

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (the ministry) reconsideration decision of April 23, 2013, 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 the appellant's 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; or that
- as a result of those restrictions, the appellant requires the significant help or supervision of another person, an assistive device, or the services of an assistance animal.

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

- A physician's report (PR) signed by the appellant's physician on October 12, 2012, and then subsequently amended by the physician on March 27, 2013 (the amended PR). The amended PR differs from the PR only to the extent that four DLA that were described in the PR as being unrestricted are shown as being restricted in the amended PR. In explanation for the amendment, the physician wrote that "Information was changed by myself as the question was not fully understood previously."
- An assessor's report (AR) completed and signed by a physician who also happens to have been a friend of the appellant's family for approximately 27 years.
- The appellant's hand-written self-report, signed by her on December 19, 2012.
- A typewritten supplemental self-report submitted to the ministry on April 10, 2013.

Admissibility of New Information

During the appeal hearing the appellant provided oral testimony that included additional detail with respect to her diagnosed impairments, the impacts they have on her ability to perform DLA, and the assistance she requires. The ministry stated no position on admissibility of the new information. The panel has admitted this oral testimony as being in support of information and records that were before the ministry at the time of reconsideration, in accordance with s. 22(4) of the *Employment and Assistance Act*.

The ministry relied on its reconsideration decision and submitted no new information.

Physical Impairment

- The appellant is diagnosed in the amended PR as having oculocutaneous albinism, with visual acuity of 20/200. Related conditions are grade 3-4 iris transillumination, nystagmus and early nuclear sclerotic changes.
- The physician who completed the PR and amended PR was filling in for the appellant's regular physician. The appellant indicated he had not previously seen the appellant.
- The physician commented that the appellant "has very poor eyesight", and wrote that the appellant has been legally blind since birth and that the conditions "will never go away".
- In terms of functional skills the physician reported that the appellant can walk 4+ blocks unaided, climb 5+ stairs unaided, has no limitations in lifting and no limitations with respect to remaining seated.

Mental Impairment

- The physician diagnosed no mental impairment, and noted no significant deficits in cognitive and emotional function.
- In terms of functional skills the physician noted no difficulties in communication.
- The assessor noted "no impact" with respect to 14 out of 14 categories of cognitive and emotional functioning.
- The appellant is described by the assessor as having "good functioning" with respect to her

immediate and extended social networks.

- The appellant said that she can get frightened and anxious in unfamiliar places.
- At the appeal hearing the appellant, through her advocate, confirmed that the appellant's application is based on a physical impairment, and that "there is no mental impairment."

DLA

- In the PR, the physician indicated that the appellant's impairment directly restricted 2 of the appellant's DLA: *shopping* and *use of transportation*.
- In the amended PR the physician indicated that an additional 4 DLA are directly restricted by the appellant's impairment: *meal preparation, basic housework; moving about indoors and outdoors* (outdoor mobility being affected), and *management of finances*.
- In the AR the assessor indicated that the appellant independently manages all DLA except for *moving about indoors and outdoors* (outdoor mobility being affected), *shopping*, and *use of transportation*.
- In her self-report the appellant wrote that since birth her parents have helped her to adapt to a great degree in the home and with respect to personal care. She does many things by feel.
- The appellant's ten year-old daughter helps her with shopping by reading the signs, prices and ingredients.
- When walking outdoors and in unfamiliar environments the appellant's daughter provides guidance. The appellant generally uses a cane or a walking stick when walking outdoors.
- The appellant wrote that she can read and write if she uses her 6 power reading glasses and a strong magnifier.
- Also in the supplemental self-report the appellant noted that she experiences anxiety and fear of falling in unfamiliar places, she cannot read fine print, she cannot go outside in an unfamiliar place by herself without tripping or falling, she cannot shop on her own, and she cannot complete most activities that require dexterity.
- During oral testimony the appellant said that she has to hold written material within 5 or 6 inches of her eyes to be able to read. She said that she had ordered her powerful reading glasses online and that her eye doctor has told her there is nothing he can do to help her see better.
- In response to a question, the appellant said that she reads a large print bible and devotional books, and that she occasionally writes letters to friends. In response to a question as to when she cannot read and needs assistance to do so, the appellant gave the example of being in a store without her magnifying glass. The appellant said that she can generally read bills, but that if she can't she takes them to the bank and has the teller read and pay the bills.
- In response to a question the appellant said that she generally relies on her daughter to read prices and labels to her in the store if they are down too low to read or if she doesn't have her magnifying glass with her.
- The appellant said that she relies entirely on family members - primarily her father - for transportation, as there is no public transportation in their rural area. When the appellant lived in an urban area she was unable to use public transportation because she couldn't see the bus identifiers and she found it frightening.

Help with DLA

- In the amended PR the physician noted indicated that the appellant does not need any

prostheses or aids for her impairment.

