

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of April 7, 2014, which found that the appellant did not meet three of five statutory requirements of section 2 of the *Employment and Assistance for Persons With Disabilities Act* (“EAPWDA”) for designation as a person with disabilities (“PWD”). The ministry found that the appellant met the age requirement and that in the opinion of a medical practitioner the appellant’s impairment is likely to continue for at least two years. However, the ministry was not satisfied that:

- the evidence establishes that the appellant has a severe physical or mental impairment;
- the appellant’s daily living activities (“DLA”) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and that
- as a result of those restrictions, the appellant requires the significant help or supervision of another person, an assistive device, or the services of an assistance animal.

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 ministry did not attend the hearing. Having confirmed that the ministry had been notified of the hearing, the panel proceeded with the hearing in accordance with section 88(b) of the EAPWDR.

The information before the ministry at the time of reconsideration included the following:

- The appellant's PWD application form consisting of the appellant's self-report [dated *November 21, 2013*], and a physician's report ("PR") and assessor's report ("AR") signed by the appellant's family physician [both dated *November 25, 2013*].

The panel reviewed the evidence as follows:

Physical Impairment

- In the PR the physician diagnosed the appellant with musculoskeletal abnormalities ("as outlined in his [self-report]"), diabetes, and drug withdrawal/addiction.
- In terms of functional skills the physician indicated that the appellant can walk 2 to 4 blocks unaided on a level surface, climb 5+ stairs unaided, and can remain seated for 1 to 2 hours.
- In the AR the physician reported that the appellant walks independently indoors (though using an assistive device) and that he uses a cane for walking outdoors. She indicated that he requires periodic assistance for carrying/holding, and that he takes significantly longer than typical in all listed areas of mobility and physical ability.
- The physician commented that "Despite visits to chronic pain specialists through the years, he has become addicted to narcotics. This contributes to weakness and lack of motivation. His poorly controlled insulin diabetes is also a factor in weakness and poor healing."
- The physician indicated that she has initiated treatment for the narcotic addiction in the form of "Attempted withdrawal – 6/12 [months?]"
- In his self-report the appellant wrote that he is a Type 1 diabetic taking insulin 2 to 5 times per day. He stated he has had carpal tunnel syndrome for a long time so any repetitive motions aggravate it almost immediately. The appellant listed a number of injuries he sustained over the course of his working life, including dislocated ankle, several fractures, arthritis, carpal tunnel syndrome, broken jaw, and concussions.
- In his oral testimony the appellant said that he always walks with a cane. He stated that he can mobilize independently indoors by leaning on furniture and counters, and that he occasionally uses a walker.
- The appellant said that he's been living with his parents since he stopped working 7 months ago.
- The appellant said that since the beginning of September 2013 he has seen his physician every 3 weeks. He stated that the physician was in error to indicate in the PR that the appellant can walk 2 to 4 blocks unaided – he said he can't do it. He also said that he can't climb the 5+ stairs indicated by the physician without using a handrail or an elevator. He can lift 15 to 35 pounds but said that it would be "touchy" as to whether he could carry 15 pounds across the room.
- In response to a question from the panel regarding the progress of the withdrawal from narcotics initiated by his physician, the appellant said that when he was working he was getting a dose of narcotic 3 times a day. He needs less now that he's not working – getting a smaller dose only 2 times a day. The appellant said the withdrawal treatment is not going well, stating that the substitute analgesics prescribed by the physician "aren't working."

- In response to a question from the panel as to whether the pain is from his physical injuries the appellant said that he has “massive arthritis”, and that every joint in his body has been injured.

Mental Impairment

- The physician provided no diagnosis of a mental impairment in the Diagnosis section of the PR form, but commented “mild depression” in the section of the PR form dealing with functional skills. There the physician indicated the appellant has significant deficits with cognitive and emotional function in the areas of emotional disturbance, motivation, and attention/sustained concentration.
- In the AR, the physician reported that the appellant’s mental impairment has a major impact in 1 of 14 categories of cognitive and emotional functioning - his memory. She indicated that he has moderate impacts in another 6 areas – bodily functions (e.g. sleep disturbance), consciousness, emotion (depression), attention/concentration, executive, and motivation. The remaining 7 areas showed minimal or no impact. The physician commented “Depression, inability to cope and poor motivation. Result is significant slowing of [DLA]. Socially isolated.”
- In the PR and the AR the physician indicated that the appellant has no difficulties with communication other than that his writing is poor as a result of pain and tremor in his hands.
- In his self-report the appellant wrote that he is forgetting more and more all the time, from appointments to meetings to picking up different things. He stated he forgets to take his medications 5 or 6 times per week, and that he is getting more and more depressed.
- In his oral testimony the appellant said that since the PWD application was submitted he is now seeing a psychiatrist, and stated that his depression has gone from mild to severe. He said that he stays in bed most days because it hurts too much to get out of bed.
- The appellant said that he used to be a very articulate individual, but that it now often takes him 4 or 5 attempts to get “the right word.”

