

**PART C – DECISION UNDER APPEAL**

The decision under appeal is the Ministry of Social Development and Poverty Reduction ("the ministry") reconsideration decision dated April 4, 2019 which found that the appellant did not meet three of the five statutory requirements of Section 2 of the Employment and Assistance for Persons with Disabilities Act (EAPWDA) for designation as a person with disabilities ("PWD"). The ministry found that the appellant met the age requirement and that his impairment is likely to continue for at least two years. However, the ministry was not satisfied that the evidence established that:

- the appellant has a severe impairment;
- the appellant's daily living activities ("DLA") are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and,
- as a result of these restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

The ministry also found that it has not been demonstrated that the appellant is in one of the prescribed classes of persons who may be eligible for PWD designation on the alternative grounds set out in section 2.1 of the Employment and Assistance for Persons with Disabilities Regulation. As there was no information or argument provided by the appellant regarding alternative grounds for designation, the panel considers this matter not to be at issue in this appeal.

**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 and 2.1

**PART E – SUMMARY OF FACTS**

The evidence before the ministry at the time of reconsideration included:

- The appellant's PWD Application comprised of the appellant's self report ("SR"), a medical report ("MR") completed by the appellant's family physician ("the GP") and an assessor report ("AR") completed by a registered nurse ("RN");
- Request for Reconsideration (RFR) submitted by the appellant on March 27, 2019, which included four pages citing why he does not agree with the ministry's decision to deny PWD designation, summarized as follows:
  - He does have a severe mental and physical impairment; his impairment significantly restricts his ability to perform DLA and he does require significant help from another person to perform DLA restricted by his impairment.
  - Everyday activities are a struggle and minimal activity increases the pain, such as: difficulties washing hair and getting dressed due to limited use of his right arm; it takes him significantly longer than typical to get out of bed as he has to roll himself out; always goes shopping with a friend for assistance with reaching, lifting and carrying; when prepping meals he must always sit down; it is a struggle to do household chores due to increased pain and periodically a friend or family member will help with housekeeping and laundry; and a friend helps with firewood.
  - Both his GP and RN confirm his medical condition and confirm how he is restricted with his DLA. (The appellant listed all the activities, and which will be noted below in the PWD Application SR section)
  - With respect to the Supreme Court of BC decision in the Hudson Judicial Review, that there is evidence that indicates he has a direct and significant restriction on at least two DLA and that there is confirmation from a prescribed professional that his impairment is severe and directly and significantly restricts his ability to perform DLA.
  - A copy of the Interpretation Act section 8 as well as the PWD eligibility criteria: Judicial Review regarding Hudson v Employment and Assistance Appeal Tribunal, 2009.
- Ministry's PWD Designation Summary dated January 24, 2019;
- Hospital Exam Reports dated July 23 and 24, 2017 outlining the appellant's examination and medical condition after his accident on July 23, 2017.

**PWD Application****Diagnosis**

The GP notes that the appellant suffers from shortness of breath and cough with date of onset being January 2018 and multiple injuries and fractures with date of onset being August 2017 and that the damage most likely is permanent.

**Physical Impairment**

In his SR the appellant reported that:

- his chronic back, neck and right shoulder pain affects both his physical and mental well-being and that the pain never goes away;
- it is painful to lift his right arm past his shoulder or to lift or carry anything weighing more than ten to fifteen pounds;
- he sleeps poorly due to the inability to get comfortable due to neck pain and stiffness and that he must roll to get himself out of bed;
- he is unable to walk more than a block without increased pain and discomfort in his back and that he must stop to rest after being out walking;
- climbing stairs takes him significantly longer than typical;
- he is unable to stand for more than ten minutes;
- it is extremely painful to bend; and
- he is unable to sit for more than one hour, and if on a hard chair he is unable to sit for more than ten to

fifteen minutes.

In the MR, Part B, Health History the GP wrote that the appellant had a bad accident on August 24, 2017 and since the accident the appellant: is in severe pain involving the back, neck and chest wall, the pain is severe enough even carrying five to ten kg; is not able to walk one block before feeling shortness of breath and chest pain over the fractures site; is not able to do his previous job; and is incapacitated at home and not able to work.

