

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of October 7, 2015, 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

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

PART E – Summary of Facts

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

- The appellant’s PWD application form consisting of the appellant’s self-report dated May 8, 2015; a physician’s report (“PR”) completed by the appellant’s general practitioner (the “physician”) on May 8, 2015; and an assessor’s report (“AR”) completed by a registered nurse (the “nurse”) on May 5, 2015.
- A “To Whom it May Concern” letter from the physician dated September 1, 2015 (the “Letter”).

Admissibility of Additional Information

Oral information provided by the appellant through his advocate supplied additional detail which was consistent with information that was before the ministry at the time of reconsideration. This oral information was admitted into evidence in accordance with section 22(4) of the *Employment and Assistance Act*.

The ministry relied on its reconsideration decision and provided no additional information.

Diagnoses

In the PR the physician diagnosed the appellant with Hepatitis C (onset 2010), arthritis of the knees (onset 2013), and a rare eye condition (onset 2015). In the Letter, the physician reported that the appellant has had several episodes of depression in the past including suicidal ideation, and that due to his illness with his eye and vision loss, he has once again developed depression. He also has “chronic anxiety.”

Physical Impairment

In the PR the physician reported that:

- She has known the appellant since 2009 and had seen him eleven or more times over the previous 12 months.
- The rare eye condition is an eye infection that causes light sensitivity and pain in surrounding structures. The appellant is currently legally blind in his left eye. The healthy right eye’s vision is impacted by squinting and photophobias. She foresees the eye problem continuing for one year, though it may not completely resolve.
- The Hepatitis C causes mild liver dysfunction and fatigue.
- Moderate to severe bilateral osteoarthritis in his knees prevents the appellant from climbing ladders and slopes. He has difficulty in bending.
- In terms of physical functional skills the appellant can walk 4+ blocks unaided on a flat surface, climb 2-5 steps unaided, and has no limitations on lifting or remaining seated.

In the AR the nurse reported that:

- She has known the appellant for five years and has seen him 11 or more times in the past year.
- The appellant walks independently indoors but he navigates slowly to avoid bumping into furniture.
- He requires continuous assistance in walking outdoors because of extreme eye pain due to light sensitivity. He also requires continuous assistance with climbing stairs (“10 stairs maximum with severe pain” and standing “10-15 minutes then knee pain exacerbates.”)
- The appellant requires periodic assistance with lifting/carrying/holding (15-20 pounds then left eye pain exacerbates.)
- The arthritis is “severe” – cartilage removed from both knees.

In the Letter the physician stated that:

- The appellant’s mobility has been limited by his loss of vision, and the arthritis in his knees “has reduced his mobility too.”
- “I estimate that [the appellant’s] eye would be blind for at least another year and this would only change after he undergoes several surgeries if they are successful.”

In his self-report the appellant explained that the eye infection was caused by his getting scratched in the eye with a branch. A rare bacterial infection went undiagnosed for a long period of time, resulting in his cornea being eroded and ulcerated. The appellant stated that his eye injury has caused a large amount of additional stress, and expressed the hope that the “combination of [physical] afflictions does not create a depressive episode, which life traumas have done in the past.”

In his oral testimony the appellant stated that he takes eye drops hourly, and that he uses a flannel patch to protect his eye during the evening and while sleeping. He said that he wears sunglasses both indoors and outdoors, and that the indoors sunglasses are “less dense” than the ones he wears outdoors. In response to a question from the ministry, the appellant responded that the specialist has told him “most corneal transplants are successful”, though there is less certainty regarding the outcome of the appellant’s rare eye condition. The specialist and appellant are “cautiously optimistic” about the outcome of eye surgery.

In response to questions from the panel, the appellant replied that:

- He suffered light sensitivity in both eyes for about six months, but now it is just his left eye. He stated that both eyes are, however, “interconnected.”
- He can drive to appointments and to the store – just short distances. He cannot drive at night because of oncoming headlights.
- He can’t walk the 4 or 5 blocks to the grocery store and back without having to rest because of his knees.

