

PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Social Innovation (the ministry) dated August 13, 2013 which held that the appellant did not meet 3 of the 5 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 a medical practitioner has confirmed that the appellant has an impairment that is likely to continue for at least 2 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
- as a result of those restrictions, in the opinion of a prescribed professional, the appellant requires help, as it is defined in the legislation, 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

Employment and Assistance Act (EAA), section 19.1

Administrative Tribunals Act (ATA), sections 44 and 46.3

PART E – Summary of Facts

Evidence before the ministry at reconsideration

- A PWD application comprised of a Self-report (SR) signed by the appellant on March 12, 2013 and both a Physician Report (PR) and Assessor Report AR) completed by the appellant's general practitioner (since 2011) and dated March 6, 2013.
- Submissions in excess of 200 pages (includes multiple copies of some documents) provided by the appellant at reconsideration including:
 - 1) A 16-page reconsideration submission written by the appellant which includes some evidence as well as argument (the relevant evidence is set out below and relevant argument is set out in Part F of the panel's decision as the appellant's position);
 - 2) Diagnostic imaging reports respecting exams performed on October 26, 2008, February 11, 2009, and June 25, 2011;
 - 3) A number of dictionary definitions, including disability and impairment, and Wikipedia information respecting disability;
 - 4) Excerpts from federal and provincial enactments respecting the meaning of disability; and
 - 5) Information respecting previous ministry reconsideration decisions addressing matters unrelated to PWD eligibility.

Additional evidence and admissibility

Subsequent to reconsideration, the appellant submitted in excess of 1000 pages, identified by the appellant as Factums 1 through 4, dated September 16, 17, 19, 20, and 23, 2013. The bulk of these submissions relate to matters not before the panel including challenges to the validity or constitutionality of legislation, previous ministry reconsideration decisions respecting matters unrelated to PWD eligibility, and allegations of ministry misconduct or are additional copies of information previously submitted by the appellant. Listed below are the submissions relevant to the issue under appeal.

- Internet information respecting brain function and brain injury;
- Copies of multiple ministry Medical Report – Employability forms (Medical Reports) which were completed by a medical practitioner and dated April 7, 2010, October 6, 2010, and November 25, 2011. Also included is a copy of an incomplete form (no signature or date).

The panel admitted the internet information respecting brain injury and the completed Medical Reports pursuant to s. 22(4) of the *Employment and Assistance Act* as written testimony in support of the information and records before the ministry at reconsideration as they provided additional information respecting the appellant's brain injury, a diagnosis before the ministry at reconsideration. The panel notes that while the internet information respecting brain injury is helpful to the extent that it provides general information respecting brain injury and defines terms including "anoxic brain injury" - lack of oxygen to brain and includes evidence from the appellant, who indicated via tick marks

certain symptoms applicable to her, it does not constitute a medical assessment of the impact of brain injury on the appellant's functioning.

On appeal, the ministry relied on its reconsideration decision and did not provide additional evidence.

Set out below is a summary of the evidence from the PWD application and other information provided relating to the appellant's impairments as it relates to the PWD criteria at issue.

Diagnoses and health history

The appellant is diagnosed by her general practitioner with (1) brain injury from a motor vehicle accident in 2007 which resulted in severe neuro psychiatric and musculoskeletal consequences and (2) mood disorder NYD [not yet determined] of an unknown onset date which requires ongoing pending psychiatric assessment. Additionally, the general practitioner states that, although only seen by him 3 times over last 2 years, the appellant has an unusual combination of physical and psychiatric illness which have seemingly made her generally dysfunctional and that, despite improving, she continues to have neurological symptoms of a disabling nature.

