

## PART C – Decision under Appeal

The decision under appeal is the reconsideration decision dated March 13, 2017 made by the Ministry of Social Development and Social Innovation (the ministry) which determined that the appellant did not meet 3 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 and that his impairment was likely to continue for at least 2 years. However, the ministry was not satisfied that:

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

## 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 information before the ministry at the time of the reconsideration decision consisted of the following:

A persons with Disabilities Designation Application consisting of a self-report (SR), a physician's report (PR) and an assessor's report (AR).

In the SR the appellant describes his disability:

*I have been diagnosed with genetic disease by London Health and Science Centre called Ehler's Danlos disease. This has the significant in all my daily life, coping with pain throughout my joints. Osteoarthritis is progressing more rapidly as I age. Damp environments provide even more challenges in managing the pain. I get some small relief through medications and spinal injections. Limiting strain on the spine and lower extremities helps in managing even more complications. In 2000 I was hurt at work and have had a great deal of pain in the spine since then. Despite these medical problems, I work closely with [my physician] and try my best to be a productive member of society.*

And how his disability impacts his life and ability to take care of himself:

*My disability plays a major role in my daily life by limiting my sleep due to extreme pain. Limiting my ability to be employable and productive in the workforce. I find having a close relationship with my doctor and managing my symptoms with medication gives me some small relief. This causes to me to become extremely anxious and depressed as well as angry and frustrated. This in turn creates mental chaos on a daily basis. I am and have been for some time the single father to two boys and this disease has passed on to my youngest son.*

The PR diagnoses the appellant with major depressive disorder since 2015, and Ehlers Danlos Syndrome, osteoporosis and osteoarthritis since 2001. The physician writes:

*This man has Ehlers Danlos Syndrome which causes chronic pain and weakness in joints and muscles even when takes medications. He has generalized joint laxity which likely contributed to a back injury in October 2004 for which he requires ongoing management. He is restricted from lifting, pushing or pulling, prolonged sitting or standing. His physical disability makes employment and daily activity difficult. He is in pain on a daily basis and require ongoing use of pain medication just to carry out activities of daily living.*

Under functional skills the PR indicates that the appellant can walk unaided two to four blocks, climb 5+ stairs, lift 2 to 7 kg and stay seated for less than one hour.

The PR Indicates significant deficits with cognitive and emotional functioning in the areas of emotional disturbance, motivation, and attention for sustained concentration stating that you will suffers from symptoms of major depressive disorder and anxiety neurosis.

Regarding DLAs, the PR indicates that the appellant is restricted continuously in 3 of 10 DLAs, namely, basic housework, daily shopping, mobility outside the home and periodically in social functioning. The physician's comments indicate that the appellant's depression and anxiety interfere with his social functioning and that he receives assistance from friends and family in the indicated DLAs.

The AR indicates that the appellant's ability to communicate is good. The appellant requires periodic assistance from the person in relation to his mobility and physical ability. Regarding the impact of the appellant's cognitive and emotional functioning on his DLAs, the AR indicates that the appellant does not suffer major impacts but moderate impacts in the areas of emotion, executive, memory and motivation, and minimal impacts in the areas of consciousness and attention/ concentration. Regarding DLAs, the AR indicates that the appellant is independent except in the areas of regulating diet, laundry, basic housekeeping, carrying purchases home, food preparation, and cooking. His social functioning is indicated as independent, with good functioning in both immediate and extended social networks.

Also, included in the application was a letter from a counsellor indicating that the appellant had complained of harassment and bullying in the workplace and had been fired from his job. The appellant is challenged as the single parent of two teenage boys. The family had to move to cheaper accommodations and the appellant is feeling shocked and aggrieved at how things have gone. The counsellor states that due to his high anxiety levels the appellant will likely need support and counselling for some period.

Included with the appellant's reconsideration request was a letter from the appellant's physician reiterating the appellant's diagnoses and stating that the appellant:

*. . . is in chronic pain and is only able to manage his daily living activities with the help of medication. He is continuously restricted basic housework, **laundry, repairing meals, daily shopping and mobility outside the home.** He could not manage without the significant assistance of his two teenaged sons. One to three days a week [the appellant] is completely incapable of performing the above the activities. I confirm that [the appellant's] conditions significantly restrict his ability to perform activities of daily living and that he needs help to manage those activities.*

Also, included with the appellant's reconsideration request was a written submission by his Advocate. This submission details the appellant's conditions and symptoms including severe joint pain in his spine, hips, knees, ankles, fingers and toes. The appellant has unstable, shifting joints and suffers frequent sprains and dislocations. He wraps his ankles with bandages and his lower legs are scarred as his skin is fragile and tears easily. He takes nine Tylenol 4s per day and 1200mg of gabapentin 3 times per day as well as 225mg of Effexor for depression. He has difficulty sleeping and on 1 to 3 days per week is not able to do anything. In its conclusion, the submission states "[The Appellant} has severe physical impairment and associated depression. His conditions directly and significantly restrict his ability to perform activities of daily living, both continuously, and in the extreme for one to three days a week. He requires significant help and relies on his sons to provide that help."

