

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision of April 30, 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 PWD application form consisting of a physician's report (PR) signed by the appellant's general practitioner (GP) on January 24, 2013; an assessor's report (AR) signed by the GP on February 1, 2013, and the appellant's hand-written self-report signed by the appellant on January 30, 2013.
- Letters reporting on various aspects of the appellant's hearing loss, including a letter from a specialist dated December 9, 2003; a letter from an audiologist dated February 23, 2004; a letter from a specialist dated January 12, 2004; and a letter from a specialist dated September 22, 2011.
- A written reconsideration submission dated April 24, 2013.

Admissibility of New Information

During the appeal hearing the appellant submitted three documents for consideration by the panel. The first was a written submission based on the judicial review decision in *Hudson v. Employment and Assistance Appeal Tribunal*, 2009 BCSC 1461. The second was a letter from the GP dated October 18, 2012 which, according to the appellant, was prepared in support of the appellant's application for Canada Pension Plan disability benefits. The third was a document setting out the Global Assessment of Functioning (GAF) Scale (the GAF scale). The appellant also provided oral evidence 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.

With respect to the documents, the panel accepted the first document as written argument. The ministry did not object to admission of the October 18, 2012 letter and the GAF scale, but noted that they were not before the ministry at the time of reconsideration. Since the October 18 letter provides more detail with respect to the appellant's impairment, and the GAF scale helps to explain the October 18 letter, the panel has admitted them as written testimony in support of information and records that were before the ministry at reconsideration, in accordance with s. 22(4) of the *Employment and Assistance Act* (EAA).

The appellant and her witness also provided oral evidence on appeal. This oral evidence provided additional detail regarding the appellant's impairments, the affects they have on the appellant's ability to manage DLA, and the nature of the assistance she receives. The ministry stated no position on admissibility of the new information. The panel has admitted this oral evidence 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 GP diagnosed the appellant with chronic, permanent bilateral hearing loss, a condition having "no cure".
- The GP indicated no limitations of the appellant's physical functional skills with respect to

walking unaided on a flat surface, climbing stairs, lifting, or remaining seated. He noted she has difficulties with communication due to her hearing loss.

- The September 22, 2011 specialist's letter explained that the appellant has severe-to-profound hearing loss after surgery in her right ear, with moderate hearing loss for lower frequencies to more severe hearing loss for higher frequencies in her left ear. The hearing in her left ear has been deteriorating over the years. The appellant gets some ringing mainly in the right ear with some on the left, and has significant problems trying to hear in background noise. The specialist noted the appellant wears a hearing aid on the left ear and even that does not sometimes help in the presence of background noise. The specialist recommended that appellant try a crossover hearing aid for her right ear.
- In the January 12, 2004 letter a specialist indicated that the appellant had "...had some occasional imbalance episodes but nothing reminiscent of true vertigo." He suggested she may be a candidate for a bone-anchored hearing aid (BAHA).
- In her oral testimony the appellant said that she can usually understand speech one-on-one with another person, but that if there are 2 or more people talking she can't understand anyone. The appellant also stated that part of her difficulty with comprehension is due to her English language skills.
- In response to a question the appellant said that she tried a hearing aid on her right side for 2 or 3 weeks. It didn't help in the workplace but it was "OK" in a quiet room.
- The appellant stated she had followed up on the BAHA with a specialist but was discouraged because there was a long waiting list, and because the BAHA was so expensive it was being prioritized for younger - rather than older - patients, so the likelihood of her being approved was low.
- The appellant's sister said that family members call the appellant several times a day to check up on her because the appellant experiences frequent falls due to vertigo. The sister said that the appellant falls down at every family gathering. In response to a question the appellant said that she hadn't mentioned her frequent falls because she tries to deal with it herself.