In Part C, Degree and Course of Impairment the GP assessed the appellant's functional skills as:

- able to walk less than one block on a flat surface unaided;
- able to climb two to five steps unaided;
- able to lift two to seven kg (five – fifteen pounds);
- able to sit without limitation;
- having no significant deficits to cognitive and emotional function.

In the AR, the RN wrote in response to what impairments impact the appellant's ability to manage DLA: "chronic back, neck and right shoulders pain from an accident in 2017 - affects ability to sleep, affects walking, bending and lifting"

### **Mental Impairment**

No mental condition was noted in the MR.

In the AR, the RN assessed that there was moderate impact on daily functioning in the areas of emotion and motivation, minimal impact in the area of insight and judgement and no impact in all other areas.

In the SR, the appellant wrote that he has no motivation or interest in doing things and that it is a struggle to concentrate and pay attention.

### **Restrictions in the Ability to Perform DLA**

In his SR the appellant reported that:

- he has difficulties washing his hair and it is a struggle to get dressed as he is unable to use his right arm and not able to bend and twist;
- he has to go shopping with a friend because he cannot reach, lift or carry and he uses the shopping cart as a walker;
- he must sit down when he is prepping meals and is unable to use the oven as he cannot bend;
- it is a struggle to do housework because of the pain and he can only do a little bit each day and that a family member helps with it;
- he is unable to do laundry because he cannot transfer the heavy wet laundry to the drier or fold the laundry;

In the MR Part E – DLA the physician answered yes to the question "Does the impairment directly restrict the person's ability to perform DLA" and indicated that activities are restricted on a continuous basis in the areas of basic housework, daily shopping, and mobility inside and outside the home. There are no activities restricted in the areas of personal self-care, meal preparation, management of medications, use of transportation, management of finances or social functioning. The GP wrote as an additional comment regarding the degree of restriction: "pain with many activities like walking, lifting objects" and "shortness of breath".

In the AR, the RN noted that the appellant is independent in most areas, but it takes significantly longer than typical in the areas of dressing, grooming, transfer in and out of bed, laundry, housekeeping and going to and from stores. She comments that the appellant: has difficulty putting on socks and shoes; is not able to use his right arm as he has restricted movement of his right shoulder; takes five to ten minutes before he can put his feet on the floor after getting up; his sitting is restricted to about thirty minutes; needs help with vacuuming and any activities that require bending or reaching. Additional comments by the RN include "client is poorly kept and has offensive body odour", "client smoking gets frequent episodes of vertigo", "reactional depression after accident", "can no longer enjoy outdoor activities"

**Need for Help**

In the MR, the GP wrote in response to the question "What Assistance does your patient need with DLA" that the appellant "needs financial support".

In the AR, the RN indicated that the appellant required periodic assistance from another person in the areas of meal planning, food preparation and cooking and commented that his sister will often bring food over for him and that he often has to sit to rest when preparing food.

In the SR and the RFR, the appellant wrote that he always arranges to go shopping with a friend as he is unable to bend, lift and carry, that someone has to help him with his laundry and housework and that he also needs help with getting his firewood.

**Additional Information Submitted after Reconsideration**

On his Notice of Appeal (NOA) dated April 12, 2019 the appellant wrote that he does have a severe physical impairment that significantly restricts his ability to perform DLA.

