

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated July 9, 2013 which found that the appellant did not meet all of the 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 the appellant has an impairment which was likely to continue for at least two or more years. However, the ministry was not satisfied as follows:

- That the evidence establishes that the appellant has a severe physical or mental impairment;
- 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; and
- 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, 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 copies of the following:

1. Person With Disabilities (PWD) Application: applicant self-report ("SR") dated February 15, 2013, physician report ("PR") dated February 15, 2013 and assessor report ("AR") which is undated;
2. A January 22, 2013 letter prepared by the Appellant's mother;
3. A one-page report dated January 2, 2013 and prepared by the Appellant's physiotherapist ("the Physiotherapist report");
4. A two-page report dated February 4, 2013 and prepared by the Appellant's chiropractor ("the Chiropractor report");
5. A two-page "Pain Chart for PWD" dated December 2, 2012, prepared by an advocacy organization and completed by the Appellant;
6. A four-page "Daily Living Activities for PWD" form dated December 2, 2012, prepared by an advocacy organization and completed by the Appellant;
7. A two-page undated "Musculoskeletal Outcome Measures" form;
8. A letter from the Ministry addressed to the Appellant dated May 8, 2013 enclosing a PWD Designation Decision Summary of the same date; and
9. The appellant's Request for Reconsideration dated June 11, 2013 ("RFR") attaching the following:
 - a. A two-page written submission prepared by the Appellant's advocate;
 - b. The Chiropractor report;
 - c. The January 22, 2013 letter prepared by the Appellant's mother; and
 - d. A one page summary of *Hudson v. Employment and Assistance Appeal Tribunal*, (2009) BCSC 1461

In her Notice of Appeal dated July 15, 2013, the appellant submits that the ministry has not given any consideration to her evidence as described by the assessor in her original application.

At the beginning of the hearing, the appellant sought to have admitted into evidence three additional documents as follows:

1. A Medical Expense Report covering the period of January 1, 2013 through July 29, 2013 setting out various medications that the appellant has been prescribed;
2. A handwritten summary describing what each of the medications are intended to treat and describing the appellant's relationship with a psychiatrist; and
3. A diagram setting entitled "Comorbid Symptoms and Syndromes" which indicates various symptoms and syndromes and the area of the body that they are associated with.

The appellant seeks to have these documents admitted on the basis that they are in support of information that was before the ministry when the reconsideration decision was made. In particular, the appellant says that the medical records that were considered by the ministry at reconsideration reference a need for medication to manage pain which is secondary to her fibromyalgia and irritable bowel disorder and for her depression and that these three documents demonstrate the medications required and the specific ailments they are intended to treat. In response, the ministry consented to the admission of the three documents.

After consideration of the submissions of both parties, the panel admits each of the three documents into evidence insofar as they are in support of the information and records that were before the minister at reconsideration pursuant to section 22(4)(b) of the *Employment and Assistance Act*. The Panel finds that each of the records relates to medication that has been prescribed to the appellant for medical conditions referred to in the PWD application and as such is in support of the information and records before the minister at reconsideration.

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

Physical Impairment

While the appellant has dated and signed the SR, there are no further comments other than the appellant's direction to "Please See attached." It is not clear what was attached to the SR.

In the PR, the appellant's physician ("the physician") has diagnosed the appellant as suffering from Fibromyalgia with date of onset being 2008, Irritable Bowel Disorder with date of onset being 2008 and Degenerative Disc Disease in her Cervical spine with date of onset being 2012. The physician notes that the appellant is 5' 5 ½" and 140 lbs, that she has been prescribed no medication and/or treatments that interfere with her ability to perform DLA and that she requires no prostheses or aids for her impairment. The physician states that the appellant's impairment is likely to continue for 2 years or more. With respect to functional skills, the physician notes that the appellant is able to walk more than 4 blocks unaided, climb more than 5 steps unaided, lift 5 to 15 pounds, and that she can remain seated for less than an hour.