Physical Impairment

- Physical functional skills reported in the PR indicate that the appellant can walk 2 to 4 blocks unaided (occasional use of a cane for "long walking" is noted), climb 2 to 5 steps unaided, lift under 5 lbs., and remain seated for 2 to 3 hours.
- Where asked to provide an applicant's height and weight "if relevant", the general practitioner reported a height of 5' (the number of inches is illegible) and weight of 200 lbs.
- In the AR, the appellant is reported as independent with walking indoors and outdoors, climbing stairs, standing, lifting, and carrying and holding. Walking outdoors, climbing stairs, lifting, and carrying and holding are reported as taking significantly longer than typical with occasional use of a cane after "prolonged walking."
- Satisfactory hearing, rather than good, and an upcoming assessment are reported in the AR.
- In the SR, the appellant reports the following:
 - 1) She experiences lots of pain, headaches, weakness, and problems with co-ordination;
 - 2) As she lives in 1 room with laundry facilities, is less than 2 blocks from shopping and transportation, and only has to manage 5 steps occasionally, worsening of the effects of her condition is prevented;
 - 3) Range of motion is difficult and everything she does takes a long time and is exhausting;
 - 4) Incontinence is a problem;
 - 5) Walking is a problem, especially if too far; and
 - 6) She must alternate between sitting, standing, and lying down, and requires a lot of bed-rest and sleep.
- The diagnostic imaging reports from 2008, 2009 and 2011 consistently identify multiple brain lesions (foci of increased signal). The most recent, the 2011 report, states that the lesions are non-specific but likely due to chronic ischemia (restriction of blood supply) and do not have

characteristics typical of demyelination (destruction, removal or loss of the myelin sheath of nerves). The impression is reported as "cerebral atrophy."

- The medical imaging reports (MRI of the spine) indicate no abnormalities with the exception of degenerative disc changes at C5-6 level described, in part, in the most recent 2011 report as moderately severe disc space narrowing consistent with spondylosis.
- Both the 2010 and 2011 Medical Reports state that the appellant's head injury results in "weakness." The 2011 Medical Report also identifies pain as a restriction. All 3 Medical Reports indicate that the expected duration of the medical condition as either 1-3 months or 3-6 months.
- Physical symptoms of brain injury identified in the internet information which the appellant indicates are applicable include headaches, reduced coordination, spasticity, and fatigue.

Mental Impairment

The information below reflects the reported impairment to mental function from both the physical condition of brain injury (classified as a neurological condition) and the mental disorder of mood disorder.

- In the PR, the physician reports that the appellant is improving but continues to have neurological symptoms of a disabling nature.
- The general practitioner reports that there are no difficulties with communication.
- In the PR, significant deficits in 8 of 11 listed aspects of cognitive and emotional function are reported – consciousness, executive, memory, perceptual psychomotor, emotional disturbance (anxiety is specified), motivation, impulse control, and attention or sustained concentration. The general practitioner reiterates that the nature of the appellant's mood disorder has yet to be defined.
- In the AR, 2 of 14 listed aspects of cognitive and emotional functioning due to mental impairment or brain injury are reported as having a major impact on daily functioning – bodily functions and attention/concentration. A moderate impact on daily functioning is reported for 3 aspects – consciousness, memory, and other emotional problems (the nature of the other emotional problems is not identified). The general practitioner reports a minimal to moderate impact for 2 aspects – emotion and impulse control. The remaining 7 aspects are reported as having minimal impact on daily functioning. Both head injury and mood disorder are identified as the causes of the above noted impacts.
- The general practitioner indicates that the appellant independently manages all 5 listed aspects of social functioning noting that "all psychosocial functions are hindered by current ? mood disorder."
- Marginal functioning with immediate and extended social networks is reported.
- In the SR, the appellant reports having poor memory and concentration.
- Cognitive symptoms from brain injury identified in the internet information which the appellant indicates are applicable include loss of empathy, anxiety, impaired reading and writing skills, slowed thinking, and disorganization.