His specialist has not given him an anticipated date for eye surgery since he is waiting for the condition of the eye to improve more. There may still be bacteria hiding within the cornea.

Mental Impairment

In the PR the physician reported that the appellant has no difficulties with communication and has no significant deficits with cognitive and emotional function.

In the AR the nurse reported that:

- The appellant's communication skills are satisfactory in all respects except that his reading is poor due to blindness in his left eye.
- The appellant suffers major impacts in 3 of 14 categories of cognitive and emotional function in the areas of sleep disturbance ("related to medication for pain"), depression ("panic attacks and depressive episodes: fluctuates lasting 2 months at a time"), and other neuropsychological problems (visual/spatial problems, psychomotor problems, "balance + vision affected.")
- The appellant suffers moderate impacts to motivation ("fluctuates with depression 2-3 months very low motivation.")
- The appellant experiences no impacts to the remaining 10 categories of cognitive and emotional function.
- He has been psychiatrically assessed for depression. Numerous trials of antidepressants have been ineffective and cause side effects that outweigh the benefits of the medication.

In the Letter, the physician wrote that:

- The appellant is socially isolating more than before and still finds it difficult to relate well to other people. His social functioning "is currently greatly inhibited."
- His self-care and appetite have been affected by lack of motivation.
- The appellant has "an emotional reluctance" to take psychotropic medications due to "his previous exposure with suboptimal success rates and a higher level of side effects."
- The appellant will be enrolled into a counselling program "which I hope would give him some benefit, but it would take several months."

DLA

In the PR the physician indicated that:

- The appellant has been prescribed eye drops that interfere with his ability to perform DLA, since he takes them several times a day and they cause "significant stinging pain." She expects the duration of the treatment to be "several months."
- The appellant's impairments directly and continuously restrict his ability to perform the DLA of personal self-care, basic housework, daily shopping, and the outside aspect of mobility indoors and outdoors. She reported no restrictions in the DLA of meal preparation, management of medication, management of finances, use of transportation (though commenting that he needs travel assistance as he "cannot drive"), and social functioning.
- In describing the degree of restriction, the physician responded "mild to moderate due to vision loss."

In the AR the nurse reported that:

- The appellant independently manages all tasks related to the DLA of management of finances (pay rent and bills), management of medications, and meal preparation (though taking significantly longer than typical with food preparation and cooking to avoid damaging his eye).
- He independently manages almost all tasks related to the DLA of personal self-care (he takes twice as long as typical with grooming to avoid cutting himself while shaving or getting soap in his eyes, and requires continuous assistance regulating his "Hepatitis C diet.") He requires periodic help with aspects of daily shopping (sunglasses, eye cover, limits weight of groceries

carried to less than 15 pounds) and use of transportation (periodic assistance using transit schedules, and requires assistance driving after 15 minutes.)

- Regarding the DLA of social functioning, the appellant is independent in all respects except that he requires periodic support/supervision in securing assistance from others as he “Has difficulty asking for help when needed.” The nurse described the appellant’s functioning as “good” with respect to both his immediate and extended social networks.”

Help

In the PR the physician reported that the appellant requires prostheses or aids for his impairment in the form of sunglasses and, possibly, eye patches.

In the AR the nurse reported that the appellant requires “assistive devices” in the form of “numerous eye drop prescriptions”, and that he needs assistive devices for mobility because of severe knee pain. She indicated the appellant does not have an assistance animal. The nurse commented “Friends assist with paperwork, computer work, carrying heavy items, advocacy with paperwork, forms etc. Assistance with driving more than 15 minutes.”

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.

Severe Physical Impairment

The appellant's position is that the combination of the pain and light sensitivity caused by his eye condition, the pain of his osteoarthritis, and the fatigue caused by Hepatitis C constitutes a severe physical impairment. The appellant argued that the ministry read the evidence in discrete pieces, rather than considering the entirety of the evidence, and improperly assessed his impairments as "moderate." He stated that too much weight was put on the PR, and that the Letter offered a complete reassessment of the appellant's functioning. The appellant also argued that sunglasses are an "assistive device" since they are designed to protect the eye from light and he requires sunglasses to aid his mobility both indoors and outdoors. He stated that since there is some ambiguity with respect to the definition of "assistive device", the court's decision in *Hudson v. British Columbia (Employment and Assistance Appeal Tribunal)* 2009 BCSC 1461 requires the ambiguity to be resolved in favour of the appellant. Finally, the appellant argued that since he requires the sunglasses as an assistive device to perform the majority of his DLA, the appellant satisfies the legislative test for severity of his impairment.

