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PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated March 14, 2014 which found that the appellant did not meet three 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 his 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; 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

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PART E – Summary of Facts

The evidence before the ministry at the time of the reconsideration decision included the Person With Disabilities (PWD) Application comprised of the applicant information dated August 27, 2013, a physician report (PR) and an assessor report (AR) both dated August 26, 2013 and completed by a physician who has known the appellant for 6 months. In describing the approach and information sources used to complete the AR, the physician indicated only an office interview with the appellant and no review of his file or chart information or any other secondary source.

The evidence also included the Request for Reconsideration- Reasons dated January 6, 2014.

Diagnoses

In the PR, the appellant was diagnosed by the medical practitioner with degenerative disc disease L-spine and T-spine (prior vertebral fracture) with onset in 1985, COPD [chronic obstructive pulmonary disease], depression and anxiety; chronic pain disorder.

Physical Impairment

In the PR, the appellant's physician reported that:

- In terms of health history, the appellant "suffers from severe chronic back pain as a result of previous vertebral fractures (thoracic spine) and degenerative disc disease (lumbar spine); this has led to chronic pain and depression. He is physically very limited- difficulty standing for very long. Unable to lift or carry anything more than about 10 lbs. Chronic cough and SOB [shortness of breath] due to significant COPD as well."
- The appellant does not require any prostheses or aids for his impairment.
- In terms of functional skills, the physician assessed the appellant as able to walk 4 or more blocks unaided on a flat surface, climb 2 to 5 steps unaided, lift 2 to 7 kg. (5 to 15 lbs.), and remain seated 1 to 2 hours.
- In the additional comments, the physician wrote: "he has significant problems which prevent him from working; disabled."

In the AR, the appellant's physician indicated that:

- The appellant is assessed as independent with walking indoors, walking outdoors and climbing stairs, with a note: "some limitations to endurance."
- The appellant is independent with standing and requires continuous assistance from another person with lifting and carrying and holding, with no further comments provided by the physician.

In the appellant's self-report included as part of the PWD application, he wrote:

- The appellant was in an accident in 1985 which resulted in a broken vertebrae T4/T5 area and not discovered until an X-Ray was done in 1990. His pain had grown to a chronic condition of daily pain and he was taking chiropractic treatments 3 to 4 times a week.
- He was subsequently employed in a job requiring standing, bending and lifting and his condition worsened until he ruptured a disc at the L3-L4 area, pinching his sciatic nerve, and requiring surgery.
- He has degenerative bone disease in his lower back and now experiences numbness in his left leg and foot. He has "patchy feelings" on his arms and legs, no feeling in some areas and hypersensitive in others, his hips "pop" and knees ache constantly.
- He is in constant pain from his shoulder blades to his waist, his back spasms daily, he has

diminished control with his bowel and bladder, and his lower back can be "put out" with as little as a cough or just bending down to pick something up.
- He has lived with chronic pain for almost 30 years, which leads to problems sleeping, and constant fatigue and tiredness.
- In November 2011 his left lung collapsed and he discovered he has emphysema and COPD and 'fibro.'
- He cannot stand for more than 20 minutes before the pain gets to be too much.
- Any physical activity where his heart rate increases leads to a worsening in breathing ability and increasing dizzy episodes to the point of almost "blacking out."
- He cannot lift or carry more than 10 lbs. for more than 5 minutes before his back starts to spasm, leading to leg and lower back pain worsening, and increasing difficulty in breathing, making daily chores, and even walking, painful.

In his Request for Reconsideration, the appellant wrote:
- Since filing the reports in August 2013, he has had 3 sciatic episodes which have lasted, the first time 10 days, second time 3 weeks, and third time 6 days. He had to go to the hospital on one of these occasions due to extreme pain. These attacks leave him in so much pain after 30 seconds to 1 minute that he cannot stand, can hardly walk, sitting is painful and his sleeping is also affected due to pain.
- He had another X-Ray and breathing test December 2013 and his breathing has become worse to the point where he is labored after 5 minutes walking and any inclines or stairs worsen this condition considerably.

Mental Impairment

In the PR, the appellant's physician reported that:
- The appellant's chronic back pain has led to depression.
- There are no difficulties with communication.
- The appellant has significant deficits in cognitive and emotional function in the areas of emotional disturbance and motivation, with a note by the physician: "significant depression due to chronic pain."