DLA

- In the PR the physician reported that the appellant’s ability to manage DLA is affected by his medication in the form of narcotics, commenting “Weakness and fatigue are increased by these meds.”
- In the AR the physician indicated that the appellant independently manages all aspects of the DLA of *managing personal finances*.
- She reported that the appellant requires periodic assistance with most aspects of personal self-care, and that the appellant requires significantly longer than typical with these activities.
- The physician stated that the appellant requires continuous assistance with *basic housekeeping*, and with most aspects of *meal preparation*, commenting that his mother brings him his meals. He requires periodic assistance with one aspect of *managing personal medications* because of poor memory, but independently manages to take medications as directed and to safely handle and store medications. He requires periodic assistance getting into/out of a vehicle and using public transit, but independently uses transit schedules and arranges transportation.
- Regarding the DLA of *social functioning* (relate to, communicate or interact with others effectively) the physician indicated that while the appellant can independently make appropriate social decisions, and interacts appropriately with others, he requires periodic supervision/support with developing and maintaining relationships, dealing appropriately with unexpected demands, and securing assistance from others. She commented that the appellant “socially isolates mostly because of pain, movement.” Overall, she described the

appellant as functioning marginally in terms of both his immediate and extended social networks.

- The physician commented that “This patient’s numerous injuries and ailments have contributed to poor coping, poor mobility, depression, lack of motivation and pain. Thus he seems to be unable to cope with [DLA].”
- In his self-report the appellant wrote that he now needs assistance with almost all DLA. He has a hard time dressing himself and taking a shower.
- In response to a question from his advocate as to how much longer than typical it takes the appellant to walk across the room (which the advocate estimated would typically take 10 seconds) the appellant responded that with his cane it would take him double or triple the typical time. He said that he couldn’t do it without the cane, or if he could do it, it would take him 5 or 10 minutes.
- The appellant said that his parents have a cleaner come in every couple of weeks.

Help

- The physician indicated that the appellant requires help with DLA as provided by his family, commenting “He is severely disabled and requires help from family members” and “Parents do most [DLA] – shopping, cooking, laundry.”) She reported that the appellant requires an assistive device (cane) for mobility, and has bars in his bathroom. The appellant does not have an assistance animal.

Admissibility of New Information

In his oral testimony the appellant provided new information regarding his impairment. This information generally provides additional detail tending to corroborate evidence in the original PWD application. Accordingly, the panel has 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 s. 22(4) of the *Employment and Assistance Act*.

The appellant, through his advocate, also submitted two documents, one citing section 8 of the British Columbia *Interpretation Act*, and the other containing a summary of the *Hudson* case. (*Hudson v. Employment and Assistance Tribunal*, 2009 BCSC 1461. The panel accepted these documents as argument.

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

PART F – Reasons for Panel Decision

The issue on this appeal is whether the ministry's decision to deny the appellant designation as a PWD was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. In particular, was the ministry reasonable in determining that the appellant does not have a severe physical or mental impairment, and that in the opinion of a prescribed professional the appellant's impairments do not directly and significantly restrict him from performing DLA either continuously or periodically for extended periods, and that as a result of those restrictions the appellant does not require help to perform DLA?

The relevant legislation is as follows:

EAPWDA:

2 (1) In this section:

"assistive device" means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform;

"daily living activity" has the prescribed meaning;

"prescribed professional" has the prescribed meaning.

(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person has a severe mental or physical impairment that

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

(b) in the opinion of a prescribed professional

(i) directly and significantly restricts the person's ability to perform daily living activities either

(A) continuously, or

(B) periodically for extended periods, and

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

(3) For the purposes of subsection (2),

(a) a person who has a severe mental impairment includes a person with a mental disorder, and

(b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires

(i) an assistive device,

(ii) the significant help or supervision of another person, or

(iii) the services of an assistance animal.

EAPWDR section 2(1):

2 (1) For the purposes of the Act and this regulation, "**daily living activities**" ,

(a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:

- (i) prepare own meals;
- (ii) manage personal finances;
- (iii) shop for personal needs;
- (iv) use public or personal transportation facilities;
- (v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
- (vi) move about indoors and outdoors;
- (vii) perform personal hygiene and self care;
- (viii) manage personal medication, and

(b) in relation to a person who has a severe mental impairment, includes the following activities:

- (i) make decisions about personal activities, care or finances;
- (ii) relate to, communicate or interact with others effectively.

