pain, equals bad." However, the general practitioner did not assess the appellant as requiring periodic or continuous assistance from another person with any specific aspect of any DLA. While the general practitioner noted in the assessor report that the appellant requires periodic help from her mother, he did not specify the type of assistance required. The appellant stated that her mother helps her with transportation/ carrying purchases home from shopping and for assisting with managing her finances, but the appellant also attributed the need for assistance with budgeting to her limited financial resources and does not indicate that this assistance is required for extended periods of time. The panel concludes that the noted restrictions in the appellant's ability to perform some aspects of some DLA were reasonably viewed by the ministry as not constituting a direct and significant restriction of the appellant's ability to perform DLA and that, in the opinion of a prescribed professional, she remains independent with a majority

of the aspects of DLA, thereby not satisfying the legislative criterion of s. 2(2)(b)(i) of the EAPWDA.

Help to perform DLA

The appellant's position is that she requires the significant assistance of another person and the use of a cane as an assistive device to perform DLA.

The ministry's position is that because it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required.

Panel Decision

Section 2(2)(b)(ii) of the EAPWDA requires that, as a result of direct and significant restrictions in the ability to perform DLA, a person requires help to perform those activities. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

The evidence of the prescribed professional does not establish that the appellant requires assistance continuously or periodically for extended periods of time with any aspects of her DLA, and the panel also finds that the ministry reasonably determined that, as direct and significant restrictions in the appellant's ability to perform DLA have not been established, it cannot be determined that the appellant requires help to perform DLA as a result of those restrictions.

Conclusion

Having reviewed and considered all of the evidence and relevant legislation, the panel finds that the ministry's reconsideration decision which determined that the appellant was not eligible for PWD designation was reasonably supported by the evidence, and therefore confirms the decision.