At the hearing, the appellant's advocate reviewed the appellant's medical condition and that a physician has confirmed that the appellant is incapacitated. The advocate reviewed all areas of the PWD application and how the appellant's DLA are affected by his condition, as written above in the PWD Application Section. The advocate argues that the ministry has indicated the appellant has a moderate condition, however the appellant: lives in extreme pain that never goes away; finds that all DLA are difficult for him; requires help with all of his household chores and that the GP and the RN have confirmed all of this, so this makes his condition severe rather than moderate. The advocate noted that the ministry requested additional information as to how much longer than typical it takes the appellant to manage his DLA and argues that although the PWD application asks for this information the legislation sets no calculation as to the time required to complete DLA. The advocate reviewed the Hudson v EAAT Judicial Decision and pointed out that the GP has confirmed that the appellant has a severe medical condition, that he has four limitations on DLA, which the RN also confirmed, and that he requires assistance to perform those DLA so therefore meets the criteria for PWD. The appellant added that recently his family and friends don't help as often and when asked how the RN completed the form, he stated that she asked him the questions regarding DLA and he told her the things he could and could not do and who had to help him. The appellant also commented that he was feeling very depressed because he is not able to do anything that he used to do, and that his GP only read his accident reports and did not do any hands on to check to see what hurts and what doesn't.

At the hearing, the ministry reviewed the reconsideration decision and summarized that the appellant had met the age and duration criteria but that the ministry did not consider his medical condition to be severe, that it does not significantly affect DLA or that assistance was required. The ministry argues that the RN wrote that the appellant "states" how he managed his DLA and that he took typically longer than usual to do them, but did not describe how much longer than typical and that they consider the physical impairment to be moderate rather than severe. The ministry argues, regarding a mental impairment, that no mental impairment was noted by the GP, and that the RN indicated a moderate impact on emotion and motivation and periodic support for social interactions/maintaining relationships, so they do not consider that the appellant has a severe mental impairment. When asked if there was any contradictory evidence between the GP and the RN, the ministry responded that there was nothing noted in the decision regarding contradictory evidence.

The Panel considered the written information in the NOA and the verbal evidence presented at the hearing to be argument in support of the information and records that were before the Ministry at reconsideration and therefore admitted the additional information in accordance with Section 22(4)(b) of the EAA.

**PART F – REASONS FOR PANEL DECISION**

The issue in this appeal is whether the ministry reasonably determined that the appellant was ineligible for designation as a PWD. The ministry determined that the appellant did not meet all of the required criteria for PWD designation set out in the Employment and Assistance for Persons with Disabilities Act, Section 2. Specifically, the ministry determined that the information provided did not establish that:

- the appellant has a severe impairment;
- the appellant's DLA are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and,
- as a result of these restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

Relevant legislation:

**EAPWDA****Persons with disabilities**

2 (1) In this section:

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

"daily living activity" has the prescribed meaning;

"prescribed professional" has the prescribed meaning.

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

- (a) in the opinion of a medical practitioner or nurse 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****Definitions for Act**

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

- (a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:
  - (i) prepare own meals;
  - (ii) manage personal finances;
  - (iii) shop for personal needs;
  - (iv) use public or personal transportation facilities;
  - (v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
  - (vi) move about indoors and outdoors;

- (vii) perform personal hygiene and self care;
- (viii) manage personal medication, and
- (b) in relation to a person who has a severe mental impairment, includes the following activities:
  - (i) make decisions about personal activities, care or finances;
  - (ii) relate to, communicate or interact with others effectively.

(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.

**Part 1.1 — Persons with Disabilities**

**Alternative grounds for designation under section 2 of Act**

2.1 The following classes of persons are prescribed for the purposes of section 2 (2) [persons with disabilities] of the Act:

- (a) a person who is enrolled in Plan P (Palliative Care) under the Drug Plans Regulation, B.C. Reg. 73/2015;
- (b) a person who has at any time been determined to be eligible to be the subject of payments made through the Ministry of Children and Family Development's At Home Program;
- (c) a person who has at any time been determined by Community Living British Columbia to be eligible to receive community living support under the *Community Living Authority Act*;
- (d) a person whose family has at any time been determined by Community Living British Columbia to be eligible to receive community living support under the *Community Living Authority Act* to assist that family in caring for the person;
- (e) a person who is considered to be disabled under section 42 (2) of the Canada Pension Plan (Canada).