(2) For the purposes of the Act, "**prescribed professional**" means a person who is

(a) authorized under an enactment to practise the profession of

- (i) medical practitioner,
- (ii) registered psychologist,
- (iii) registered nurse or registered psychiatric nurse,
- (iv) occupational therapist,
- (v) physical therapist,
- (vi) social worker,
- (vii) chiropractor, or
- (viii) nurse practitioner, or

(b) acting in the course of the person's employment as a school psychologist by

- (i) an authority, as that term is defined in section 1 (1) of the *Independent School Act*, or
- (ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the *School Act*,

if qualifications in psychology are a condition of such employment.

Severe Physical Impairment

The appellant's position is that the reconsideration decision was "inaccurate". He argued, through his advocate, that the information provided by the appellant and his physician in the PWD application form was more than sufficient to show that the appellant has a severe physical impairment due to his multiple injuries, addiction, and diabetes. The appellant cited section 8 of the *Interpretation Act* in

arguing for a “fair, large and liberal construction and interpretation” of the relevant legislation. The appellant relied on *Hudson* to argue that significant weight must be placed on the evidence of the appellant unless there is a legitimate reason not to do so.

The ministry’s position, as set out in its reconsideration decision, is that there is no evidence of any current medical consults or evidence regarding the prognosis for the appellant’s older musculo-skeletal injuries. The ministry also said there is no evidence of a treatment plan for the appellant’s depression, and that attempts are underway to replace the narcotics with pain management that would allow better functionality and increased motivation. The ministry argued that until the withdrawal treatment is complete, it cannot be determined that the appellant’s lack of motivation or weakness will persist indefinitely or for a period of 2 or more years. While acknowledging that the appellant experiences limitations to his physical functioning, the ministry stated that the evidence speaks to a moderate degree of physical impairment rather than a severe impairment.

Panel Decision

A diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment. An “impairment” is the resulting restrictions to a person’s ability to function independently or effectively.

To assess the severity of an impairment 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 are key considerations. A medical barrier to the appellant’s ability to engage in paid employment is not a legislated criterion for severity. The legislation makes it clear that the determination of severity 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 – in this case, the appellant’s physician. In exercising its decision-making power the ministry cannot merely defer to the opinion of the professionals with respect to whether the statutory requirements are met as that approach would amount to an improper fettering of discretion. The professional evidence has to be weighed and assessed like any other evidence.

In the appellant’s case, the physician has indicated that the appellant’s impairments consist of multiple musculoskeletal abnormalities as outlined in the appellant’s self-report, diabetes, and drug withdrawal/addiction. The panel has concerns with the evidence on each of these impairments. As pointed out by the ministry, the physician has referenced the appellant’s old injuries “as outlined in his statement”, but there is no information as to any supporting medical evidence relied on by the physician with respect to the impacts of these injuries or their prognosis. The appellant suggested that much of his pain comes from “massive arthritis” due to the injuries but the physician has not corroborated arthritis as a diagnosis. Section 2 of the EAPWDA specifies that impairments must be confirmed by a medical practitioner.

The physician has indicated that addiction to his narcotic pain-killers is a significant contributor to the appellant’s weakness, fatigue, lack of motivation and inability to cope. She has initiated a plan of treatment to withdraw the narcotic and substitute for less harmful analgesics over a period of 6 to 12 months. The treatment plan is still in process. There is no evidence of a medical prognosis as to whether this treatment approach is likely to lead to improvements in the appellant’s strength, energy

level, motivation, or ability to cope.

Finally, the physician reported the appellant's "poorly controlled insulin diabetes" as being a factor in his weakness and poor healing. There is no evidence as to what factors are causing the diabetes to be poorly controlled and what the prognosis is – if any – for providing better control.

In terms of functional skills, the appellant disagreed with the physician's evidence about his ability to walk for 2 to 4 blocks unaided on a flat surface, saying that he requires a cane to walk any distance at all. He also pointed out that he could only climb stairs with the assistance of a stair rail. The appellant stated that he may be able to lift 15 to 35 pounds, but that he would be able to carry 15 pounds only with great difficulty. Even accepting these clarifications from the appellant, in the panel's view it wasn't unreasonable for the ministry to conclude that this level of functionality is more in keeping with a moderate degree of physical impairment.

In the circumstances of the appellant - given that the treatment plan for withdrawal is still in process, that there are gaps in the evidence as noted above, and considering the level of functional skills exhibited by the appellant - the panel has concluded that the ministry reasonably determined that the evidence falls short of establishing on the balance of probabilities that he has a severe physical impairment as contemplated by the legislation.

Severe Mental Impairment

The appellant's position is that his depression has worsened since the PWD application forms were completed, and that the depression and memory lapses constitute a severe mental impairment.