In the AR, the Social Worker ("SW") reports that the appellant lives with a roommate and comments that she has severe ongoing fibromyalgia and degenerative disc disease, that she has had two serious motor vehicle accidents with injuries and shoulder surgery that did not heal properly. The SW notes that the appellant's ability to communicate in speaking, reading, writing and hearing are all listed as satisfactory and she comments that the appellant has ulcers in her lower digestive tract. The SW indicates that the appellant requires periodic assistance with walking indoors and outdoors and climbing stairs and she comments that she is fairly able some days and basically bedridden 3-4 days each week. The SW further notes that the appellant requires continuous assistance standing, lifting, carrying and holding and she comments that she can only stand for a maximum of 10 minutes due to her back, that she can only lift a maximum of 10lbs and struggles to lift a 10lb bag of sugar into a cart and that for carrying and holding she needs a cart and her mother helps her. The SW comments further that the appellant has generalized pain throughout her body and sharp pain in her back due to degenerative disc disease with resulting restrictions in standing, lifting and carrying.

In the Physiotherapist report, the appellant is described as suffering from "chronic pain due to FMS/MPS/DDD/OA". Under the heading "Progress", the physiotherapist has checked off "condition improving" and "return to work" and further comments that the appellant suffers from chronic pain with limitations in mobility, strength, stamina and activities of daily living.

In the Chiropractor report, the appellant is described as initially presenting in September 2007 with symptoms in her cervical, thoracic and upper extremity joints. The appellant's upper extremity symptoms are described as consisting of numbness, tingling, muscle weakness and sharp shooting pain into left shoulder and left elbow and right hand and wrist, deep boring muscle pain and swelling and inflammation in upper trapezoids and deltoid muscle. The appellant's cervical and thoracic symptoms are described as spinal segmental joint dysfunction at C5-C7, myospasm of adjacent offending musculature, sub occipitals, cervical paraspinals and anterior longitudinal ligaments bilaterally, spinal segmental joint dysfunction at T4-T6 and swelling and inflammation in her thoracic spine.

The chiropractor goes on to describe the appellant's condition at her most recent physical examination as including decreased joint mobility in her cervical and thoracic spine, hypersensitivity and palpatory tenderness in several soft tissue areas in the mid and upper thoracic spine, decreased deep tendon reflex in her upper extremity, muscle weakness in her upper extremity, atrophy of the upper extremity musculature and instability in her cervical and thoracic spine.

The chiropractor comments that the appellant responds well to chiropractic treatments but is never symptom free and that she lives with moderate to severe pain for which she is receiving treatment. The appellant is noted as having fibromyalgia symptoms and degenerative disc disease.

The appellant stated that when she wakes up in the morning, everything hurts and that due to her fibromyalgia, every joint is in pain. The appellant confirmed that the information in the AR is true and accurate.

In response to a question, the appellant stated that she was not present with her family physician when he completed the PR and as a result she does not consider the PR to accurately reflect her physical or mental condition.

The ministry representative relied on the reconsideration decision and stated that in the PR, the physician does not describe the severity of the medical conditions relevant to the appellant's impairment and that the functional skills do not reflect a severe impairment. The ministry representative referred to the Chiropractor report which states that the appellant is responding well to treatment and to the Physiotherapy report which indicates that the appellant's condition is improving.

In response to a question, the ministry representative stated that the AR does not outweigh the PR because the physician has known the appellant longer than the SW. The ministry representative went on to state that as there is no indication in the PR as to how the medical conditions impair the appellant's function, there is insufficient evidence of severe physical impairment.

Mental Impairment

In the PR, the physician has diagnosed the appellant with depression with onset in 1996 and he indicates that while the appellant has no difficulties with communication, she has significant deficits with cognitive and emotional function in the areas of emotional disturbance and attention or sustained concentration.

In the AR, for section 4, cognitive and emotional functioning, where asked to complete for an applicant with an identified mental impairment or brain injury, the SW assesses the degree that the appellant's mental impairment restricts or impacts daily functioning as follows:

- Major impact on bodily functions (sleep disturbance, insomnia and sleep apnea are highlighted), emotion (depression is underlined), insight and judgment ("overestimates abilities and health" is added), attention/concentration ("forgets appointments" is added), executive, motivation ("loss of interest" is highlighted) and other emotional or mental problems with the comment added "suicidal ideation."
- Moderate impact on consciousness and motor activity.
- Minimal impact on impulse control and memory.
- No impact on language, psychotic symptoms or other neuropsychological problems.

The SW comments further that the appellant is under the care of a psychiatrist for fibromyalgia, sleep disorder and severe depression. The SW comments that the appellant was tearful during the assessment and that she described suicidal ideation, inability to absorb training due to frequent errors, suffering exhaustion and mental breakdowns and making mistakes on the job due to forgetting simple information and becoming disoriented.