## 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 determined that the age requirement and that his impairment was likely to continue for at least 2 years had been met, but was not satisfied that:

- the appellant had a severe mental or physical impairment,
- 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 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

In his request for appeal the appellant writes:

*Based on my conditions I do have severe impairment which significantly restricts my ability to perform daily living activities and as a result I require significant help to perform those activities.*

At the hearing the appellant's advocate reviewed the relevant legislation and highlighted certain parts of the record including those describing the appellant's physical condition. The appellant's advocate also raised section 8 of the *Interpretation Act* which states: "Every enactment must be construed as being remedial, and must be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects." Finally, the appellant's advocate cited *Hudson v. Employment and Assistance Appeal Tribunal* in which the court states that: "Significant weight must be placed on the evidence of the applicant, unless there is a legitimate reason not to do so," and "The *Employment and Assistance for Persons with Disabilities Act* must be interpreted with a benevolent purpose in mind."

On this basis the appellant's advocate argued the following:

- The ministry's statement that it has considered the appellant's self-report in conjunction with other evidence does not meet the requirement in *Hudson* that it be given significant weight.
- The ministry's position that it does not have enough information to assess how often and how long the appellant is severely impacted by his medical condition does not accord with the information provided in the PR, AR and SR which establish that he is significantly restricted most of the time and completely incapacitated 1 to 3 days per week.
- The ministry's statement that the appellant is not prescribed medications that interfere with his DLAs is perverse as the medications he does take help him perform DLAs and there is no legislative requirement that he be prescribed medications that *interfere* with his ability to perform DLAs.
- The ministry's statement that the AR indicates that the appellant can walk 2 to 4 blocks

unaided is not accurate as the appellant requires tensor bandages and knee braces, and, although they were not prescribed by a medical practitioner, they were prescribed by an ergonomic specialist in another province.

- The ministry's analysis of the frequency and duration of the appellant's restrictions is not reasonable because, although it is useful for the ministry to have this information, there is no legislative requirement in this regard and the totality of the evidence establishes that the appellant is significantly restricted every week for days at a time which should satisfy this requirement.
- The ministry has applied the legislation narrowly, in contradiction of section 8 of the *Interpretation Act*.
- The ministry has not given the appellant's evidence the weight that it is required to do in accordance with *Hudson*.
- The ministry has not interpreted the legislation with a benevolent purpose in mind as required by *Hudson*.

### **The Ministry's Position**

The ministry's position is that, based on the evidence before it at the time of the reconsideration decision it did not have enough information to determine that the appellant has a severe physical or mental medical condition that significantly impacts his ability to carry out DLAs and he requires significant assistance to carry out those DLAs.

The ministry acknowledged that the appellant does have some limitations to his physical functioning due to his medical conditions both physical and mental, but this does not indicate a *severe* physical impairment. The ministry considers that based on the SR, PR and AR the appellant suffers from moderate physical and mental impairment.

In terms of DLAs, the SR, PR and AR indicate that the appellant is independent or requires only periodic assistance in almost all of his DLAs. In particular, the ministry considered that the information that it had dealing with how often and how long the appellant might have significant difficulties with his DLAs ("1 to 3 days per week") was not enough to establish that the appellant requires continuous assistance or periodic assistance for extended periods.

### **Panel Decision**

#### Severe Physical Impairment

In making its determination that the appellant does not suffer from a severe physical impairment the ministry considered the evidence before it in the form of the SR, PR and AR. There is no indication that the ministry did not give appropriate weight to the SR as alleged by the appellant's advocate. There is nothing in the SR which is not covered in the PR and AR so that the ministry's consideration of the PR and AR included and was read in the context of the SR. The fact is that in both the PR and the AR (read in the context of the SR) there is nothing to indicate a *severe* physical impairment. The PR indicates moderate impacts under the "Degree and Course of Impairment" as does the "Mobility and Ability to function" section of the AR. The SR provides context for these sections in that it expresses more clearly the level of pain experienced by the appellant. But it does not establish a severe physical impairment.

## Severe Mental Impairment

Again, both the PR and AR indicate a moderate mental impairment which is entirely the result of the ongoing pain experienced by the appellant which affects his sleep and so his mood. The PR talks about “symptoms” of major depressive disorder and anxiety neurosis. The AR indicates no “Major Impacts” and mostly “No Impacts” in terms of cognitive and emotional functioning. The appellant’s SR provides some detail in this regard, but it does not add to or materially change these assessments which do not indicate a mental impairment.