In the AR, the physician indicated that:
- The appellant has a good ability to communicate in all areas.
- There are no major impacts to the appellant's cognitive and emotional functioning.
- There are moderate impacts to the appellant's cognitive and emotional functioning in the areas of bodily functions, emotion and motivation, and a minimal impact to attention/concentration. There are no impacts in the remaining 10 areas of functioning.
- The physician added comments: "some bowel and bladder problems due to neurologic problems caused by disc disease. Significant depression, low mood, anxiety."
- The appellant is independent in making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others, and securing assistance from others. The appellant requires periodic support/supervision dealing appropriately with unexpected demands. The physician has not provided further comment to explain or describe the support/ supervision required.
- The appellant has good functioning in both his immediate and extended social networks.

In the appellant's self-report as part of the PWD application, he wrote:

- Chronic pain has led to chronic depression and anxiety. He was on anti-depressants and, as a result, two suicide attempts.

In his Request for Reconsideration, the appellant wrote:

- Since filing the reports in August 2013, he is now on medication for anxiety and depression.

Daily Living Activities (DLA)

In the PR, the physician indicated that:

- The appellant has not been prescribed any medication and/or treatment that interfere with his daily living activities.

In the AR, the physician reported that:

- The appellant is independent with moving about indoors and outdoors, with some limitations to endurance.
- The appellant is independent with all 8 tasks of the DLA personal care: dressing, grooming, bathing, toileting, feeding self, regulating diet, transfers in/out of bed and transfers on/off chair.
- The appellant requires periodic assistance from another person with laundry and with basic housekeeping, with a note: "light work only."
- The appellant is independent in performing 4 of 5 tasks of the DLA shopping, while requiring periodic assistance from another person with carrying purchases home, with no explanation or description provided by the physician.
- The appellant is independent with all tasks of the DLA meals: meal planning, food preparation, cooking and safe storage of food.
- The appellant is independent with all 3 tasks of the DLA paying rent and bills: banking, budgeting, and paying rent and bills.
- The appellant is independent in performing all 3 tasks of managing his medications: filling/refilling prescriptions, taking as directed and safe handling and storage.
- The appellant is independent with all 3 tasks of managing transportation, namely: getting in and out of a vehicle, using public transit, and using transit schedules and arranging transportation.

In the appellant's self-report as part of the PWD application, he wrote:

- The back spasms and difficulty breathing make daily chores and walking painful.

In his Request for Reconsideration, the appellant wrote:

- His breathing has become worse to the point where he is labored after 5 minutes of walking.

Need for Help

The physician reported in the AR that the help required for DLA is provided by the appellant's friends. In the section of the AR relating to assistance provided through the use of assistive devices, the physician has not indicated any of the listed items apply to the appellant.

In his Notice of Appeal dated February 4, 2014, the appellant expressed his disagreement with the ministry reconsideration decision due to chronic back pain, recently diagnosed with emphysema and anxiety/ depression 10 years ago. He wrote that he has rapidly decreasing ability to do everyday menial chores including waling short distances without having an effect on his breathing abilities and endurance. This is also leading to worsening anxiety and depression.

Prior to the hearing, the appellant provided the following additional documents:

1) Written submission prepared by his advocate; and,
2) Letter signed by the appellant's physician on April 29, 2014 in which he responded to a series of questions as follows:

- The appellant has a severe physical or mental disability. He suffers from severe, chronic back pain as a result of degenerative disc disease and prior vertebral fractures. He has sciatica which causes pain and numbness throughout his left leg and foot. He experiences periodic, immobilizing flare-ups of sciatica lasting from 5 days to 3 weeks. This has occurred 3 times during the last year. He is also diagnosed with significant COPD resulting in chronic cough and shortness of breath.
- The appellant has developed depression and anxiety which led to two suicide attempts in 2011. Since the time of his original application, the appellant has been prescribed additional medication for his anxiety and depression. He has a long history of substance abuse and recently spent 3 years in a recovery home.
- Based on his knowledge of the appellant's medical history and current circumstances, he is significantly restricted in the ability to perform DLA. His mobility is significantly restricted. During episodes when the sciatica flares up, he is unable to walk or stand at all. At other times, he is limited to walking 5 to 10 minutes before needing to sit due to pain, shortness of breath and fatigue. He is unable to stand for extended periods and must sit down in the shower. He can only carry light items for very short distances.
- The appellant has difficulty sleeping due to constant pain and is consequently fatigued during the day. Combined with worsening depression and anxiety, this creates significant restrictions in many daily activities.
- All activities requiring mobility are restricted. The appellant is unable to get to and from stores on his own and rarely leaves the house. Basic housework and meal preparation take 5 times longer than normal to complete and he is unable to stand for extended periods and fatigues easily. He has difficulty remembering to take medications on time and does not have a regular appetite.
- Asked if he could confirm that the appellant requires significant help with DLA as a direct result of his impairment, keeping in mind that when no help is available it takes the appellant significantly longer than normal to perform DLA on his own, the physician agreed and wrote: The appellant requires assistance with many ADL's. He lives with his partner who provides regular help with housework, meals and shopping. The appellant relies on friends and family for rides when leaving home and he is unable to walk long distances or take transit due to limited mobility. Without help, most ADLs would take 5 times longer to complete or frequently go undone.