Mental Impairment

- In the PR the GP diagnosed chronic depression and anxiety starting in 2004 "due to hearing loss and inability to function." He indicated the appellant has significant deficits in 6 of 12 areas of cognitive and emotional function: *executive, memory, emotional disturbance, motivation, motor activity, and attention/sustained concentration.*
- In the AR, the GP indicated that the appellant's mental impairment has moderate impacts on 8 of 14 categories of cognitive and emotional functioning and minimal or no impact on the remaining categories.
- Also in the AR the GP reported the appellant as being marginally functional in terms of both her immediate and extended social networks. He indicated the appellant is completely independent in terms of making appropriate social decisions, but that she needs either periodic or continuous support with the other 4 categories of social functioning. He commented that she experiences social isolation due to depression, and that she avoids social situations because of her hearing problem and is "unable to communicate."
- In his October 18, 2012 letter the GP wrote that the appellant "has not seen mental health", and reported that "Her GAF score is 40-50".
- The header on the GAF scale reads in part "Consider psychological, social and occupational functioning on a hypothetical continuum of mental health-illness." The GAF scale ranges from 0 to 100, with a higher score indicating better functioning. The GAF scale describes a score in

the range of 41-50 as resulting from "Serious symptoms (e.g. suicidal ideation...) OR any serious impairment in social, occupational, or school functioning (e.g. no friends, unable to keep a job.)"

- In her self-report the appellant wrote that she has difficulty concentrating in her day-to-day life because her hearing problem causes her to be disoriented and anxious.
- In her reconsideration submission the appellant wrote that she lives constantly in a state of fear, stress and anxiety, that she is unable to leave her house because she is too scared and anxious, "some days" she cannot function and needs one of her sisters or her son to come help her, and that her inability to hear creates an even more frightening and fearful environment for her. She wrote in her self-report that "Stress, fear, anxiety and depression are my reality on a daily basis and continue to affect and control my life as a result of my disability."
- In her oral testimony the appellant said that she had worked at the customer service desk at a local store, but that her hearing problems eventually required her to be transferred to another job where she was not dealing with members of the public. She said that she was insulted at work many times by customers who misinterpreted her hearing impairment as a lack of the English language, and with her mental state she just can't go through that any more. She left her job last fall.
- She said that having people behind her and not being able to hear them causes fear and anxiety.
- The appellant's sister provided oral testimony that the family has to continually encourage the appellant to attend family functions, otherwise the appellant would choose to remain isolated due to anxiety and frustration at not being able to hear or communicate properly in crowded situations.

DLA

- In the PR the GP reported that the appellant has been prescribed medications that interfere with her ability to perform DLA by causing drowsiness and fatigue.
- In the PR the GP reported the appellant as being continuously restricted in 2 of the 10 prescribed DLA (*use of transportation and social functioning*), and correspondingly, not being restricted in the other 8 prescribed DLA.
- In the AR the GP provided more detail regarding *use of transportation*, indicating that the appellant requires periodic assistance with the use of public transport because "anxiety increases."
- Also in the AR the GP indicated that the appellant requires periodic assistance with *basic housekeeping* (commenting "help from family" and with aspects of *shopping* (going to and from stores, and carrying purchases home).
- In her self-report the appellant wrote that she lives in constant fear when she leaves her home, and that she avoids going out whenever possible. She goes out a couple of times a day to walk her dog.
- In her reconsideration submission the appellant wrote that her sisters help her with grocery shopping because she is too frightened to go to the store or the mall.
- In her oral testimony the appellant confirmed that she owns and drives her own vehicle. In response to questioning by her advocate as to what she would do if she no longer had the car, the appellant said that she could not use public transit because of fear and anxiety.
- Both the appellant and her sister said that she usually depends on family to drive her to family functions and shopping, with the sister saying this occurs 3 or 4 times per week.

- In response to a question as to whether she ever goes shopping on her own, the appellant said that she usually goes with family, but that if it's urgent, such as when she requires a prescription refill and family members are not available, the appellant will drive herself.
- In response to a question from her advocate, the appellant acknowledged that if she had to she could walk to do her shopping.
- The appellant confirmed that she cooks her own meals.
- In response to a question, the appellant said that her sisters will occasionally help her with housekeeping, but "not very often." The appellant said that she used to vacuum daily, but that now she only does so when she "feels like it." She said that she cleans her place at least once a month.

