

PART C – Decision under Appeal

The decision under appeal is the reconsideration decision dated December 9, 2015 made by the Ministry of Social Development and Social Innovation (the ministry) which determined that the appellant did not meet 2 of the 5 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, that his impairment was likely to continue for at least 2 years and that the appellant had a severe mental or physical impairment. However, the ministry was not satisfied that:

- the appellant's mental or physical impairment, in the opinion of a prescribed professional, directly and significantly restricted daily living activities (DLA) either continuously or periodically for extended periods, and
- as a result of those restrictions, in the opinion of a prescribed professional, the appellant required help to perform DLA.

PART D – Relevant Legislation

The relevant legislation is section 2 of the EAPWDA and section 2 of the *Employment and Assistance for Persons with Disabilities Regulation* (EAPWDR).

PART E – Summary of Facts

The evidence before the ministry at the time of the reconsideration decision consisted of:

- (1) a physician's report (PR) dated June 23, 2015, completed by a physician who was seeing the appellant for the first time as a walk-in patient,
- (2) an assessor's report (AR) dated June 11, 2015, completed by a psychologist who had known the appellant for 4-5 months and had seen him 2-10 times in the last year,
- (3) a self report (SR) which has been left blank,
- (4) two letters received by the ministry in response to the ministry's request for more information, one from the appellant's physician who completed the PR dated October 23, 2015, and one from the appellant's psychologist who completed the AR which is undated,
- (5) a letter signed by the appellant's mother and grandmother dated November 26, 2015, printed on the letterhead and apparently prepared on the advice of the ADHD specialist who submitted the letter in (7) below,
- (6) a written statement dated November 29, 2015 signed by the appellant's grandmother, and
- (7) a letter, dated December 3, 2015, written by a specialist in ADHD who had seen the appellant on November 11, 12, 21 and 26 2015, and prepared in response to a ministry request for more information.

The PR indicates that the appellant has been diagnosed with "anxiety disorders → GAD, social anxiety disorder." Under *Health History* the physician notes: "Pt states he is unable to complete schooling (left in Gr 10) feels anxious at work & has never officially had a job. He does not have any friends & does not go out to socialize. His psychologist diagnosed him with Generalized Anxiety Disorder & Dysthymia." The appellant's functional skills are generally good, being able to walk 4+ blocks, climb 5+ stairs and with no limits on lifting or sitting. The physician indicates that the appellant has no difficulties with communication, but does have significant deficits with cognitive and emotional functioning in the areas of executive, memory, emotional disturbance, impulse control and attention or sustained concentration consistent with ADHD and dysthymia. DLAs are all indicated as not restricted, although the physician states that "his mother manages finances & basic housework".

The AR identifies the appellant's mental impairments that impact his ability to carry out DLAs as follows: "Due to anxiety and depression the applicant's unable to engage in problem solving, goal setting or make judgement and act upon judgements in a manner that has allowed for the completion of education or meaningful employment." His ability to communicate is stated to be satisfactory for speaking, reading and hearing, but poor for writing due to a "specific learning disability". The appellant is independent in terms of mobility. Cognitive and emotional functioning shows no impact on daily functioning for 6 of 14 listed items, minimal impact on 2 items, moderate impact on 1 item and major impact on 5 items. Major impact is indicated for emotion, attention/comprehension, executive, motivation and other neuropsychological problems, with the following comments: "Applicant is diagnosed with ... Generalized Anxiety Disorder (severe), ... Persistent Depressive Disorder, Attention-Deficit/Hyperactivity Disorder, ... Specific Learning Disability with Impairment in written expression. Was unable to attend school since grade 9, placed in alternative program and still unable to complete program or later enter job market. To my knowledge was not offered any significant treatment." The appellant is stated to be independent in all personal care DLAs except banking, budgeting and paying rent and bills, which require periodic assistance. The assessor indicates that the appellant requires continuous support/supervision in all social functioning DLAs, but indicates that he has good functioning with both immediate and extended social networks,

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commenting that the “Applicant need [sic] ongoing therapy to learn skills to deal with anxiety & depression as well as accommodate for learning disabilities.” Finally, the assessor writes that the appellant requires the following assistance: “Cognitive behavior therapy for anxiety and depression ... along with academic/workplace coaching.”

