

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation's (the ministry) reconsideration decision dated February 3, 2014 which found that the appellant did not meet two of the five statutory requirements of Section 2 of the *Employment and Assistance for Persons with Disabilities Act* for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that he has a severe mental impairment that in the opinion of a medical practitioner 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 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 these restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act (EAPWDA), section 2
Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), section 2

PART E – Summary of Facts

The appellant did not attend the hearing. The panel received confirmation from the Tribunal that the appellant had been notified of the date, time and location of the hearing. Accordingly, under s. 86(b) of the *Employment and Assistance Regulation*, the panel heard the appeal in the appellant's absence.

The evidence before the ministry at the time of the reconsideration decision included the Person With Disabilities (PWD) Application comprised of the applicant information and self-report dated June 28, 2013, a physician report (PR) and assessor report (AR) both dated June 28, 2013 and prepared by the appellant's general practitioner (GP). The evidence before the ministry also included the appellant's Request for Reconsideration (RFR) dated January 10, 2014 to which was attached three pages of written submissions prepared by an advocate (RFR Submissions).

Diagnoses

The appellant has been diagnosed by his GP with lumbar pain with date of onset as 2008, depression with date of onset as 2008 and attention deficit disorder with date of onset as 2002.

Physical Impairment

- In the PR, the GP indicated in the health history that "the patient has chronic lumbar pain due to concentric bulging disc since 2008 post work accident."
- The GP reported that the appellant does not require any prostheses or aids for his impairment.
- In response to the question as to whether the appellant's impairment is likely to continue for two years or more the GP checks the "yes" box and comments "Due to nature of history of back pain, depression and ADH."
- In the PR, the GP indicated under Functional skills that the appellant can walk 4 or more blocks unaided, climb 5 or more stairs and he can lift 2 to 7 kg (5 – 15 lbs.) although the GP adds the note "back pain" and the appellant is noted as being able to remain seated for less than 1 hour.
- In the AR, the GP summarized the appellant's impairments that impact his ability to manage DLA as "depression/anxiety/lumbar pain/attention deficit disorder."
- The GP indicates that the appellant's ability to communicate by speaking, reading, writing and hearing are all good.
- The GP indicated that the appellant is independent walking indoors and outdoors, climbing stairs and standing. The GP further indicated that the appellant requires continuous assistance from another person or is unable to lift due to lumbar pain and he requires continuous assistance or is unable to carry and hold.

Mental Impairment

- In the PR, under health history, the GP notes that the appellant suffers from major depression and attention deficit disorder.
- The GP reported significant deficits with cognitive and emotional function in the areas of memory, emotional disturbance and attention or sustained concentration and added the comment "patient has major depression plus attention deficit disorder." The appellant is noted as having no difficulties with communication.
- In the AR, the GP summarized the appellant's impairments that impact his ability to manage daily living activities as "depression/anxiety/lumbar pain/attention deficit disorder."
- In the AR, the GP assessed the appellant's speaking, reading, writing and hearing as good.
- In the AR, the GP assessed major impacts to daily functioning in the following areas of cognitive and emotional functioning: bodily functions, emotion, attention/concentration, memory and motivation. Further, the GP noted no impact in the areas of consciousness, impulse control, insight and judgment, executive, motor activity, language, psychotic symptoms and other neurological problems. The GP commented that the appellant "has major depressive disorder and attention deficit which impairs his

ability to do daily chores (ADL's)."

- With respect to the appellant's social functioning, the GP notes that the appellant is independent making appropriate social decisions, developing and maintaining relationships and interacting appropriately with others and that he requires continuous support and supervision dealing appropriately with unexpected demands and securing assistance from others due to anxiety, depression and back pain.
- The GP describes the appellant as having marginal functioning in his immediate and extended social networks.

Daily Living Activities (DLA)