At the hearing, the appellant provided a handwritten letter with a summary of his background and current restrictions, which included:

- He has suffered from depression and anxiety from the time he was a teenager until present. Along with issues of depression, anxiety, mood swings and addiction, he has made 2 attempts on his life.
- Recent X-Rays have shown that he has degeneration in his neck which is causing numbness and tingling mostly in his right hand and frequent dizzy spells. It takes up to 2 hours to fall asleep due to pain and he has constant fatigue from not being able to sleep.
- He cannot stand for longer than 5 minutes before his left leg starts to tremble and go numb. He needs heat and cold many times a day to help with the pain management.

- He has to sit while showering in case of dizzy spells.
- Walking distance is limited to about 5 to 15 minutes depending on how his breathing is. He cannot go out on days it is too hot due to shortness of breath. He only goes out when he absolutely has to and he usually has to rely on getting rides to do grocery shopping. Shopping trips are short and limited due to how much he can carry. He only shops two times a month or when needed.
- He has trouble taking his medication and needs to be reminded by his partner.
- Any physical activity like dishes, housework takes 5 times as long as it normally would as he needs to rest constantly to catch his breath. Daily chores such as dishes, cleaning, often go undone by him.
- Preparing meals usually consists of 'quick prep' items or frozen dinners so he does not have to stand and watch over the cooking.
- Due to anxiety/depression, he has an eating disorder where he does not eat for two days sometimes, even when being told by his partner to eat.
- He cannot do anything when his back pain is too severe and he basically relies on his partner for help at these times.
- He cannot walk up hills or slopes as it immediately affects his breathing and stairs have the same effect. Walking for exercise is limited to 5 to 10 minute intervals before he starts to experience shortness of breath.
- Mentally, he is exhausted and he sometimes starts to cry for no reason. He has no self-esteem or confidence left. To do daily activities is a big challenge and he is at the point where the frustration of living daily is an issue.

At the hearing, the advocate stated that:

- The physician did not interview the appellant when he filled out the AR and he may not have fully understood how to complete the form. The physician did not ask the appellant questions about his DLA, about what happens at home. He did not know that the appellant lives with his girlfriend who has to help him with many activities.
- When the appellant completed his Request for Reconsideration, he did not have the assistance of an advocate and did not realize that he needed to verify his worsening condition with information from his doctor.
- They acknowledge that the original PWD application did not paint a clear picture and that there are ambiguous portions. Despite having the ability to seek clarification from the physician, especially in view of the new information the appellant provided in his Request for Reconsideration that his condition has worsened, the ministry did not do so before making its decision as there was no telephone log to indicate communication with the doctor's office.
- The advocate had a 2-hour interview with the appellant, in which he fully described his condition, and then the advocate contacted the physician to explain the requirements for PWD designation. The advocate explained the requirement that the person 'require' assistance, not that they necessarily 'receive' assistance with DLA.
- The advocate drafted the questions and answers in the letter, based on her extensive interview of the appellant, for the physician to review and sign, thereby indicating his professional endorsement of the information set out.

At the hearing, the appellant stated that:

- He met with his doctor and he asked a few questions but likely only took about 5 to 10 minutes to complete the reports. He has been denied the Persons With Persistent Multiple Barriers to

employment (PPMB) status twice in the past and his doctor was familiar with some of his restrictions.