- In the AR the assessor indicated that the appellant receives assistance for her DLA from family members, and that she uses a cane, walking stick, magnifying glass, and glasses.
- The appellant does not have an assistance animal.
- In the supplemental self-report, which was prepared by the advocate on the basis of the appellant's input, the appellant said that she requires assistance with aspects of meal preparation, taking medication, shopping, moving about indoors and outdoors, using transportation, and managing her finances.
- Also in her supplemental self-report, the appellant stated that she needs help from community agencies, friends and family.
- In response to a question as to how she manages when her daughter is in school, the appellant said that her daughter is home-schooled so is almost always available to assist her. She said that she had gone shopping on 1 or 2 occasions and left her daughter in the car, but that when she goes in the store with her father or her sister they "leave [her] alone to find [her] own way around the store."

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 periodically 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 Physical Impairment

The appellant's position is that when read as a whole, the evidence supports her contention that her physical impairment is severe. She argues that the ministry failed to read the evidence objectively and comprehensively, and incorrectly focused on what it perceived to be inconsistencies in the evidence. As examples, the appellant said that the ministry had mistakenly assumed that by amending the PR, the physician was indicating an unexplained change in the appellant's condition rather than acknowledging the physician's express explanation that he had originally misunderstood the question he was to answer. The appellant also stated that the ministry mistakenly assumed that the appellant had completed the supplemental self-report independently, when in fact it was prepared by the appellant's advocate with input from the appellant. As a third example of the ministry's misreading of the evidence, the appellant said that the ministry did not understand why the appellant

has to use a cane since the physician reported no functional limitations. She said that the ministry failed to consider all aspects of the application and to give the benefit of the doubt to the appellant when reviewing the medical evidence. Finally, the appellant argued that "if there is any debate in the interpretation of the [legislation], then [the ministry] must side with the applicant."

The ministry's position is that there is not enough evidence to establish a severe physical impairment.

Panel Decision

The legislation makes it clear that the determination of severity is at the discretion of the ministry – the ministry must be "satisfied" that the statutory criteria for granting PWD designation are fulfilled. In making its determination the ministry must consider all the relevant evidence, including that of the appellant. While the legislation is clear that the fundamental basis for the analysis is the evidence from prescribed professionals, in exercising its decision-making power the ministry cannot merely defer to the opinion of the professionals with respect to whether the statutory requirements are met as that approach would amount to an improper fettering of discretion. The professional evidence has to be weighed and assessed like any other evidence.

In the appellant's case, the PR was filled out by a physician whose knowledge of the appellant was limited because he was not her regular physician. The assessor who completed the AR was a physician who had known the appellant for many years, though the appellant was not her patient. Because of the long term nature of the relationship, where the evidence in the PR is inconsistent with that in the AR, the panel has tended to give more weight to the AR.

The appellant's argument - that "any debate" about the interpretation of the legislation means that the ministry "must side with the [appellant]" - cannot stand. Merely because arguments ascribing different meanings to legislation can be raised doesn't mean that the legislation is ambiguous and has to be interpreted in favour of the appellant. As the court said in *Bell ExpressVu Partnership vs. Rex*, [2002]S.C.R. 559, 2003 SCC 42, (para. 30), "...it is not appropriate to take as one's starting point the premise that differing interpretations reveal an ambiguity." Legislation can only be said to be ambiguous if, after the application of the principles of statutory interpretation, it can still fairly be said that the legislation is capable of bearing two or more equally valid but conflicting meanings.

Because the term "severe" is not defined in the PWD legislation, it has to be determined within the context of the legislative scheme. The diagnosis of a medical condition is not itself determinative of a severe impairment. One person with, say, diabetes may be significantly restricted from being able to manage DLA independently, while another person with diabetes may be entirely unrestricted. Accordingly, to assess the severity of an impairment one must consider the nature of the impairment and its impact on the appellant's ability to manage her DLA as evidenced by functional skill limitations, the restrictions to DLA, and the degree of independence in performing DLA. The ministry describes this approach well when it defines the word "impairment" in the PR form as being "*a loss or abnormality of psychological, anatomical or physiological structure or function causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration.*" Of course, this definition is not set out in legislation and is not binding on the panel, but in the panel's view it quite appropriately describes the legislative intent.

It appears that in making its reconsideration decision the ministry misunderstood the physician's

amendment to the PR as representing an unexplained change to the appellant's physical condition, and the ministry also failed to understand that the appellant's use of a cane was necessitated by her poor eyesight, not by any problem with her ability to walk *per se*. Despite these misunderstandings by the ministry, however, in the appellant's case there appear to be no limitations to her functional skills except for her ability to walk unaided outdoors. In that situation her eyesight limits her to walking with a cane, walking stick, or with the guidance of her daughter. As discussed in more detail in the following section of this decision, the limitations resulting from her impairment do not appear to have translated into significant restrictions on the appellant's ability to manage her DLA independently. Accordingly, the panel has concluded that the ministry reasonably determined that there is insufficient evidence to establish that the appellant has a severe physical impairment.

Severe Mental Impairment

The appellant did not advance an argument with respect to mental impairment, and acknowledged that "there is no mental impairment."

The ministry's position is that there is not enough evidence to establish a severe mental impairment.