## Daily Living Activities

Here, again, both the PR and AR do not establish that the appellant’s ability to carry out his DLAs is significantly restricted by his medical conditions. The PR indicates that 6 of 10 of his DLAs are not impacted, while the AR (in more detail) indicate that he can carry out the vast majority of his DLAs independently. The SR does not add to this assessment except to state that the appellant relies on his two sons periodically (1 to 3 days per week) for assistance.

The appellant’s advocate placed great importance on the fact that the legislation does not require that an applicant establish the frequency or duration of the impact on their ability to carry out DLAs. This is a specious argument because if followed to its logical conclusion it would preclude the ministry from making an assessment of the impact of the applicant’s medical conditions on their ability to carry out DLAs as required by the legislation. It may not be an explicit, but it is inherent in the legislative requirement that the ministry properly assess the impact of the applicant’s medical condition on their ability to carry out DLAs.

## Help is Required to Perform DLAs

There is no indication in the information before the ministry at reconsideration that the appellant requires assistance continuously or periodically for extended periods. Both the PR and AR indicate that the appellant requires periodic assistance in a very few DLAs. The SR states that the appellant relies on his sons occasionally (1 to 3 days per week) for some DLAs. This does not meet the legislative requirement.

## The Advocate’s Arguments

As the appellant’s advocate raised a number of specific arguments, the panel considers it appropriate to address those arguments directly.

- The ministry’s statement that it has considered the appellant’s self-report in conjunction with other evidence does not meet the requirement in *Hudson* that it be given significant weight.
  - In this case, the appellant’s evidence (including the SR) adds very little to the information contained in the PR and AR. Certainly, there are no contradictions. But, more importantly, it does not speak directly to the legislative requirements in such a way as to establish either a severe physical or mental impairment, or the need for continuous or periodic assistance for extended periods for DLAs in a way that would satisfy the legislative requirements.
- The ministry’s position that it does not have enough information to assess how often and how long the appellant is severely impacted by his medical condition does not accord with the information provided in the PR, AR and SR which establish that he is significantly restricted most of the time and completely incapacitated 1 to 3 days per week.

- The panel disagrees that the evidence establishes this. Given the vagueness of the description of how often and how long the appellant is severely impacted by his medical condition, it was reasonable for the ministry to find that it did not have enough information to make this assessment.
- The ministry's statement that the appellant is not prescribed medications that interfere with his DLAs is perverse as the medications he does take help him perform DLAs and there is no legislative requirement that he be prescribed medications that *interfere* with his ability to perform DLAs.
  - The panel considers that this is a misreading of the ministry's statement which was simply restating something written by the appellant's physician. In any case, there is no indication that the ministry relied on this statement in its decision.
- The ministry's statement that the AR indicates that the appellant can walk 2 to 4 blocks unaided is not accurate as the appellant requires tensor bandages and knee braces, and, although they were not prescribed by a medical practitioner, they were prescribed by an ergonomic specialist in another province.
  - Again, this was not a ministry statement, but a statement by the appellant's physician. The medical evidence before the ministry states that the appellant can walk unaided (i.e. without knee braces) 2 to 4 blocks. Nothing in the evidence before the ministry contradicts this.
- The ministry's analysis of the frequency and duration of the appellant's restrictions is not reasonable because, although it is useful for the ministry to have this information, there is no legislative requirement in this regard and the totality of the evidence establishes that the appellant is significantly restricted every week for days at a time which should satisfy this requirement.
  - This argument is addressed above.
- The ministry has applied the legislation narrowly, in contradiction of section 8 of the *Interpretation Act*, because it failed to give weight to all the evidence regarding the appellant's incapacities.
  - The appellant's advocate has not established that the ministry ignored or failed to give appropriate weight to any of the evidence before it. Section 8 does not give the ministry licence to find that an applicant qualifies for PWD status where the legislative requirements and the policies supporting those requirements are not met.
- The ministry has not given the appellant's evidence the weight that it is required to do in accordance with *Hudson*.
  - This argument is addressed above.
- The ministry has not interpreted the legislation with a benevolent purpose in mind as required by *Hudson*.
  - The requirement of benevolent interpretation does not extend to finding that an applicant qualifies for PWD status when the evidence does not establish that qualification.



## Conclusion

The panel finds that the ministry's decisions that it could not determine that:

1. the appellant has a *severe* physical or mental impairment;
2. the appellant's impairment directly and significantly restricts DLAs, and
3. the appellant requires assistance with DLAs were reasonable;

Accordingly, the panel concludes that the ministry's decision that the appellant does not qualify for PWD was a reasonable application of the relevant legislation and reasonably based on the facts before it. The panel therefore confirms the ministry's decision.