- For preparing meals, he cannot stand at the stove so he does it in stages. He will put something simple in the oven but he cannot cook like he used to, because he loves cooking.
- He has done a lot of physical work in the past and "worked through" the pain until 2006 when he had back surgery. He was working 2 weeks after surgery because he had to support his family. He did not let his body heal properly.
- He discovered that he has hyper-mobility in his pelvis and he had to see the chiropractor about this several times.
- He had X-Rays done 2 weeks ago and he now has degeneration in his neck which is likely causing the numbness and tingling in his arm and the dizzy spells. If he turns his head sometimes, he will get dizzy and cannot see.
- He experienced the sciatica episodes after he sent in the disability forms, sometime in November or December 2013. His hips "pop" at that time and he feels pain in his left leg which starts at his hip bone. He has no feeling in some of his toes and there are 3 vertebrae in his lower back that have no cartilage and simple movements can put his back "out." He feels shooting pain and sometimes he gets cramps in the arches of his feet too. The cramps will go away after a few minutes.
- When he has the sciatica episodes, he cannot do anything except lie on the couch with hot packs or ice packs. When the episode lasted 3 weeks the pain got so bad he had to go to the hospital, in January 2014. They gave him a shot of morphine to help with the pain. He believes muscle relaxants do nothing for nerve pain.
- He takes some pain medication but finds the anti-inflammatory medication is ineffective for his condition. He takes medication for his COPD every day and additional puffers as needed.
- He tries to get out for a walk 3 or 4 times a day as this has been recommended to help his breathing. He has a trail he can walk with a pretty steep incline and when he walks the 300 yards to the top of the hill he is usually 'puffing' at the top of the hill and it takes him about 10 minutes to walk that distance.
- He does not use a cane or any assistive device and will lean or hang on to things to provide support if he needs it.
- At the time of his suicide attempts, there were personal issues in his life that caused him to become very depressed and he does not believe it was the result of the medications he was taking.
- He has started taking anti-depressant medication again but has not been referred to a psychiatrist.

The ministry relied on its reconsideration decision.

Admissibility of New Information

The ministry did not object to the admissibility of the physician's letter or the appellant's handwritten notes and did not raise an objection to the admissibility of the appellant's oral testimony. In the letter, notes and the oral testimony on behalf of the appellant, new information was provided regarding the appellant's impairment. This information provides additional detail with respect to issues addressed in the original PWD application. The panel admitted this new information as being in support of information and records that were before the ministry at the time of reconsideration, in accordance with Section 22(4) of the *Employment and Assistance Act*. The advocate's written submission was considered as argument on behalf of the appellant.

APPEAL #

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 mental or physical impairment and that his daily living activities (DLA) 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, 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 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.

Evidentiary Considerations

The advocate argued that the ministry did not consider the appellant's evidence set out in his Request for Reconsideration or, alternatively, that significant weight was not given to the appellant's evidence, as directed by the court decision in *Hudson v EAAT,* 2009 BCSC 1461, with no explanation of a legitimate reason not to do so. The advocate argued that the ministry had the ability, upon considering the appellant's evidence that his conditions had worsened, to contact the appellant's physician to seek clarification and that the ministry did not do so. The advocate argued that more weight should be placed on the evidence of the physician in the letter dated April 29, 2014 because the physician may not have fully understood how to complete the reports in the PWD application, since he did not interview the appellant when he filled out the AR and he did not appreciate the important distinction that the person may 'require' assistance even when he may not necessarily 'receive' assistance with DLA.

The ministry pointed out that the evidence provided by the appellant in his Request for Reconsideration was referred to in the reconsideration decision and argued that it was considered along with the physician's evidence in the reports filed with the PWD application. The ministry argued that it does not always seek clarification from a physician and agreed that it appears the ministry did not follow-up with the physician in this case.

Panel decision

While the advocate argued that the ministry did not consider the information provided by the appellant in his Request for Reconsideration, the panel finds that the ministry referred to the appellant's evidence in detail and stated that, since no further information was provided by his physician, the decision was based on the evidence from the physician in the original application. There is no indication by the ministry in the decision that there was a reason to discount the appellant's evidence or that it was not considered, and the panel finds that the appellant's evidence was considered along with the physician's evidence in the original application. The appellant's evidence in his Request for Reconsideration provides information that his conditions are worsening; however, there is no requirement that the ministry contact the physician regarding the appellant's additional information, particularly since the assessment by the ministry is that it is not significantly different than the information provided in the original PWD application. To assess the severity of an impairment, the ministry must consider the nature of the impairment and the extent of its impact on daily functioning as evidenced by functional skill limitations and the degree to which performing DLA is restricted. In making its determination the ministry must consider all the relevant evidence, including that of the

appellant. However, the legislation is clear that the fundamental basis for the analysis is the evidence from a prescribed professional – in this case, the appellant's physician.