The ministry representative stated that the PR only sets out a diagnosis with moderate cognitive impact which cannot be established as chronic or continuous and as such no severe mental impairment has been established.

DLA

In the PR, the physician has indicated that all of the appellant's DLA are restricted with Personal self-care, Mobility inside the home and Mobility outside the home being periodically restricted and 5 of the remaining 6 activities – Meal preparation, Management of medications, Basic housework, Daily Shopping and Management of finances - being continuously restricted.

In the AR, the SW comments that the appellant can't bend or stoop, can't pick things up off of the floor, does not have the energy to do so 4 out of 7 days and that her mother helps with most of the daily household tasks. The SW then makes the following assessments:

- Personal care: the appellant is independent with toileting and regulating her diet but requires periodic assistance with dressing, feeding herself and transfers in and out of bed and continuous assistance with grooming and bathing. The appellant is described as taking significantly longer with all aspects other than feeding herself and regulating her diet. The SW comments that with dressing, the appellant doesn't get up several days each week, with grooming and bathing she has no energy or motivation and does not do either 4 out of 7 days a week. The SW goes on to comment that the appellant is often too depressed to eat and is 10 times slower getting in and out of bed and can't a few days a week.
- Basic housekeeping: the appellant requires periodic assistance with laundry and continuous assistance with basic housekeeping. The SW comments that the appellant can't do laundry 4 days per week and that her mother helps with most of the housekeeping.
- Shopping: the appellant requires continuous assistance going to and from stores, making appropriate choices and carrying purchases home for which she uses a cart or the assistance of her mother. The SW comments that the appellant gets lost going to the store and requires help and she suffers from anxiety and panic attacks in stores.
- Meals: the appellant is noted as requiring continuous assistance with all aspects of meals aside from safe storage of food for which she is independent. The SW comments that over the last few years the appellant's ability to cook has been limited as she cannot chop safely, she forgets things on stoves, she can't stand at the sink and stove and she is not motivated.
- Pay rent and bills: the appellant is noted as requiring continuous assistance with all aspects and the SW notes that she forgets to pay bills and lacks the ability to focus and concentrate on this task.
- Medications: the appellant is noted as independent in safe handling and storage but requires periodic assistance with filling/refilling prescriptions and taking as directed and the SW comments that the appellant forgets and becomes confused often which is related to her depression symptoms.
- Transportation: the appellant is noted as requiring continuous assistance getting in and out of a vehicle, using public transit and using transit schedules and arranging transportation.
- Social functioning: the appellant is noted as independent in making appropriate social decisions but requires continuous support/supervision in developing/maintaining relationships, interacting appropriately with others, dealing appropriately with unexpected demands and securing assistance from others. The SW notes that the appellant is very withdrawn, panics easily, isolates, can't function and has no supports other than her mother.

The SW describes how the appellant's mental impairment impacts her relationships with both her immediate and extended social networks as very disrupted functioning and comments that the appellant left an abusive spouse recently and is now reliant on her mother for basic needs and that she is very isolated and not sure who to trust in her new community. The SW comments further that the support/supervision required by the appellant includes continued counseling and support and that she has suicidal ideation and dangerous isolation.

In the letter signed by the appellant's mother, she notes that the appellant is unable to vacuum, sweep floors, wash windows and handle her finances. The appellant's mother does the majority of the grocery shopping, cooking and dishes. The appellant's mother drives her to many medical and counseling appointments and to the hospital. The appellant's mother states that she isolates herself and that she has to be reminded to take medications and supplements. The appellant's mother provides emotional and mental support to her, frequently reminds her to eat and fears for her daughter's life.

In the Daily Living Activities for PWD form, the appellant is asked to mark the activities that she cannot do without help or activities that take her much longer than most people on her worst day. The appellant has

indicated that she cannot perform or takes much longer than most people in many aspects of meal preparation, shopping, eating, managing money and paying bills, housework, using transportation, moving around inside and outside her home, social skills, personal hygiene, taking medications, mental and emotional skills and communication.

At the hearing, the appellant stated that she lives with her mother and if she lived alone she couldn't cope. She stated that she doesn't cook for herself unless the food is ready-made and that trying to accomplish things is daunting.