The ministry's position is that the assessments provided by the prescribed professionals in the PWD application speak to a moderate, rather than a severe physical impairment. The ministry argued that the use of sunglasses for light sensitivity does not demonstrate the existence of a significant restriction to the appellant's mobility or physical ability.

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.

To assess the severity of an impairment one 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. 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, and that the fundamental basis for the analysis is the evidence from prescribed professionals – in this case, the physician and the nurse. While the physician described the appellant's arthritis as being "moderate to severe" and the nurse described it as being "severe", the ministry cannot simply defer to the professionals' opinion as to whether the statutory criterion regarding severity has been satisfied, as that would constitute improper fettering of the ministry's discretion.

The Letter deals almost exclusively with the effects of the appellant's depression and anxiety, which the evidence of the appellant and the nurse indicates is an episodic condition that periodically affects the appellant during times of high stress. Accordingly the panel does not view the Letter as providing a "complete reassessment of the appellant's functioning" as proposed by the appellant. The panel has read the Letter in conjunction with the PR, the AR, and the appellant's written and oral testimony.

In the PR the physician described the appellant's physical functional skills as being near the high end of the scale. The nurse indicated in the AR that the appellant needs either periodic or continuous assistance from another person with respect to all physical functions other than walking indoors, but there is no evidence before the panel from the physician, the nurse, or the appellant with respect to any help the appellant requires or receives with these functions. Viewing the evidence as a whole, it indicates that the appellant manages these functions independently, though he does have some restrictions due primarily to his vision, as well as fatigue and knee pain.

Regarding the appellant's characterization of sunglasses as an assistive device, a statutory provision is not rendered ambiguous simply because different arguments can be advanced about its interpretation. The modern approach to statutory interpretation is to read the words of the provision in their entire context and in their ordinary sense harmoniously with the scheme of the legislation, the object of the legislation, and the intention of the legislature. A statutory provision can only be said to be ambiguous if, after the application of statutory interpretation principles, there are still two or more possible valid but conflicting meanings to the legislation. With respect to the appellant's situation, the term "assistive device" is not ambiguous. Sunglasses are designed for use by individuals generally to protect eyes from bright light. They are not primarily designed to enable persons with mental or physical impairments to perform DLA. The fact that a person with an impairment may use an everyday item to assist with a DLA does not satisfy the statutory definition of "assistive device." The use of sunglasses by the appellant may be one piece of evidence with respect to the severity of impairment; however it is not determinative on its own.

As discussed in more detail in the subsequent section of this decision under the heading Significant Restrictions to DLA, the appellant's physical condition does not appear to have translated into significant restrictions in his ability to manage his DLA independently.

Based on the foregoing evidence and analysis, the panel has concluded that the ministry was reasonable in determining that the appellant has a moderate – rather than severe – physical impairment.

Severe Mental Impairment

The appellant's position is that his depression and anxiety constitute a severe mental impairment. He argued that the need for continuous assistance with decision making around personal activities and personal care is a result of restrictions stemming from a mental impairment.

The ministry's position is that the information provided by the prescribed professionals indicates a moderate, rather than a severe impairment of mental functioning. The ministry argued that the physician and nurse indicated the appellant has no significant difficulties with communication, and that in the PR and AR there is no indication of significant restrictions to social functioning.