Although the advocate argued that the physician did not interview the appellant when he completed the original reports, the appellant clarified that his physician was familiar with his restrictions from the appellant's previous applications to the ministry and that the physician asked a couple of questions but the appellant felt he did not take much time completing the reports. The panel notes that in the AR the physician added a handwritten comment with respect to basic housekeeping ("light work only") which indicates some interaction with the appellant and the physician reported that his approach and information source used to complete the form was solely an office interview with the appellant. The physician did not provide a reason for the change in his assessment in the April 29, 2014 letter and did not describe any misapprehension on his part regarding the initial reports as a reason for the letter. The panel therefore accorded equal weight to the additional medical information and the original reports, as supplemented by the evidence from the appellant.

Severe Physical Impairment

The appellant's position is that a severe physical impairment is established by the evidence of his chronic back pain and constant fatigue due to previous vertebral fractures and degenerative disc disease as well as his chronic cough and shortness of breath as a result of significant COPD. The appellant argued that he also experiences sciatica episodes that last 6 days to 3 weeks at which time he is immobilized and that his breathing is also getting worse. The advocate argued that while the physician's statement that the appellant is unable to work does not directly address any criteria for PWD eligibility, being unable to work is a reasonably indication that the appellant is significantly restrict in performing at least some daily tasks and this should not be automatically dismissed. Section 8 of the *Interpretation Act* requires that the legislation be given a fair, large and liberal construction and interpretation that best ensures the attainment of its objects. The advocate argued that the court decision in *Hudson* is authority for the position that the evidence from a physician must be read in a broad way, including narrative sections, to determine if eligibility can be confirmed.

The ministry's position is that the impacts described by the general practitioner are more in keeping with a moderate degree of impairment and there is not sufficient information to confirm that the appellant has a severe physical impairment. The ministry argued that, in assessing the appellant's physical ability, the general practitioner indicated that the appellant is able to walk 4 or more blocks unaided, climb 2 to 5 stairs unaided, lift 5 to 15 lbs. and remain seated 1 to 2 hours. The ministry argued that the general practitioner indicated that the appellant requires continuous assistance with lifting and carrying and holding, and is independent in the remainder of his mobility and physical abilities, with some limitations to endurance. The ministry stated that the general practitioner wrote that the appellant is unable to work and pointed out that the PWD application is not intended to assess employability as it is not an eligible criterion for designation as a PWD.

Panel Decision

A diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment. An "impairment" is a medical condition that results in restrictions to a person's ability to function independently or effectively. The medical practitioner, a physician who has known the appellant for a period of 6 months, diagnosed the appellant with degenerative disc disease L-spine and T-spine (prior vertebral fracture), COPD and chronic pain disorder. The physician also noted in the health history that the appellant is "... physically very limited- difficulty standing for very

long. Unable to lift or carry anything more than about 10 lbs. Chronic cough and SOB due to significant COPD as well." The physician indicated that the appellant does not require any aids for his impairment and, in terms of functional skills, the appellant's abilities are assessed at the higher end of the scale, being able to walk 4 or more blocks unaided on a flat surface, climb 2 to 5 steps unaided, lift 5 to 15 lbs., and remain seated 1 to 2 hours. In the AR, the appellant's physician reported that the appellant is independent with walking indoors, walking outdoors and climbing stairs, with "some limitations to endurance" and is also independent with standing. The appellant requires continuous assistance from another person with lifting and carrying and holding, with no further comments provided by the physician. In his self-report filed with the PWD application, the appellant wrote that he cannot lift or carry more than 10 lbs. for more than 5 minutes before his back starts to spasm.

The appellant's evidence at the hearing was consistent with the assessment in the initial reports as well as with the information provided by the physician in the April 29, 2014 letter. The appellant stated that he tries to get out for a walk 3 or 4 times a day as this has been recommended to help his breathing. He has a trail he can walk with a pretty steep incline and when he walks the 300 yards to the top of the hill he is usually 'puffing' at the top of the hill and it takes him about 10 minutes to walk that distance, but he does not use a cane or any assistive device and the appellant stated that he will lean or hang on to things to provide support if he needs it. In the letter dated April 29, 2014, the physician reported that the appellant is limited to walking 5 to 10 minutes before needing to sit due to pain, shortness of breath and fatigue, he is unable to stand for extended periods, and he can only carry light items for very short distances.