Panel Decision

Neither the PR nor the AR provides any evidence of a mental impairment. Though the appellant can feel a degree of anxiety when alone in an unfamiliar environment, in the circumstances the panel concludes that the ministry reasonably determined that the evidence does not establish that the appellant has a severe mental impairment.

Restrictions to DLA

The appellant argues, on the basis of the judgement in *Hudson v. British Columbia (Employment and Assistance Appeal Tribunal)*, 2009 BCSC 1461, that restrictions to any 2 DLA will satisfy this legislative criterion. Her position is that since the physician identified continuous restrictions to 6 DLA, the appellant has established that her impairment does significantly restrict her ability to manage her DLA.

The ministry's position is simply that the physician and the assessor have not provided enough information to determine that the appellant's impairments directly and significantly restrict her ability to manage her DLA continuously or periodically for extended periods.

Panel Decision

As explained above, where the evidence of the amended PR and the AR conflict, the panel has generally given more weight to the AR. In the PR the physician originally identified direct and continuous restrictions to 2 of the 10 prescribed DLA – *shopping and use of transportation*. Subsequently, on being revisited by the appellant and stating that he had misunderstood what the PR was asking, the physician amended the PR to indicate direct and continuous restrictions to the 4 additional DLA of *meal preparation, basic housework, moving about indoors or outdoors* (mobility outside the home being affected), and *management of finances*.

The AR breaks these DLA down into component activities, which allows the assessor to provide more detail with respect to restrictions. The assessor noted continuous restrictions to aspects of 2 DLA – *moving about indoors and outdoors* (mobility outdoors being affected) and *shopping*. The assessor also noted restrictions to 2 aspects of *use of transportation* in that the appellant takes significantly longer than typical.

The amended PR and the AR are consistent with each other in showing the appellant independently manages her *self-care*.

With respect to *management of medications* the amended PR indicates the appellant is independent, while the AR the assessor has written "N/A", presumably because the appellant is not currently on any medications. In her supplemental self-report the appellant wrote that she needs assistance to read labels on medications. This, however, is inconsistent with her evidence that she can read with the assistance of her reading glasses or magnifying glass.

With respect to *moving about indoors and outdoors*, the evidence indicates that though the appellant is at risk of falling over items left out of place on the floor, she is generally independent with respect to mobility inside her home. Outside the home she relies on a cane/walking stick and/or the assistance of her daughter to avoid falls and obstacles.

Regarding *meal preparation*, the assessor indicates the appellant is independent. The appellant wrote in the supplemental self-report that she needs assistance to read labels and recipes.

Regarding *basic housework*, the assessor indicates the appellant is independent. The appellant wrote that she has difficulty performing these tasks alone but that she has been able to organize her home so that she knows where everything is.

Regarding *shopping*, the assessor describes the appellant as requiring continuous assistance in all aspects. There is no narrative to explain, however, why the appellant requires assistance making appropriate choices or paying for purchases.

With respect to *management of finances* (pay rent and bills), the assessor indicates the appellant is independent, though she uses a magnifying glass.

With respect to the *use of transportation*, it's clear that the appellant cannot drive her own transportation, but she is capable of arranging transportation with her family members.

Weighing the evidence as a whole, it's apparent that the appellant is directly restricted in aspects of a number of DLA, but that the restrictions can only be said to be significant and continuous in respect of the outdoors aspect of *moving about indoors and outdoors*, and in aspects of *shopping*. On this analysis, the panel concludes that the ministry reasonably determined that there is insufficient evidence to establish that the appellant is significantly restricted from managing her DLA either continuously or periodically for extended periods.

Help with DLA

The appellant argues that common sense would dictate that an individual with the appellant's limitations would require "significant" help, even if she is not currently receiving it. Her position is that, reading the evidence in its totality, she satisfies this legislative criterion.

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

Panel Decision

The panel notes that there may be situations in which a person may "require" help but not be receiving it. In the panel's view the word "require" indicates a degree of necessity so that it is something that a person cannot reasonably do without. If the person does not get the help she requires, the DLA goes undone either continuously or periodically for extended periods.

It is clear that the appellant receives assistance from her daughter with some aspects of many DLA. However, in the panel's view, the evidence viewed as a whole indicates that it is the appellant who substantially performs the DLA and that other than perhaps walking outdoors and transporting herself shopping, the appellant is capable of performing virtually all DLA independently. The evidence simply doesn't show that the assistance the appellant receives from her daughter constitutes "the significant help or supervision of another person" that is required by s. 2(3)(b)(ii) of the EAPWDA. The appellant's use of a cane/walking stick and reading glasses/magnifying glass is not sufficient to fulfill this legislative criterion.

The appellant does not use an assistance animal.

The panel finds that the ministry reasonably concluded that as it has not been established that DLA are significantly restricted, it could not be determined that the appellant requires help with DLA as defined by s. 2(3)(b) of the EAPWDA.

Conclusion

The panel acknowledges that the appellant's medical condition affects her ability to function. However, 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 is reasonably supported by the evidence and is a reasonable application of the legislation in the circumstances of the appellant. The panel therefore confirms the ministry's decision.