Panel Decision:

The legislation requires that a severe impairment must be identified by a medical practitioner and be confirmed as being likely to continue for at least 2 years. In the Letter the physician has diagnosed the appellant with depression and chronic anxiety. The evidence of the physician, the nurse, and the appellant when read together indicate that these mental conditions are episodic and situational. The physician reported that in her opinion counselling would improve the appellant's condition in "several months". The nurse's evidence indicated that the appellant suffers bouts of depression and panic attacks generally lasting two to three months at a time. The episodic nature of the appellant's mental condition is supported by the evidence that at the time the physician completed the PR she reported that he had no significant deficits in cognitive or emotional functioning. The panel notes that though the nurse identified cognitive and emotional impacts in the AR, she linked two of them to periodic depressive episodes (depression/anxiety and motivation), one of them to his medications (sleep disturbance) and one to his physical impairment rather than his mental impairment (other neuropsychological problems linked to balance and vision).

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 the decision making aspects of managing personal medications (filling/refilling/taking as directed), managing personal finances (budgeting), daily shopping (making appropriate choices), meal preparation (meal planning) and social functioning (appropriate social decisions). The nurse did report that the appellant requires continuous assistance regulating his Hepatitis C diet. On balance the evidence demonstrates the appellant manages his own decision making.

With respect to social functioning, the evidence of the nurse and the physician, when read together, indicate that the appellant has good functioning in both his immediate and extended social networks, except that when he is in one of his depressive episodes he becomes more isolated and anxious. In the Letter the physician stated that the appellant's social functioning is "currently greatly inhibited," but as noted above she expects improvements in many months.

Based on the foregoing analysis, the panel finds that the ministry was reasonable in concluding that

the appellant's mental impairment is more likely moderate rather than severe.

Significant Restrictions to DLA

The appellant's position is that his impairments significantly restrict his ability to manage his DLA. He argued that his mobility, daily shopping, decision-making, and social functioning are directly and significantly restricted.

The ministry's position, as set out in its reconsideration decision, is that there is not enough evidence to confirm that the appellant's impairments directly and significantly restrict his ability to perform DLA either continuously or periodically for extended periods. The ministry argued that the evidence demonstrates the appellant independently manages most 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. In circumstances where the evidence indicates that DLA are directly restricted, it is appropriate for the ministry to require evidence as to whether the restriction is continuous or periodic and – if periodic – of how frequently the restriction arises.

In the PR the physician identified direct restrictions to four DLA. She described the degree and source of restriction as "mild to moderate due to vision loss." She did not identify any restrictions as being "significant." In the AR, the nurse reported the appellant as being independent with almost all tasks related to almost all DLA. The restrictions she noted are virtually all linked to his eye condition. This is consistent with the appellant's self-report, which dwelt almost entirely on his eye infection and contained only passing references to his arthritis and Hepatitis C. The panel notes the appellant's evidence is that his right eye is no longer as sensitive to light as it was for the first six months following his injury, that he can drive himself to appointments and shopping, and he can walk to the store, though having to rest along the way.

In the Letter, the physician focused almost entirely on the effects of the appellant's depression and anxiety. For the reasons detailed above under the heading Severe Mental Impairment, the panel has concluded that the evidence does not indicate that the restrictions to the DLA of decision-making and social functioning meet the statutory criterion as being "significant". The physician reported that depression has affected the appellant's motivation for such DLA as self-care, but the evidence indicates that even if the appellant's depression goes on longer than the typical two to three months, he is likely to benefit from counselling within "several" months.

Based on the foregoing analysis, the panel finds that the ministry was reasonable in concluding that there is not enough evidence to confirm that the appellant's impairments directly and significantly restrict his ability to perform DLA either continuously or periodically for extended periods.

Help with DLA

The appellant's position is that he requires the use of an assistive device (sunglasses) to manage

DLA.

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

A finding that a severe impairment directly and significantly restricts a person's ability to manage his DLA either continuously or periodically for an extended period is a precondition to a person requiring "help" as defined by section 2(3)(b) of the EAPWDA. For the reasons provided above, the panel finds the evidence falls short of satisfying that precondition.

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

Conclusion

The panel acknowledges that the appellant's medical conditions affect his ability to perform DLA. However, having reviewed and considered all of the evidence and the relevant legislation and for the reasons provided above, the panel finds 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.