Of the two letters received by the ministry at its request for more information, the physician’s letter states that a psychiatrist has diagnosed the appellant with “general anxiety disorder, social anxiety disorder, ADHD (combined type) as well as persistent depressive disorder and a likely learning disorder.” The physician indicates that he has seen the appellant a few times since the PWD application and has prescribed medications for his anxiety disorders as well as exercise, and that once these issues are under control he would prescribe ongoing medications (?) for the underlying ADHD issues. He considers the prognosis difficult - while the conditions the appellant suffers from are likely permanent, the physician indicates with proper treatment they do not have to necessarily interfere with his living a normal life. The physician indicates that the appellant is consulting with a specialist, receiving treatment and responding well. He opines that while without the assistance of his family he would currently be in difficulties, he is responding well to treatment.

The psychologist’s letter states:

Currently [the appellant] lives with his family. It is my understanding always. He has a history of severe anxiety, most likely related to Asperger’s/Autism Spectrum Disorder, as well as significant learning disabilities. This anxiety has kept him from completing school and becoming gainfully-significantly employed. I understand he has been treated medically for this condition.

When being supported by his family he does much better. They are able to monitor him and assist him. I don’t think he could successfully navigate the world without this supervision/support, in spite of the fact that he can present rather well. There has never been a period of intensive intervention, with medication and behavioral (CBT) training that I am aware of.

On his own I would foresee failure. He needs a lot of therapy and medical support to get through this.

The letter signed by the appellant’s mother and grandmother dated November 26, 2015, restates the appellant’s diagnosis of GAD, ADHD, depression and learning disabilities. It states that the appellant met with another psychiatrist who confirmed this diagnosis. It details the appellant’s difficulties in school and states: “[The appellant] continues to require supervision and care. He further requires assistance with almost all activities of daily living including, but not limited to: laundry; cooking; cleaning; attending appointments; reminders to take medication; socializing; reminders regarding personal hygiene, finances, etc.”

The written statement dated November 29, 2015 signed by the appellant’s grandmother states that the ministry now has more information regarding the appellant as the physician did not have a history with the appellant, but the ministry now has the information provided by the ADHD specialist indicating that the appellant’s medical condition is permanent and significantly impairs his DLAs and

that the appellant has seen another specialist who has prescribed new medications based on a diagnosis of ADHD and other anxiety disorders.

The letter dated December 3, 2015, written by a specialist in ADHD states that the diagnosis of ADHD is confirmed; that the appellant has also been diagnosed with depression for which he has been prescribed Zoloft, that ADHD with comorbid anxiety is a permanent condition; that the appellant “feels restricted in his activities of daily life especially with completing daily tasks, inability to organize, self care, social situations.” The ADHD specialist reports that these difficulties mean the appellant is unable to find a job, deal with family or pursue school. He has difficulties with “nutrition, money management, self-care, tardiness, keeping acceptable appearance, sleep/wake difficulties, and avoidance of exercise. Any of the above occurrences could present on a daily basis.” Finally, the ADHD specialist reports that, “[The appellant] definitely requires help with his activities of daily life including assistance with self-care, organizational problems, school assistance, sustainable jobs and money management.”

PART F – Reasons for Panel Decision

The issue under appeal is whether the ministry's determination that the appellant has not met all of the eligibility criteria of section 2 of the EAPWDA for designation as a PWD was either a reasonable application of the legislation, or reasonably supported by the evidence. The ministry was not satisfied that:

- the appellant's mental or physical impairment, in the opinion of a prescribed professional, directly and significantly restricted DLAs either continuously or periodically for extended periods, and
- as a result of those restrictions, in the opinion of a prescribed professional, the appellant required help to perform DLAs.

The ministry determined that the appellant met the age requirement, that the appellant's impairment was likely to continue for at least 2 years, and that he has a severe mental impairment.

The criteria for being designated as a person with disabilities are set out in s. 2 of the EAPWDA and s. 2 of the EAPWDR. Section 2 of the EAPWDA states:

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;

"**health professional**" repealed

"**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 of the EAPWDR provides further clarification:

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.