DLA

- In the PR, the general practitioner reports that the appellant's physical and psychological impairments directly restrict her ability to perform DLA as follows:
 1. Self care, basic housework, and mobility outside the home (a component of the DLA "move about indoors and outdoors") are periodically restricted due to the appellant's head injury and associated dilemma.
 2. Social functioning is continuously restricted. The appellant is described as generally withdrawn and as requiring ongoing psychiatric assessment.
- In the PR, DLA that are reported as not restricted are: meal preparation, management of medications, daily shopping, mobility inside the home, use of transportation, management of finances.
- The AR sets out a number of listed tasks within each DLA. The general practitioner reports that the appellant independently performs all 28 listed tasks of the DLA personal care, basic housekeeping, shopping, meals, paying rent and bills, medication, and transportation while noting that all tasks of personal care, basic housekeeping and 4 other tasks - going to and from stores (shopping), food preparation (meals), getting in and out of vehicle/using public transportation (transportation) take significantly longer than typical as pace is impaired by physical restriction and psychiatric dysfunction.
- Respecting the DLA social functioning, as noted above, the general practitioner comments that all psychosocial functions are impacted by the appellant's mood disorder but that all aspects of social functioning are managed independently.
- In the SR, the appellant reports that bathing and dressing are problems.
- In her appeal submissions, the appellant stated that meal preparation is hot-plate preparation and pharmaceutical management is a non-issue as there are no neurological prescriptions. She does not shop daily and can use transportation if she has to go somewhere but does not go anywhere.

Need for Help

- In the PR, the general practitioner reports that the assistance required with DLA is "Not clear yet."
- In the SR, the appellant reports that she uses a cane when she hurts and is unbalanced, and that she requires help with housekeeping and may require a scooter.

PART F – Reasons for Panel Decision

The issue on 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 that, in the opinion of a prescribed professional, directly and significantly restricts her from performing DLA either continuously or periodically for extended periods thus necessitating the need for help with 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.

(4) The minister may rescind a designation under subsection (2).

EAPWDR

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.

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 below. However, the panel notes that the appellant also advances a number of other arguments which the panel will address first.

The appellant challenges the constitutionality and validity of the legislation in question and alleges that it contravenes human rights legislation. The panel has no authority to address these arguments. Section 19.1 of the *Employment and Assistance Act* imports a number of provisions of the *Administrative Tribunals Act* including s. 44 which states that "the tribunal does not have jurisdiction over constitutional questions" and s. 46.3 which states that "the tribunal does not have jurisdiction to apply the *Human Rights Code*."

The appellant argues that PWD designation is a discretionary determination and questions the tribunal's expertise, not on matters pertaining to the Employment and Assistance legislation but, on matters of disability. The Tribunal's jurisdiction, and that of a panel, is set out in legislation. In accordance with s. 24 of the *Employment and Assistance Act*, a panel's authority is limited to considering the reasonableness of the ministry's reconsideration decision. As such, the panel is not

making its own independent determination as to whether an applicant is disabled. Rather, the panel is determining whether the ministry's decision that criteria were not met was reasonable based on the evidence and the legislation. Additionally, as the panel's authority is limited to assessing the reasonableness of the reconsideration decision, the panel is also without authority to address the appellant's assertions of ministry malevolence in its interactions with the appellant.

The appellant also argues that there is no statutory requirement that all 5 PWD criteria must be met as s. 2(2) of the *EAPWDA* is not conjunctive but rather is severable. Subsection (2) reads as follows:

(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** [emphasis added]

(a) in the opinion of a medical practitioner is likely to continue for at least 2 years, **and** [emphasis added]

(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 [emphasis added]

(B) periodically for extended periods, **and** [emphasis added]

(ii) as a result of those restrictions, the person requires help to perform those activities.

On a plain reading of s. 2(2) of the *EAPWDA*, in accordance with the principles of statutory interpretation, the requirements set out under ss. (2) must be met including the requirements set out in paragraphs (a) and (b)(i) and (ii). Consequently, all 5 criteria set out in s. 2(2) of the *EAPWDA* must be met. However, given the use of "or" in ss. (2) it is sufficient if either a severe physical or a severe mental impairment is established. Similarly, paragraph (b)(i) does not require that a person's ability to perform DLA is directly and significantly restricted both continuously and periodically for extended periods.