**Analysis**

Section 2(2) of the EAPWDA requires that in determining whether a person may be designated as a PWD, the Ministry must be satisfied that the individual has a severe physical or mental impairment with two additional characteristics: in the opinion of a prescribed professional, it must be both likely to continue for at least two years [EAPWDA 2(2)(a)] and it must significantly restrict a person's ability to perform DLA continuously or periodically for extended periods, resulting in the need for the person to require assistance in performing those activities [EAPWDA 2(2)(b)]. Therefore, in determining PWD eligibility, after assessing the severity of an impairment the ministry must consider how long the severe impairment is likely to last and the degree to which the ability to perform DLA is restricted and whether help in performing DLA is required. In making its determination the ministry must consider all the relevant evidence, including that of the appellant. However, the legislation is clear that the fundamental basis for the analysis is the evidence from a prescribed professional – in this case the appellant's GP and RN.

In the appellant's circumstance, the ministry found that he had met the age criteria and that he had a medical condition that is likely to continue for at least two years however they do not consider his impairment to be severe or that it affects his ability to manage his DLA directly and significantly. The panel agrees that the age and duration requirements of the legislation have been met, and will consider the remaining requirements by reviewing each of

them individually.

### **Severity of Impairment**

Neither the terms "*impairment*" nor "*severe*" are defined in the EAPWDA. The Cambridge Dictionary defines "*impairment*" in the medical context to be "*a medical condition which results in restrictions to a person's ability to function independently or effectively*" and defines "*severe*" as "*causing very great pain, difficulty, worry, damage, etc.; very serious*". A diagnosis of a severe impairment does not in itself determine PWD eligibility.

### **Physical Functioning**

The appellant's position is that he does have a severe physical impairment that significantly restricts his ability to perform DLA both continuously and periodically and that he needs assistance from others to manage, and that this has all been confirmed by his GP and RN.

The ministry's position is that the appellant's impairment is moderate, not severe and that there is no evidence as to the typical length of time it takes the appellant to perform his DLA so therefore he does not meet the required criteria in legislation.

### **Panel Decision**

The panel notes that the physician wrote that the appellant had a bad accident several years ago and as a result of that he is in severe pain involving his back, neck and chest wall. The physician wrote that the appellant's pain is severe enough even when carrying only five to ten kilograms, that walking one block causes shortness of breath and chest pain in the fracture area and that the appellant is able to climb two to five steps unaided. The RN wrote that the appellant's chronic back, neck and right shoulder pain affects his ability to sleep, walk, bend and lift.

The Panel notes that when considering the definition of the term "severe" that the appellant's physician confirmed that the appellant has severe pain from his impairment, and the definition of the term "impairment", as it relates to the appellant, indicates a medical condition that restricts his ability to function independently or effectively, which both the GP and RN confirmed. Accordingly the panel finds that there is evidence to support that the appellant's physical impairment is severe and that the ministry was not reasonable in determining that the appellant did not have a severe physical impairment.

### **Mental Functioning**

The appellant's position is that his physical impairment is affecting his ability to be social and do the activities that he used to, such that he is feeling depressed.

The ministry's position is that there is no evidence from the physician that a mental impairment exists and that the RN indicated moderate impacts in two areas and that this does not establish that a severe mental impairment exists.

### **Panel Decision**

The panel notes that although the appellant is experiencing depression, has little motivation or interest in doing things, that there were no assessments in the record that indicate a severe mental impairment so therefore finds the ministry was reasonable in determining that the appellant did not have a severe mental impairment.

### **Restrictions in the ability to perform DLA**

The appellant's position is that he is significantly restricted in his ability to do his DLA because of his impairment and that both his GP and RN have confirmed this.

The ministry's position is that considering the appellant's medical history, that it is reasonable to expect that he would encounter some restrictions in his ability to perform DLA, however they found that there was not enough

evidence to confirm that the impairment significantly restricts his ability to perform DLA continuously or periodically for extended periods as is required by legislation.