In the additional comments to the PR, the physician wrote: "he has significant problems which prevent him from working; disabled." As for finding work and/or working, the ministry noted that employability is not a criterion in section 2(2) of the EAPWDA nor is it listed among the prescribed daily living activities in section 2 of the EAPWDR. The advocate argued that the physician's comment is still indicative of restrictions to the appellant's functioning. The panel finds that the difficulty with the reference to medical problems 'preventing' the appellant from working is that the 'work' contemplated by the physician is more likely than not the appellant's previous employment. The appellant described his previous employment as being of a very physically-demanding nature, requiring a high level of physical ability and stamina such as prolonged standing, bending and lifting that caused his condition to worsen until he ruptured a disc. The nature of work is different from managing DLA as work involves constant and prolonged performance of tasks.

The new information endorsed by the physician in the letter dated April 29, 2014 is that the appellant has a severe physical or mental impairment and that the appellant experiences periodic, immobilizing flare-ups of sciatica lasting from 5 days to 3 weeks, and that this has occurred 3 times during the last year. In his Request for Reconsideration dated January 6, 2014, the appellant wrote that, since filing the reports in August 2013, he has had 3 sciatic episodes which have lasted, the first time 10 days, second time 3 weeks, and third time 6 days. These attacks leave him in so much pain that he cannot stand, he can hardly walk, and sitting is painful. At the hearing, the appellant also stated that he experienced the sciatica episodes after he sent in the disability forms, sometime in November or December 2013 and that, when he has the sciatica episodes, he cannot do anything except lie on the couch with hot packs or ice packs. When the episode lasted 3 weeks, the pain got so bad he had to go to the hospital, which was in January 2014. While the evidence demonstrates that the appellant's functioning during his episodes of sciatica is markedly decreased from his usual functioning, that he is 'immobilized' during these times, the panel finds that the evidence of how often these periods occur

is not consistent and, therefore, it is given little weight. Whereas the physician's evidence is that there have been 3 episodes in 12 months, the appellant stated both that these 3 episodes have occurred in just over 4 months, from August 2013 to January 2014, and also that they occurred over 2 months, from November/December 2013 to January 2014. As discussed in more detail in the subsequent section of this decision reviewing restrictions to DLA, any physical limitations resulting from the appellant's impairments have not translated into significant restrictions in his ability to manage his DLA independently.

The panel finds that the ministry reasonably concluded that there is not sufficient information to confirm that the appellant has more than a moderate degree of impairment in his usual functioning. The panel finds that it is difficult to obtain an accurate picture of the appellant's experience of episodes of sciatica due to the inconsistencies discussed and the lack of detail in the evidence. In the absence of further detail, the panel finds that the ministry reasonably determined that there is not sufficient evidence to establish that the appellant has a severe physical impairment under section 2(2) of the EAPWDA.

Severe Mental Impairment

The appellant's position is that a severe mental impairment is established by the evidence of his significant depression, low mood and anxiety. The appellant argued that his condition has worsened since the original application and he has since been prescribed medication for depression and anxiety. The appellant argued that the fact that he has attempted suicide twice in the past is evidence of the severity of his mental impairment.

The ministry's position is that there is insufficient evidence to establish that the appellant has a severe mental impairment. The ministry stated that the physician indicated that the appellant has deficits with cognitive and emotional function in the areas of emotional disturbance and motivation due to depression and chronic pain. The ministry argued that when assessing the impacts on daily functioning, the physician indicated that the appellant has moderate impacts to bodily functions (some bowel and bladder problems) and motivation, a minimal impact to attention/ concentration and no impacts to the remainder of his cognitive and emotional functioning. The ministry argued that the physician also indicated that the appellant has no difficulties with communication and that he is good with speaking, reading, writing and hearing.

Panel Decision

The physician diagnosed depression and anxiety and wrote in the PR that the appellant's chronic back pain has led to depression. The physician also reported that there are no difficulties with communication and that the appellant has significant deficits in cognitive and emotional function in the areas of emotional disturbance and motivation, with a handwritten note added by the physician: "significant depression due to chronic pain." In the AR, the physician reported that there are no major impacts to the appellant's cognitive and emotional functioning and moderate impacts in 3 out of a total of 14 areas of functioning, namely: bodily functions, emotion and motivation. The physician added handwritten comments: "some bowel and bladder problems due to neurologic problems caused by disc disease. Significant depression, low mood, anxiety." The panel finds that the physician repeatedly ties the appellant's depression to his physical experience of chronic pain.