THE APPELLANT'S POSITION

The appellant's mother prepared a substantial written submission on appeal. It may be summarized as follows:

- (1) The decision in *Hudson v British Columbia (Employment and Assistance Appeal Tribunal)* 2009 BCSC 1461 establishes that restrictions to as few as two DLAs may establish that a person's ability to perform DLAs is significantly restricted. The evidence before the ministry at reconsideration, particularly the letter from the ADHD specialist, indicates that the appellant has restrictions in more than 2 DLAs.
- (2) The letter from the ADHD specialist states that difficulties with DLAs could "present on a daily basis" indicating the frequency and duration of the restrictions on the appellant's DLAs.
- (3) The letter from the appellant's physician states that the appellant's impairment restricts his ability to carry out DLAs. It does not refer to specific DLAs, but according to *Hudson*, it is not a requirement that all DLAs be affected.
- (4) The letter from the appellant's psychologist states that the appellant requires periodic assistance with a number of DLAs and continuous assistance with a number of others and that the appellant might not be able to "successfully navigate the world without this [his family's] supervision/support". This establishes that the appellant does require continuous support for a number of DLAs and is in fact receiving that support.
- (5) The supporting letters from the appellant's mother and grandmother clearly identify at least 7

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DLAs with which they currently provide continuous support, including cooking, cleaning, self-care, communications skills, safety, transportation and social.

- (6) The courts have opined that the legislation and regulations should be construed “liberally, humanely and compassionately and not narrowly and technically”. In this case, the ministry should have taken all the evidence together and applied the legislation in this manner.

At the hearing the appellant’s mother and grandmother representing the appellant restated the written submission, in general pointing out that a reasonable person, taking into consideration all of the evidence before them would conclude that there are indeed significant impacts to a number of the appellant’s DLAs due to his medical condition. They further stated that both the PR and AR do not accurately represent the true situation as regards the impact of the appellant’s medical condition on his DLAs. This is because neither the physician nor the psychologist was sufficiently familiar with the appellant at the time of completing the reports in the PWD application and that the appellant is given to minimizing the impact of his medical condition on his DLAs when directly questioned.

At the hearing the appellant submitted a document dated January 10, 2016, entitled *Daily Living Activities Checklist*. This document, provided to the appellant by a community organization, consists of a 3-page list of daily living activities similar to, but more extensive than, the list contained in the PR and AR. The appellant has marked the activities with which he requires assistance, amounting to 38 of the approximately 60 activities listed. The appellant submitted this document in support of the information in the letters submitted to the ministry at reconsideration and the verbal evidence provided by his mother arguing that the PR and AR inaccurately reflect the true impact that the appellant’s medical condition has on his ability to perform DLAs.

The ministry objected to the admission of the checklist on the basis that it is evidence that contains new information unavailable to the ministry at the time of the reconsideration decision and so, in accordance with section 22(4) of the *Employment and Assistance Act*, is not admissible.

In order to be admissible evidence submitted at appeal must either have been before the ministry at the time of the reconsideration decision or be in support of the information before the ministry. In this case, the checklist was not before the ministry at reconsideration so must be in support of such information to be admissible. The appellant contends that the checklist is in support of the information in the letters before the ministry at reconsideration, but it contains significantly more detail and identifies problems with DLAs that are not mentioned in the letters. The ministry maintains that this is new evidence. The panel notes that at least some of the information in the checklist does go to support the information in the letters submitted to the ministry. However, there is also more DLAs listed here and some are in contradiction to what was reported by the appellant’s physician and psychologist. The legislation is clear that this information must be provided by an approved medical practitioner, which this additional and contradictory evidence is not. On this basis, the panel determined that the checklist is not admissible because it contains new information which is in contradiction to information that was before the ministry at the time of the reconsideration decision and was provided in accordance with the legislation.

THE MINISTRY’S POSITION

- (1) IMPACTS ON DLAs: The PR indicates that 3 of the 10 listed DLAs are impacted by the

appellant's medical condition as follows: daily shopping is affected continuously, while use of transportation and management of finances are indicated both as continuous and periodic. As there is no explanation as to the frequency and duration of the assistance required and both continuous and periodic are indicated, it is difficult to establish whether the restrictions are significant. The AR indicates that the appellant requires periodic assistance with regulating his diet, making appropriate choices and paying for purchases when shopping and filling prescriptions; continuous assistance going to and from stores and reading price and labels; and both periodic and continuous assistance banking, budgeting and paying rent and bills. All other DLAs are independent, including social functioning. The AR does not explain the frequency and duration of the assistance required and, again, both continuous and periodic are indicated which makes it difficult to establish whether the restrictions are significant. Overall, there is not enough evidence to establish that the appellant's ability to perform DLAs is significantly restricted continuously or periodically for extended periods.

(2) HELP TO PERFORM DLAs: The PR indicates that the appellant does not require any assistive devices for his impairment. As it has not been established that daily living activities are significantly restricted, it cannot be determined that significant help is required.