Severe Physical Impairment

The appellant's position is that she is making efforts for wellness and healing, which she describes as being on a wellness continuum, and that this does not mean that she is not disabled, as healing from brain-injury is slow-going. The appellant points to her small living accommodation as to why she is independent walking, noting that she cannot yet manage a full day of wakefulness. The appellant further argues that, in accordance with *Hudson*, the legislation must be read with a benevolent purpose in mind and significant weight must be placed on the evidence of the applicant unless there is a legitimate reason not to do so.

The ministry's position is that a severe physical impairment has not been established. The ministry points to the medical practitioner's information that the appellant is independent with all aspects of physical mobility and ability and that, although the appellant is reported as taking significantly longer, no information is provided as to how much longer. The ministry concludes that the impacts described are more in keeping with a moderate degree of 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. While the legislation does not define "impairment", the PR and AR define "impairment" as a "loss or abnormality of psychological, anatomical or physiological structure or functioning causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration." While this is not a legislative definition, and is therefore not binding on the panel, in the panel's opinion, it reflects the legislative intent and provides an appropriate analytical framework for assessing the degree of impairment resulting from a medical condition.

A medical practitioner, the appellant's general practitioner of approximately 2 years, diagnosed the appellant with brain injury and identified resulting limitations to physical functioning. The panel notes that the general practitioner appears to attribute limitations to physical functioning solely to brain injury not degenerative disc disease, which is identified in the medical imaging reports but not included as a diagnosis in the PWD application. The panel also notes that the physician reported the appellant's height and weight as being relevant but has not provided any information clarifying any resulting restriction to physical functioning. The physician reports some limitations on the appellant's ability to manage the listed aspects of physical functional skills/mobility/physical ability, including being able to lift less than 5 lbs. However, the appellant is also reported as independently managing all of these activities - walking (2-4 blocks), climbing stairs (2 to 5), and lifting up to 5 lbs. - with the only exception being the "occasional" use of a cane for "prolonged walking." Both the physician and the appellant report that physical activities take significantly longer to perform and the appellant points to her small living accommodation as explaining her level of independence. However, given that the appellant is able to walk 2-4 blocks unaided, climb 5 stairs, and independently manage all listed aspects of all DLA, and in the absence of information as to how much longer is required, the panel finds that the ministry reasonably viewed the impacts, or resulting impairment, as more in keeping with a moderate degree of physical impairment. Consequently, the panel finds that the ministry reasonably determined that a severe physical impairment was not established.

Severe Mental Impairment

The appellant argues that a severe mental impairment is established by her general practitioner's identification of severe residual injury. Further, the ministry has not properly considered the significant deficits with cognitive and emotional function identified by her general practitioner and has, contrary to *Hudson*, narrowly interpreted the legislation. The appellant points to communication difficulties, including word retrieval, aphasia, and ataxia, all of which are common to brain injury and amount to a hugely significant deficit. Further, social functioning is majorly disrupted because, although independent, the appellant can only attend to one issue at a time.

The ministry's position is that a severe mental impairment has not been established. The ministry argues that the information respecting the impact the appellant's brain injury and mood disorder have on daily functioning reflects impacts more in keeping with a moderate degree of impairment.

Panel Decision

The appellant is diagnosed with a mental disorder, mood disorder – not yet determined, and a physical neurological condition, brain injury, both of which impact her mental functioning. The appellant also indicates a number of impacts to her cognitive functioning including problems with word retrieval, slow thinking, and disorganization. The physician reports a significant deficit with 8 of 11 listed aspects of cognitive and emotional functioning, which on its own is suggestive of a severe degree of impairment. However, the physician additionally reports, when assessing daily cognitive and emotional functioning, that there is a major impact on only 2 of 14 listed aspects – bodily functions and attention/concentration; the remaining aspects are identified as having either a moderate or minimal impact on daily functioning. Additionally, the physician reports that the appellant's ability to communicate is good, the only qualification being unrelated to a mental impairment, the recommendation of a hearing assessment. Further, while the physician indicates in the PR that the appellant's social functioning is continuously restricted, the ongoing restriction is not reported as having a significant impact in the AR where the physician notes that, despite all psychosocial functions being hindered by the as yet undetermined mood disorder, the appellant independently manages all aspects of social functioning. The physician also identifies no restriction in the appellant's ability to make decisions about personal activities, care or finances. Without a specific diagnosis of the appellant's mood disorder and a clear picture of how this affects her daily functioning, and considering the assessments provided by the general practitioner, the panel finds that the ministry has reasonably determined that the evidence respecting the impact on functioning does not establish a severe mental impairment.