In his Request for Reconsideration, the appellant wrote that, since filing the reports in August 2013, he is now on medication for anxiety and depression. The new information endorsed by the physician

in the letter dated April 29, 2014 is that the appellant has a severe physical or mental impairment and the appellant has depression and anxiety which led to two suicide attempts in 2011. At the hearing, the appellant clarified that, at the time of his suicide attempts, there were personal issues in his life that caused him to become very depressed. The physician confirmed in the letter that, since the time of his original application, the appellant has been prescribed additional medication for worsening anxiety and depression. However, besides agreeing that the appellant now has difficulty remembering to take medications, whereas there was previously no impact reported to the appellant's cognitive function in the area of memory, there were no other specific changes to the physician's assessment.

With respect to the two DLA that are specific to mental impairment – make decisions about personal activities, care or finances (decision making), and relate to, communicate or interact with others effectively (social functioning), the evidence indicates that the appellant is not significantly restricted with respect to decision making. The physician reported in the AR that the appellant independently manages his finances (pay rent and bills) and his medications and the decision-making components of the DLA of daily shopping (making appropriate choices) and meal preparation (meal planning and food storage), and is also independent with making appropriate social decisions as part of his social functioning. In the April 29, 2014 letter, the physician agreed that the appellant has difficulty remembering to take medications on time, although there was no issue raised regarding compliance with medications.

Regarding the DLA of social functioning, the appellant is assessed by the physician in the AR as independent in developing and maintaining relationships, interacting appropriately with others, and securing assistance from others. The appellant requires periodic support/supervision dealing appropriately with unexpected demands and the physician has not provided further comment to explain or describe the support/ supervision required. Overall, the physician reported that the appellant has good functioning in both his immediate and extended social networks and no difficulties with communication. In his self report, the appellant wrote that chronic pain has led to chronic depression and anxiety, which is consistent with the physician's note that the appellant's depression is a reaction to his situational experience of pain. The appellant is being treated with anti-depressants by his family physician who has not referred the appellant to a psychiatrist, and there was no evidence of a requirement for involvement by mental health services.

The panel finds that the ministry reasonably concluded that, overall, the impacts assessed to social and cognitive/emotional functioning remain in a moderate range and there is not sufficient evidence to establish a severe mental impairment, pursuant to section 2(2) of the EAPWDA.

Restrictions in the ability to perform DLA

The appellant's position is that his physical and mental impairments directly and significantly restrict his ability to perform DLA on an ongoing basis to the point that he requires the significant assistance of another person, namely his partner. The advocate argued that the court decision in *Hudson* is authority for the position that there must be evidence from a prescribed professional indicating a direct and significant restriction on at least two DLA, but there is no statutory requirement that more than two DLA be restricted in order to meet the PWD eligibility requirements.

The ministry's position is that the appellant can independently manage the majority of his DLA and, for those tasks where periodic assistance is required, the physician has not explained the extent of

the periodic assistance required to indicate restrictions for extended periods of time.

Panel Decision

Section 2(2)(b) of the EAPWDA stipulates that the ministry must be 'satisfied' that a prescribed professional has provided an opinion that an applicant's severe impairment directly and significantly restricts his DLA, continuously or periodically for extended periods. In this case, the appellant's physician is the prescribed professional. DLA are defined in section 2(1) of the EAPWDR and are also listed in the PR and, with additional details, in the AR. Therefore, a prescribed professional completing these forms has the opportunity to indicate which, if any, DLA are significantly restricted by the appellant's impairments either continuously or periodically for extended periods.

In the appellant's circumstances, his physician reported in the AR, that the appellant is independent with the DLA of preparing his own meals, managing his personal finances, with all but one task of shopping for his personal needs, with using public or personal transportation facilities, moving about indoors and outdoors (with some limitations to endurance), performing personal hygiene and self care and managing his personal medication. The appellant is assessed as requiring periodic assistance from another person with laundry and with basic housekeeping and with carrying purchases home when shopping. The physician commented that, for laundry and basic housekeeping the appellant can do light work only, so that he is not able to perform the heavier tasks, and there is no comment with respect to carrying purchases home, and it is more likely than not that this assistance would be for heavier loads in excess of the appellant's functional limitation to lifting 10 lbs. The appellant has not been prescribed any medication and/or treatment that interfere with his daily living activities.