In response to a question, the appellant stated that her mother does the cooking but that she can do some laundry. The appellant stated that for grocery shopping, she either goes with her mother or buys convenience store food that requires little preparation.

The appellant's mother was called as a witness and confirmed that the letter dated January 22, 2013 was hers and that the answers were her own.

A friend of the appellant's was called as a witness on her behalf and he stated that they had been friends for about 1 ½ years. They had lived close to each other and over the course of four months in 2012 he would help her with cutting firewood, he would take her to the hospital and he was of the opinion that she could not live on her own without the help of another person.

In response to a question, the appellant's friend stated that he helped the appellant with chores 4 – 5 days per week.

The ministry representative relied on the Reconsideration Decision and submitted that the evidence did not support a finding that the appellant needs continuous assistance or that her DLA are restricted continuously or that the appellant was periodically restricted for extended periods of time. The ministry representative commented that despite the physician's findings in the PR, there is no information with respect to frequency or duration or an explanation provided.

In response to a question, the ministry representative stated that the physician's finding that all of the appellant's DLA are restricted is not consistent with her functional skills as described by the physician in the PR.

In response to a question, the ministry representative confirmed that both the PR and the AR can be considered in determining the impact of the appellant's impairments on DLA but that there needs to be clarification as to the physician's findings with respect to her functional condition as set out in the PR.

Need for Help

In the PR, the physician makes no comment with respect to assistance needed by the appellant with DLA.

In the AR, the SW notes that the appellant lives with her mother and receives assistance from her and a few friends. The SW notes that the appellant requires ongoing counseling, community and home support should her mother no longer be able to care for her.

As referenced above, the appellant's friend who was called as a witness described helping her with chores 4 -5 days per week during 2012 and the appellant's mother gave evidence of having to help the appellant with many tasks of DLA.

The ministry representative relied on the Reconsideration Decision and stated that as it has not been established that the appellant's DLA are restricted continuously or periodically, there is no need for assistance.

PART F – Reasons for Panel Decision

The issue on the 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 mental or physical impairment;
- That the appellant's DLA's 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, the appellant does not require the significant help or supervision of another person, 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.

Severity of mental impairment:

The appellant takes the position that she has been diagnosed with, and is being treated by her physician for depression and that it constitutes a severe mental impairment.

The ministry takes the position that the information provided does not establish a severe mental impairment.

Panel Decision

The panel finds in the present case that the physician diagnosed the appellant with depression in 1996 and he has indicated that the appellant has significant deficits with cognitive and emotional function in the areas of emotional disturbance and attention or sustained concentration. In the AR, the SW has indicated that the appellant's mental impairment has a major impact on bodily functions, emotion, insight and judgment, attention/concentration, executive, motivation and other emotional or mental problems with the comment added "suicidal ideation." The SW also indicates that the appellant's mental impairment has a moderate impact on consciousness and motor activity, a minimal impact on impulse control and memory and no impact on language, psychotic symptoms or other neuropsychological problems.

Considering all of the evidence including the historical diagnosis and treatment of depression and the impact on the appellant's daily functioning as set out in the PR and the AR, the panel concludes that at the time of the reconsideration decision, the ministry was not reasonable in determining that the evidence does not establish that the appellant has a severe mental impairment under section 2(2) of the *EAPWDA*.

Severity of physical impairment

The appellant takes the position that she has been diagnosed with and is being treated by her physician for fibromyalgia, irritable bowel disorder and degenerative disc disease in her cervical spine and that her physical impairment arising out of those conditions is severe in nature.

The ministry takes the position that the information provided does not establish a severe physical impairment and that the evidence of the physician in the PR outweighs that of the SW as set out in the AR.

Panel Decision

In the PR, the appellant's physician does not indicate how long he has been her physician but that he has seen her between 2 and 10 times in the past 12 months. He indicates that functionally, the appellant can walk 4 or more blocks unaided, climb 5 or more steps unaided, lift 2 to 7 kg and remain seated for less than an hour. However, it was the evidence of the appellant that the physician did not undertake an in-person

interview with her in completing the PR and that it does not accurately reflect her physical condition.

The AR was completed by the SW who the appellant noted she had met with on three occasions over a couple of hours. The AR was confirmed by the appellant at the hearing as being a true and accurate description of her physical condition. The appellant is described in the AR as requiring periodic assistance walking indoors and outdoors and climbing stairs and continuous assistance standing, lifting, carrying and holding. The appellant gave evidence at the hearing that when she wakes up in the morning, everything hurts and that due to her fibromyalgia, every joint is in pain.