Restrictions in the ability to perform DLA

The appellant's position is that the ministry has narrowly interpreted the meaning of "DLA" as applying largely to physical disabilities and mental incapacities requiring ongoing guardianship or trustee issues, rather than recognizing that brain injury results in injury to the brain itself as well as physical functionality. Further, the appellant argues that requiring additional time to perform activities is, in her case, a significant restriction. Whatever daily activities she cannot do, do not get done. She can do one thing or another, but not many things like before her accident.

The ministry's position is that the information does not establish that, as a result of a severe impairment, the appellant's DLA are directly and significantly restricted either continuously or periodically for extended periods. The ministry relies on the PR, in which a continuous restriction is reported only for social functioning, periodic restrictions of unknown frequency are identified for personal care, basic housework and mobility outside the home, and no restrictions are identified for all other DLA. Further, the ministry points to the AR which indicates that the appellant independently manages all aspects of all DLA and that although a number of aspects are reported as taking significantly longer to perform, no information as to how much longer is provided.

Panel Decision

The legislative requirement respecting DLA is that the minister be satisfied that as a result of a severe

physical or mental impairment a person is, in the opinion of a prescribed professional, directly and significantly restricted in the ability to perform DLA either continuously or periodically for extended periods as a result of a severe physical or mental impairment. In this case, in the PR, the appellant's general practitioner, a prescribed professional, indicates restrictions in the appellant's ability to perform some DLA – personal care, basic housekeeping, mobility outside the home (one component of the DLA mobilize indoors and outdoors), and social functioning. With the exception of social functioning, which is continuously restricted, the restrictions are periodic.

With respect to social functioning, despite being continuously restricted, the general practitioner reports that the appellant manages all listed aspects of this DLA independently. Additionally, no restrictions are identified with the ability to manage finances and medications or the cognitive aspects of shopping (make appropriate choices) and transportation (using public transit schedules).

The general practitioner's information respecting the periodic restrictions with the DLA personal care and basic housekeeping and tasks of other DLA – moving about outdoors (mobilize indoors and outdoors), shopping (going to and from stores), meals (food preparation), and transportation (getting in and out of a vehicle and using public transit) is that the appellant is independent but takes significantly longer as pace is impacted by physical restrictions and psychiatric dysfunction. While these restrictions are identified in the PR as being periodic and not occurring all of the time, the narrative in the AR is suggestive of continuous problems with pace. No information is provided by the general practitioner as to how much longer the appellant takes to perform these activities.

In view of the above evidence, the panel concurs with the ministry that a clear and coherent picture of the degree of the appellant's restrictions with DLA is not presented. In the absence of additional clarification from the prescribed professional, the panel finds that the ministry has reasonably concluded that the level of independent functioning with DLA reported by the prescribed professional is not sufficient to establish that the appellant is, in the opinion of a prescribed professional, directly and significantly restricted in her ability to perform DLA either continuously or periodically for extended periods.

Help to perform DLA

The appellant's position is that she requires help with housework, including changing the bed and vacuuming, any multi-tasking involved in a day, and with transportation to appointments. She is alone and help from another person is extremely limited. As she cannot afford to access help, she is unable to prove the need for help.

The ministry's position is that because it has not been established that DLA are significantly restricted, it cannot be determined that 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 is that the need for assistance with DLA is "Not clear yet" other than the occasional use of a cane for prolonged walking. The panel 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.