With respect to the two DLA that are specific to mental impairment – make decisions about personal activities, care or finances (decision making), and relate to, communicate or interact with others effectively (social functioning), the physician did not indicate significant restrictions, either in the AR or in his letter, to either DLA. The appellant is assessed as independent with social functioning in the areas of making appropriate social decisions, developing and maintaining relationships, and interacting appropriately with others, with good functioning in both his immediate and extended social networks. He is also independent with managing his finances and making appropriate choices when shopping, and with no difficulties identified with communication. The physician agreed in the April 29, 2014 letter that the appellant has difficulty remembering to take his medications on time and, in his letter, the appellant wrote that he has trouble taking his medication and needs to be reminded by his partner.

In the letter dated April 29, 2014, the physician agreed that the appellant is significantly restricted in the ability to perform DLA. The physician agreed that the appellant's mobility is significantly restricted and, during episodes when the sciatica flares up, he is unable to walk or stand at all. At other times, the appellant is limited to walking 5 to 10 minutes before needing to sit. The physician agreed that all activities requiring mobility are restricted. However, in his letter the appellant wrote that walking for exercise is limited to 5 to 10 minute intervals before he starts to experience shortness of breath. At the hearing, the appellant stated that he tries to get out for a walk 3 or 4 times a day as this has been recommended to help his breathing. He has a trail he can walk with a pretty steep incline and when he walks the 300 yards to the top of the hill he is usually 'puffing' at the top of the hill and it takes him about 10 minutes to walk that distance. While the appellant's mobility may be restricted, he remains capable of regular unaided ambulation over 4 blocks and the panel finds that this does not reflect a significant restriction with the DLA of moving about indoors and outdoors.

In the letter dated April 29, 2014, the physician agreed that the appellant is unable to get to and from stores on his own and "rarely leaves the house;" however, the appellant stated that he gets out for walks several times per day and that he shops two times a month or "when needed." The physician agreed in the letter that basic housework and meal preparation take the appellant 5 times longer than normal to complete and he has difficulty remembering to take medications on time and does not have a regular appetite. The appellant wrote in his letter that, due to his anxiety/depression, he has an eating disorder where he does not eat for two days sometimes even when being told by his partner to eat; however, the panel finds that an eating disorder has not been diagnosed by the physician. The appellant also wrote that for preparing meals, he cannot stand at the stove so he does the cooking in stages. The physician agreed that "without help, most ADLs would take 5 times longer to complete or frequently go undone;" little weight is given to this statement as those tasks that are referred to (housekeeping and meal preparation) do not constitute "most" DLA, and there is no other detail provided. At the hearing, the appellant stated that when he has the sciatica episodes, he cannot do anything except lie on the couch with hot packs or ice pack. As previously discussed, the panel finds that during the sciatica episodes the appellant's usual functioning is greatly decreased and that the available evidence is inconsistent with respect to how often this occurs.

The court held in *Hudson* that that there must be evidence from a prescribed professional indicating a direct and significant restriction on at least two DLA, and the panel finds that section 2 of the EAPWDA stipulates that the ministry must be satisfied in each case that the opinion of a prescribed professional establishes direct and significant restrictions to the person's overall ability to perform DLA. In this case, the physician as the prescribed professional confirmed that the DLA of performing housework to maintain the person's place of residence in acceptable sanitary condition is directly and significantly restricted. In the AR, the physician indicated that periodic assistance is required from another person with heavier chores and, in the April 29, 2014 letter, the lighter chores take the appellant 5 times longer than normal. While there are some restrictions with tasks of other DLA, the appellant remains independent with most tasks of both the physical DLA and the two that relate to a mental impairment. The panel finds that the ministry reasonably concluded that there is not enough evidence from the prescribed professional to establish that the appellant's impairment directly and significantly restricts his ability to manage his DLA either continuously or periodically for extended periods, thereby not satisfying the legislative criterion of section 2(2)(b)(i) of the EAPWDA.

Help to perform DLA

The appellant's position is that he requires the significant assistance of another person, namely his partner, to perform DLA. The advocate argued that the physician provided new information that the appellant's partner helps with housework, meals and shopping and the appellant relies on friends and family for rides.

The ministry's position is that because it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required. The ministry argued that the physician indicated that the appellant does not require any assistive devices or the services of an assistance animal.

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 physician, as a prescribed professional, is that the help required with DLA is provided by the appellant's friends. In the April 29, 2014 letter, the physician agreed that the appellant requires assistance with many ADL's and his partner provides help with housework, meals and shopping. The physician reported that the appellant requires no aids or assistive devices to compensate for his impairment. 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, as defined by 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 decision which determined that the appellant was not eligible for PWD designation was reasonably supported by the evidence, and therefore confirms the decision.