The ministry's position, as set out in its reconsideration decision, is that the evidence does not establish a severe mental impairment, and that the physician has not provided any treatment plan with respect to depression. The ministry argued that the physician described the appellant's depression as "mild", that the appellant independently manages decision-making, that he has good communication skills, and that his social functioning is adequate to meet his basic needs.

Panel Decision

The physician described the appellant's depression as being "mild", and indicated it is a contributing factor to the appellant's impairment. The appellant's evidence is that his depression is now "severe", but that observation can be given little weight since there is no corroboration from either his physician or psychiatrist.

In terms of mental functional skills, the evidence indicates that the appellant's communications skills are good in all respects, except for poor handwriting.

Section 2(1)(b) of the EAPWDR prescribes 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* in that he independently manages his finances (pay rent and bills) and most aspects of his

medications. Based on the evidence in the AR, he also independently manages the decision-making components of the DLA of *daily shopping* (making appropriate choices) and *social functioning* (making appropriate social decisions).

With respect to *social functioning*, there is evidence to indicate that the appellant is isolating himself to some extent, and that some aspects of social functioning are impacted by pain. However, there is no evidence before the panel as to what sort of support or supervision the appellant may require, and the physician's evidence indicates that the appellant remains functional (albeit marginally) in respect of his immediate and extended social networks.

Considering the evidence as a whole, the panel concludes that the ministry reasonably determined that it does not establish a severe mental impairment.

Significant Restrictions to DLA

The appellant's position is that his DLA are significantly restricted. He stated that he is limited by pain and that he relies on his aged parents to perform most of his DLA. The appellant relied on the *Hudson* decision to argue that the PR and the AR must be read together, and that there is no statutory requirement for restrictions in DLA to be confirmed in each document.

The ministry's position is that evidence does not establish that his impairment significantly restricts DLA either continuously or periodically for extended periods. The ministry argued that the reported restrictions to DLA are inconsistent with the level of functional skills exhibited, and that there was no evidence as to how much longer than typical it takes the appellant to perform DLA.

Panel Decision

The legislation requires that a severe impairment directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods. The term "directly" means that there must be a causal link between the severe impairment and the restriction. The direct restriction must also be significant. Finally, there is a component related to time or duration. The direct and significant restriction may be either continuous or periodic. If it is periodic it must be for an extended time. Inherently, any analysis of periodicity must also include consideration of the frequency. All other things being equal, a restriction that only arises once a year is less likely to be significant than one which occurs several times a week. Accordingly, in circumstances where the evidence indicates that a restriction arises periodically, it is entirely appropriate for the ministry to require evidence of the duration and frequency of the restriction in order to be "satisfied" that this legislative criterion is met.

The evidence is uncontroverted that the appellant independently manages the DLA of *management of personal finances*. For the reasons noted above under the heading Severe Mental Impairment, the appellant is not significantly restricted with respect to *managing personal medications, decision-making and social functioning*.

It is equally clear that the appellant does suffer a significant restriction in his ability to *move about indoors and outdoors*.

Given the appellant's functional skill levels in terms of lifting capacity it is not clear why the appellant is unable to do any housework, to prepare meals, or to do any shopping. There is no evidence from the physician as to how much longer than typical it takes for the appellant to look after his personal self-care or to make use of transportation.

The appellant stated that he relies on his parents to manage a substantial portion of his DLA, but given the gaps in the evidence noted above, the panel is not convinced by the evidence that this arrangement results from restrictions imposed by the appellant's impairments.

In the panel's view, the evidence does not establish on the balance of probabilities that the appellant's ability to manage his DLA is significantly restricted as contemplated by the legislative scheme. Accordingly, the panel concludes that the ministry reasonably determined that the evidence falls short of establishing that the appellant's ability to manage his DLA independently is significantly restricted either continuously or periodically for extended periods.

Help with DLA

The appellant's position is that he relies almost entirely on his parents to perform his DLA, and that he makes extensive use of assistive devices – his cane, bathroom bars, and a walker.

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

Panel Decision

Findings of a severe impairment and significant restrictions in the ability to perform DLA are preconditions to a finding that an appellant requires help with DLA.

For the reasons provided above, the panel finds that the ministry reasonably concluded it could not be determined that the appellant requires help with DLA as defined by s. 2(3)(b) of the EAPWDA.

Conclusion

The panel acknowledges that the appellant's medical conditions have some impact on his ability to function. However, having reviewed and considered all of the evidence and the relevant legislation, the panel concludes that the ministry's decision finding the appellant ineligible for PWD designation is a reasonable application of the legislation in the circumstances of the appellant. The panel therefore confirms the ministry's decision.