THE PANEL'S DECISIONS

IMPACTS ON DAILY LIVING ACTIVITIES

The PR clearly states that the appellant's DLAs are not impacted by his medical condition.

The AR clearly indicates that the appellant is independent in almost all of his DLAs, excluding budgeting, banking and paying bills.

The physician's letter subsequent to the PR states that while without the assistance of his family he would currently be in difficulties, the appellant is responding well to treatment.

The psychologist's letter subsequent to the AR states: "*When being supported by his family he does much better. They are able to monitor him and assist him. I don't think he could successfully navigate the world without this supervision/support, in spite of the fact that he can present rather well. ... On his own I would foresee failure.*"

The ADHD specialist's letter states that the appellant, "feels restricted in his activities of daily life especially with completing daily tasks, inability to organize, self care, social situations," and that he has difficulties with "nutrition, money management, self-care, tardiness, keeping acceptable appearance, sleep/wake difficulties, and avoidance of exercise. Any of the above occurrences could present on a daily basis."

The mother's and grandmother's letters describe their personal experiences in caring for and assisting the appellant in his DLAs, which corroborates what is set out in the above three letters from the prescribed professionals.

In his testimony, the appellant stated (via the checklist) that his disability makes it difficult for him to do many of the same DLAs as are identified in the letters above.

At the hearing, the appellant's mother argued that the PR and AR are incorrect because at the time, the professionals completing them were not familiar with the appellant and the appellant was not forthcoming regarding his restrictions, whereas the letters before the ministry at the time of the reconsideration decision from these same medical professionals and the ADHD specialist more accurately represent the appellant's situation. These letters establish that the appellant's medical condition has a significant impact on his ability to carry out DLAs and the ministry was not reasonable in either relying on the PR and AR to the exclusion of the letters or finding that, despite the letters, the appellant did not qualify under this criterion.

The ministry argued that, given the contradictions between the information in the PR and AR and in the subsequent letters (the reasons for the discrepancies it was not aware of at the time of the reconsideration decision), combined with the lack of an adequate description of the nature, frequency and duration of the support and assistance required by the appellant, there is simply not enough evidence to establish that the appellant's medical condition significantly restricts his ability to perform his DLAs continuously or periodically for extended periods.

Panel's decision

Given the contradictory evidence before the ministry at reconsideration, the panel accepts that the PR and AR are the clearest and most reliable source of information for the ministry, and that there is a lack of coherence and detail in the letters from the prescribed professionals written after the PWD application was completed. Accordingly, the panel finds that the ministry's determination that there is not enough evidence to establish that, in the opinion of the prescribed professionals, the appellant's severe mental impairment significantly impacts his ability to carry out his DLAs either continuously or periodically for extended periods was reasonably supported by the evidence.

The appellant's further arguments concerning the application of the *Hudson* case to the number of DLAs impacted and a 'liberal' interpretation of the legislation are acknowledged. However, in this case, the ministry did not find that not enough DLAs are impacted, nor did it apply the legislative requirements restrictively. Rather, the ministry determined that given the contradictory and incomplete evidence before it, it could not determine that in the opinion of the prescribed professionals, the appellant's medical condition significantly restricts his ability to perform his DLAs continuously or periodically for extended periods.

HELP IS REQUIRED TO PERFORM DLAS

Here, again, the appellant argues that there is ample evidence in the letters from the prescribed professionals before the ministry at the time of the reconsideration decision to establish that the appellant requires significant help with his DLAs. The ministry argues, again, that the information before it was both contradictory and incomplete such that it could not be established that the appellant's DLAs are significantly restricted and so cannot be determined that he requires significant help with DLAs.

Panel's decision

The legislative requirement is that the appellant requires significant help as a direct result of the restrictions on performing DLAs caused by a severe physical or mental impairment. As the panel has found that the ministry's determination that there is not enough evidence from the prescribed

professionals to establish that the appellant's severe medical condition significantly restricts his ability to perform his DLAs continuously or periodically for extended periods, was reasonably supported by the evidence, this criterion is not applicable.

CONCLUSION

The panel finds that the ministry's determination that it could not conclude that:

1. In the opinion of the prescribed professionals, the appellant's severe impairment directly and significantly restrict his DLAs either continuously or periodically on an extended basis, and
2. the appellant requires assistance with his DLAs were reasonable.

Accordingly, the panel concludes that the ministry's decision that the appellant does not qualify for PWD designation was reasonable based on the evidence before it, and the panel confirms the ministry's decision.