At the hearing, the ministry argued that the PR outweighs the AR because the physician has known the appellant longer than the SW who completed the AR. The ministry went on to argue that there is a discrepancy between the evidence in the PR and that in the AR with respect to functional skills and that the physician's findings outweigh everything else.

The ministry's position must be considered however in light of the totality of evidence relating to physical impairment particularly given the discrepancy it refers to between the PR and the AR. Specifically, the panel refers to the Chiropractor's report which was prepared by a chiropractor who has worked with the appellant since 2007. As of the most recent physical examination, the appellant presented with decreased joint mobility in her cervical and thoracic spine, hypersensitivity and palpatory tenderness in several soft tissue areas in the mid and upper thoracic spine, decreased deep tendon reflex in her upper extremity, muscle weakness in her upper extremity, atrophy of the upper extremity musculature and instability in her cervical and thoracic spine. The chiropractor also comments in the report that the appellant lives with a moderate to severe amount of pain and that she is never symptom free. This is consistent with the appellant's evidence at hearing and it is also consistent with the AR.

Considering all of the evidence, the panel places greater weight on the AR and the Chiropractor's report in describing the appellant's severity of her physical impairment given the detail provided by both and the consistency between them and the panel therefore concludes that at the time of the reconsideration decision, the ministry was not reasonable in determining that the evidence does not establish that the appellant has a severe physical impairment 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 all DLA to the point that she requires continuous assistance of others to perform DLA.

The ministry's position is that while the physician notes that each of the appellant's DLA are restricted, there is no description of the frequency or duration or assistance required and further, the physician's DLA findings are not consistent with his functional skills assessment and as such it cannot be established that the appellant's physical and mental impairments directly and significantly restrict her ability to perform DLA.

Panel Decision

The evidence of the physician in the PR is that 5 of the 7 listed DLA are continuously restricted and that the remaining two DLA are periodically restricted. While the physician has not provided additional comments regarding the degree of restriction, in the AR the SW notes that the appellant is either periodically or continuously restricted in 6 out of 8 personal care activities, all basic housekeeping and shopping activities, 3 out of 4 meal activities, all paying rent and bills activities, 2 out of 3 medications activities and all transportation activities. Further, the SW provides further comments including that the appellant does not get up several days each week, she lacks motivation in grooming, she is 10 times slower getting in and out of bed, she cannot vacuum, sweep or make the bed and that her mother maintains stability in the home by doing many household chores on a regular basis and without her mother's support, the appellant could not keep her share

of the household clean and functional.

The panel notes again the appellant's evidence that she disagrees with the functional skills assessment by the physician in the PR and the panel finds that the evidence of the SW in the AR is consistent with the evidence of the appellant and of her mother and friend, both of whom gave evidence at the hearing.

Based on the evidence, the panel concludes that the ministry was not reasonable in finding that the appellant's impairment does not directly and significantly restrict her ability to perform DLA, either continuously or periodically for extended periods under section 2(2)(b)(i) of the EAPWDA.

Help with DLA

The appellant's position is that she requires the significant assistance of another person, most notably her mother, to perform her DLA.

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

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. Section 2(3) of the EAPWDA provides that a person requires help in relation to a DLA if, in order to perform it, the person requires an assistive device, the significant help or supervision of another person, or the services of an assistance animal.

While the panel finds that the physician has not indicated the assistance that the appellant requires with DLA, the SW has noted in the AR that the appellant's mother helps with most daily household tasks and maintains stability in the home by doing many household chores on a regular basis. The SW states that without her mother's support the appellant could not keep her share of the household clean and functional. The SW comments further that the appellant receives assistance from a women's shelter and some friends.

The panel finds that the evidence of the prescribed professionals establishes that the appellant requires assistance continuously or periodically for extended periods of time with her DLA and as a result the panel finds that the ministry unreasonably determined that it cannot be determined that the appellant does not require help to perform DLA.

Conclusion

Having reviewed and considered all of the evidence and relevant legislation, the panel finds that the ministry's reconsideration which determined that the appellant was not eligible for PWD designation was an unreasonable application of the applicable enactment in the circumstances of the appellant, and therefore rescinds the decision.