- The GP reported that the appellant has not been prescribed medications or treatments that interfere with his ability to perform his DLA.
- In the PR, the GP notes under Health History that the appellant "has problems doing his activities of daily living. It takes him 3-5 times as long to perform a single chore."
- In the AR, the GP indicated that the appellant is independent with all tasks of the DLA personal care other than transfers on/off of chair in which he is noted as requiring periodic assistance from another person and taking significantly longer than typical."
- Continuing in the AR, the GP further indicated that the appellant requires continuous assistance from another person or is unable to do laundry or basic housekeeping due to back pain and that for each of these tasks it takes significantly longer than typical.
- For shopping, the appellant is assessed as independent in all aspects other than carrying purchases home and the GP notes that for that task, the appellant requires continuous assistance from another person or is unable to perform it due to back pain and that he takes significantly longer than typical.
- For meals, the appellant is assessed as requiring continuous assistance from another person or is unable in all aspects and takes significantly longer than typical and the GP comments that the appellant's mother helps him with meal planning.
- For paying rent and bills and medications, the appellant is assessed as independent in all aspects without further comment.
- For transportation, the appellant is assessed as requiring periodic assistance from another person with getting in and out of a vehicle, using public transit and using transit schedules and arranging transportation and the GP adds the comment "due to back pain and [decreased] memory."

Need for Help

- In the PR, the GP did not indicate that the appellant requires an assistive device.
- The GP reported in the AR that the appellant lives with his parents and that the help provided by other people for DLA includes family and health authority professionals. As noted previously, the GP has commented that the appellant's mother helps him with meal planning.

In the RFR Submissions, the advocate states that the appellant should be eligible for benefits, that he has a severe physical and mental impairment which significantly restricts his ability to perform DLA, and he requires continuous assistance to perform DLA. The advocate references the PR, specifically the GP's comments that the appellant has significant deficits with cognitive and emotional function in three areas. The advocate further references the AR, stating that the appellant requires continuous assistance with lifting, carrying and holding and that the appellant has major impacts in five areas of cognitive and emotional functioning. With respect to DLA, the advocate again references the AR stating that the GP noted that the appellant requires assistance with transfers on/off a chair, laundry, basic housekeeping and carrying purchases home and that these tasks take significantly longer. The advocate notes the GP's comments in the AR that the appellant needs continuous assistance and takes significantly longer with meal planning, food preparation, cooking and safe storage of food, that he requires assistance with getting in/out of a vehicle, using public transit and using transit schedules, that he needs continuous support with two areas of social functioning and that he has marginal functioning with his immediate and social networks.

[Redacted]

In his Notice of Appeal dated February 7, 2014, the appellant states that he is incapable of functioning in a workplace in his current state and that the vagueness of his doctor did not completely portray this.

The ministry relied on its reconsideration decision. At the hearing, the ministry acknowledged that the evidence establishes that the appellant has a severe mental impairment and that he has met the age and duration requirements as set out in section 2 of the *EAPWDA*. However, the ministry found that there was insufficient evidence to establish that he has a severe physical impairment and that his impairment directly and significantly restricts his DLA continuously or periodically for extended periods. The ministry further stated that the evidence as between the PR and the AR was inconsistent and contradictory without explanation which left it unable to make a determination as to the PWD designation. The ministry commented that it disagreed with several of the statements made by the appellant's advocate in the RFR submissions.

In response to a question, the ministry reiterated that while the diagnosis of mental impairment was clear and there was enough evidence to confirm that the appellant has a severe mental impairment, the evidence with respect to physical impairment as set out in the PR and the AR was contradictory.

In response to a question, the ministry confirmed its position that the evidence of the GP indicated that it was the appellant's physical condition that impacted his DLA and not his severe mental impairment, and because his physical condition was not a severe physical impairment, the legislative test in section 2 of the *EAPWDA* had not been met.

PART F – Reasons for Panel Decision

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

The criteria for being designated as a 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.

In the Reconsideration Decision, the ministry found that there is evidence that the Appellant is at least 18 years of age and that he has a severe mental impairment that will continue for two years or more. These two criteria are not in dispute in this appeal.

In the RFR Submissions, the advocate argues that the panel is bound by the British Columbia Supreme Court decision of *Hudson vs. Employment and Assistance Appeal Tribunal*, 2009 BCSC 1461 ("*Hudson*") and a summary of that decision was provided. Specifically, the advocate notes various findings in *Hudson* including that there is no statutory requirement that more than two DLA be restricted and that a PWD application is sufficient if either the medical practitioner or the assessor confirms that the person's severe impairment directly and significantly restricts their ability to perform DLA, or, when read together confirms the same restriction on DLA. The advocate notes further findings from *Hudson* including that the evidence of the physician and assessor must be read in their entirety and in a broad way, that significant weight must be placed on the evidence of the applicant unless there is a legitimate reason not to do so, that any ambiguity in the interpretation of the *EAPWD* legislation must be resolved in favour of the applicant and it must be interpreted with a benevolent purpose in mind.