Help

- In the PR the GP confirmed that the appellant uses "hearing aids." In response to a question asking him to provide specific detail regarding the nature and extent of assistance required with DLA, the GP wrote "family members."
- In the AR the GP indicated that the help required for DLA is provided by "family." The GP indicated the appellant does not have an assistance animal.
- In the October 18, 2012 letter the GP reported the appellant as saying that her family will take care of her if needed, but she wants to avoid that as much as possible.
- In her oral testimony the appellant said that she depends on help from her son, but that she only asks him when she has to as she doesn't like to interfere with his job.

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 the appellant's hearing loss constitutes a severe physical impairment. The GP's description of the appellant's impairment as being a chronic and permanent condition with no cure supports the conclusion that her hearing loss is a severe impairment.

The ministry's position, as set out in its reconsideration decision, is that the GP has not provided enough evidence to indicate a severe physical impairment, arguing that the appellant can independently manage all of her physical functions. The ministry argues that the appellant's evidence places much emphasis on her inability to work, but points out that employability is not a legislative criterion for PWD designation.

Panel Decision

To assess the severity of an impairment one must consider the nature of the impairment and its impact on daily functioning as evidenced by functional skill limitations and the degree of independence in performing DLA. 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 act reasonably and 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, the professional evidence has to be weighed and assessed like any other evidence.

In the appellant’s case the only physical limitations indicated with respect to functional skills is the effect that the appellant’s hearing loss has on her ability to communicate. In the AR, while the appellant’s hearing is assessed as poor, she has a satisfactory ability to communicate in all other areas including speaking. The appellant’s sister raised the issue of vertigo, which was then subsequently confirmed by the appellant. The appellant had not previously mentioned vertigo in her self-report or in her reconsideration submission. The GP didn’t diagnose vertigo as an impairment and made no reference to it in his evidence. The only medical evidence with respect to vertigo is of an “occasional” imbalance that was not reminiscent of true vertigo. In the circumstances the panel cannot give significant weight to the evidence of vertigo.

The evidence indicates that the appellant’s hearing condition has impacted her employability, however the extent of the appellant’s ability to engage in paid employment is not a legislated criterion for severity. There were treatments options recommended by the specialists for improving the appellant’s hearing, such as the BAHA, that the appellant has not pursued. The appellant has also provided evidence that her hearing impairment exacerbates her anxiety because she becomes fearful when she can’t hear people who are behind her. However, given her high functional skill level, and the lack of evidence that her hearing condition has translated into significant restrictions in DLA, as discussed in detail below, the panel finds that the ministry reasonably determined that the evidence falls short of showing that the appellant has a severe physical impairment.

Severe Mental Impairment

The appellant’s position is that the ministry’s reconsideration decision focused mainly on the appellant’s physical impairment. She relied on the *Hudson* decision to argue that the ministry made a serious oversight by not referring to and giving significant weight to the appellant’s self-report with its evidence of the substantial impacts of the appellant’s mental health conditions.

The ministry’s position, as set out in its reconsideration decision, is that as the GP did not indicate that the appellant’s impairments have a major impact in any areas of her cognitive and emotional functioning, there was not enough evidence to establish a severe mental impairment.

Panel Decision

The GP has diagnosed the appellant with chronic depression and anxiety. The appellant’s evidence is that the depression and anxiety began after she suffered the total hearing loss in her right ear, that the effects of the anxiety are magnified because she can’t hear people who may be behind her, and that she is confused and unable to hear others’ speech in situations where there is more than one

other person. The appellant provided evidence that she frequently suffers anxiety attacks, and during the hearing she had to take a break to calm down. She cried frequently during her testimony.