#### Panel Decision

Section 2(2)(b) of the EAPWDA requires that the Ministry be satisfied that a prescribed professional has provided an opinion that an applicant's severe impairment *directly and significantly* restricts his or her DLA, continuously or periodically for extended periods. In this case, the GP and the RN are the prescribed professionals. DLA are defined in Section 2(1) of the EAPWDR and are also listed in the MR and, with additional details, in the AR.

The Panel notes that the GP has confirmed that the appellant is restricted in four areas of DLA: basic housework, daily shopping, mobility inside and outside the home and that the restrictions are of a continuous nature. The RN has noted that the appellant is independent in most areas but that it takes significantly longer than typical in the areas of dressing, grooming, getting in and out of bed, laundry, basic housekeeping, and going to and from the stores and that he receives periodic assistance with housekeeping and going to and from the stores as well as continuous assistance (or unable) to carry purchases home.

The ministry argued that there was no evidence that demonstrated how much longer than typical it takes the appellant to do many of his DLA, however the panel notes that the RN made numerous comments, after asking the appellant how he manages his DLA, such as: difficulty putting on socks and shoes; not able to use his right arm to dress, bathe, etc; it takes him five to ten minutes before he can put his feet down when getting out of bed; not able to bend to put food in the oven; must sit to prepare food; not able to do his laundry; and he is restricted to sitting thirty minutes before his back really hurts. These comments support the areas of restrictions that the appellant experiences and as the appellant's advocate pointed out, there is no legislative requirement that requires a specific time frame to complete DLA. The appellant requires continuous assistance when going shopping, as he is unable to bend, lift or carry anything and it is the panel's opinion that the inability to pick out your groceries, take it home to prepare it yourself is a significant restriction. The panel points out that individually taken, the restrictions on managing DLA may seem moderate, however the combination of all the restrictions the appellant experiences when doing his DLA amounts to being him being significantly restricted and this was confirmed by both the GP and the RN. Accordingly the panel finds that there is evidence to support that the appellant faces significant restrictions in managing his DLA and that the ministry was not reasonable in their decision.

#### **Help with DLA**

The appellant's position is that he relies on help from family and friends with many of the DLA listed.

The ministry's position is that because it had not been established that DLA are significantly restricted it cannot be determined that significant help is required from other persons.

#### Panel Decision

Section 2(2)(b)(ii) of the EAPWDA requires that, *as a result of direct and significant restrictions* in the ability to perform DLA, a person requires help to perform those activities. That is, the establishment of direct and significant restrictions under section 2(2)(b)(i) is a precondition of meeting the need for help criterion. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

The panel has reviewed all the evidence and finds that the physician confirmed that the appellant requires continuous assistance in four areas of DLA, and although the RN indicated for these same areas that the appellant requires periodic assistance from another person, the comments indicate that whenever the appellant does those DLA's he requires assistance. Accordingly the panel finds that there is evidence to support that the appellant requires help with DLA, therefore finds that the ministry unreasonably concluded that significant help was not required.



**Conclusion**

Having reviewed and considered all of the evidence and relevant legislation, the panel finds that the ministry's decision, which determined that the appellant was not eligible for the PWD designation under Section 2 of the EAPWDA, was not reasonably supported by the evidence and was not a reasonable application of the EAPWDA in the circumstances of the Appellant, and therefore rescinds the decision. The appellant's appeal, therefore, is successful.

APPEAL NUMBER

**PART G – ORDER**

THE PANEL DECISION IS: (Check one)       UNANIMOUS       BY MAJORITY

THE PANEL       CONFIRMS THE MINISTRY DECISION       RESCINDS THE MINISTRY DECISION

If the ministry decision is rescinded, is the panel decision referred back to the Minister  
for a decision as to amount?       Yes       No

**LEGISLATIVE AUTHORITY FOR THE DECISION:**

*Employment and Assistance Act*

Section 24(1)(a)  or Section 24(1)(b)

and

Section 24(2)(a)  or Section 24(2)(b)

**PART H – SIGNATURES**

PRINT NAME

Janet Ward

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2019 May 7

PRINT NAME

Laurie Kent

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019 May 7

PRINT NAME

Linda Smerychyski

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019 May 7