Severity of physical impairment

The advocate states in the RFR Submissions that the appellant has a severe physical impairment.

The ministry takes the position that based on the information provided by the GP in the PR and the AR, the evidence does not establish a severe physical impairment.

Panel Decision

Section 2(2)(a) of the *EAPWDA* is clear that when addressing the issue of a severe physical impairment in the context of a person applying for a PWD designation, that person must be found to have a severe physical impairment that, in the opinion of a medical practitioner, is likely to continue for at least 2 years. The panel notes that the appellant's GP, while describing his condition as "chronic lumbar pain due to concentric bulging disc since 2008", indicates that the appellant is able to walk more than 4 blocks unaided on a flat surface, climb more than 5 stairs unaided and lift between 2 and 7 kg. The panel notes that no medical records or diagnostic test results were submitted in support of the GP's diagnosis and that further, the GP describes the appellant as being independent walking indoors and outdoors, climbing stairs and standing but requiring continuous assistance with lifting, carrying and holding despite his advice in the PR that the appellant is able to lift between 2 and 7 kg.

Where there is inconsistent or contradictory evidence as to the appellant's functional skills, the panel must look to see whether the appellant provides a reasonable explanation and in the present case, the panel is unable to find such an explanation. Despite the general practitioner's diagnosis of chronic lumbar pain, the inconsistent and contradictory nature of the functional skills as set out in the PR and AR, for example, in the appellant's

ability to lift, leads the panel to conclude that the ministry was reasonable in determining that the evidence did 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 advocate states in the RFR Submissions that the appellant's impairments significantly restrict his ability to perform DLA.

The ministry's position is that it has not been established by the evidence that the appellant's ability to perform DLA has been directly and significantly restricted by his severe mental impairment but rather, any restriction is due to his physical condition which it argues is not a severe physical impairment as required by section 2(2) of the *EAPWDA*.

Panel Decision

Section 2(2)(b) of the *EAPWDA* requires that in the opinion of a prescribed professional, a person's DLA are directly and significantly restricted by their severe impairment either continuously or periodically for extended periods.

In the AR the GP reports the appellant to be independent in 7 out of 8 personal care activities, 4 out of 5 shopping activities, all of the paying rent and bills activities and all of the medications activities. While the appellant is noted in the AR as requiring continuous assistance from another person and taking significantly longer with laundry, basic housekeeping and carrying purchases home, the GP has explained these as being due to "back pain" as opposed to his diagnosed severe mental impairment. Further, while the appellant is described as requiring continuous assistance from another person and taking significantly longer with all aspects of meals, there is no explanation in the AR as to why the appellant requires such assistance other than the comment "mother helps him." Finally, the appellant is described as requiring periodic assistance from another person with all aspects of transportation but the GP reports that is due to both back pain and decreased memory.

While the appellant is noted in the AR as having marginal functioning in respect of immediate and extended social networks, he is further described as being independent in making appropriate social decisions, developing and maintaining relationships and interacting appropriately with others. His requirement of continuous support or supervision in dealing appropriately with unexpected demands and securing assistance from other is described as being due to a combination of his physical and mental conditions.

In the present case, the evidence of a prescribed professional, the appellant's GP, is that the appellant is able to perform the majority of his DLA independently. For the four tasks that require periodic assistance, the evidence is unclear as to whether the assistance is needed for extended periods as required under section 2(2)(b) of the *EAPWDA*. For the tasks in which the appellant is described as requiring continuous assistance, the panel finds that the ministry was reasonable in concluding that there is insufficient evidence to establish that the continuous nature of the direct and significant restrictions on the appellant's DLA are as a result of the appellant's severe mental impairment. On review of the AR, the panel notes that restrictions on laundry, basic housekeeping and carrying purchases home are explained by the GP as due to "back pain" and the restrictions on all aspects of meals are not explained or described as being due to either the appellant's physical or mental condition.

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



Help with DLA

The appellant's position is that he requires continuous assistance to perform DLA.

The ministry's position is that as it has not been established that the appellant's DLA 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 ministry noted that the GP indicated in the AR that the appellant requires the assistance of family and health authority professionals to perform his DLA, the ministry concluded that the evidence of the prescribed professional does not establish that the appellant requires assistance with his DLA either continuously or periodically for extended periods of time.

The panel therefore 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, as defined in section 2(3)(b) of the *EAPWDA*.

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 a reasonable application of the applicable enactment in the circumstances of the appellant, and therefore confirms the decision.