While the GP, in the PR, indicated that the appellant has significant deficits in 6 areas of cognitive and emotional functioning, the more detailed assessment in the AR indicates that these impacts are ranked "moderate" at most. No impacts have been ranked as "major." The ministry's conclusion that the mental impairment has not been shown to be severe is indirectly supported by the GP's evidence that the appellant's GAF score is in the mid-range of the GAF scale, and by his evidence that the appellant has "not been to mental health." There is no evidence that the appellant is under any form of treatment for her mental health condition – such as therapy or referral to a mental health specialist – other than a prescription for medications prescribed by the GP. The foregoing analysis of the evidence, considered in context with the analysis of restrictions to DLA as discussed below, leads the panel to find that the ministry reasonably determined that the evidence does not establish a severe mental impairment.

Restrictions to DLA

The appellant relied on the *Hudson* decision to argue that this legislative criterion is satisfied as long as the GP indicates that the appellant is directly and significantly restricted, either continuously or periodically for extended periods, in at least two DLA. She argues that the GP has confirmed that the appellant requires continuous assistance with respect to the DLA of *social functioning* and *use of transportation*. She also argues that there is no legislative requirement for the GP to provide any evidence regarding the duration or frequency of restrictions.

The ministry's position is that the GP has indicated the appellant is able to perform 8 of 10 DLA independently. The ministry argues that the GP has provided no evidence of the frequency or duration of any restrictions to DLA, and therefore there is insufficient evidence to show that there are direct or significant restrictions to the appellant's ability to manage her DLA.

Panel Decision

As discussed above with respect to the determination of severity, the legislation gives the ministry the discretion to decide whether it is "satisfied" that the legislative criteria have been met. The ministry must base its decision on a reasonable consideration of all the relevant evidence. It cannot merely defer to the professionals, as that would represent an improper fettering of the ministry's exercise of discretion.

In the appellant's case, the GP indicated that her impairments directly restrict her ability to perform the DLA of *use of transportation* and *social functioning*. Regarding *use of transportation*, the appellant owns and operates her own vehicle, and can also rely on rides from her family as needed. Her evidence is that, in a pinch, she could walk to do her shopping. It is difficult to conclude that the appellant's anxiety about using public transit amounts to a significant restriction in her ability to perform DLA.

Regarding *social functioning*, while the GP indicated that the appellant is functioning marginally in this area, the evidence supports the conclusion that the appellant has a good relationship with her family, and that her family is strongly supportive of her. Even with respect to her extended social network,

the GP indicates that the appellant is functioning marginally in this area, though the appellant's evidence is that she avoids going out of her home when at all possible.

The *social functioning* check box on the PR also refers to *decision-making*, which is one of the two prescribed DLA – along with *social functioning* – that is specifically relevant to severe mental impairment. The GP provided uncontroverted evidence that the appellant is independent with respect to making appropriate social decisions, meal planning, managing her finances, managing her medications, and making appropriate shopping choices. There is no evidence that the appellant is directly or significantly restricted with respect to the DLA of *decision-making*.

The GP also provided evidence, consistent with that of the appellant, that the appellant requires periodic assistance with respect to the DLA of *basic housekeeping* and aspects of *shopping*. Given the evidence that the appellant does not very often get help with her housework, that she does clean her place at least monthly, and that she can go out alone when she needs to, it would be difficult to conclude that these DLA are significantly restricted.

Based on a consideration of the evidence as a whole, the panel finds that the ministry was reasonable in deciding that the evidence does not show that the appellant is directly or significantly restricted, either continuously or periodically for extended periods, in her ability to manage her DLA independently.

Help with DLA

The appellant argues that she needs the help of family members to perform her DLA.

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

Panel Decision

Given the panel's findings that the appellant's DLA are not significantly restricted either continuously or periodically for extended periods, the panel finds that the ministry reasonably concluded that 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 suffers from medical conditions that affect 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. The panel therefore confirms the ministry's decision.