

APPEAL NUMBER

PART C – DECISION UNDER APPEAL

The decision under appeal is the Ministry of Social Development and Poverty Reduction (ministry) reconsideration decision dated 8 July 2019, in which the ministry determined that the appellant was not eligible for persons with disabilities designation (PWD) because he had not met all of the legislated criteria under section 2 the *Employment and Assistance for Persons with Disabilities Act*.

The ministry determined that the appellant had demonstrated that he has reached 18 years of age and that he has a severe mental or physical impairment.

The ministry further determined that the appellant had not demonstrated that his impairment, in the opinion of a medical practitioner or nurse practitioner, is likely to continue for at least 2 years; that his severe mental or physical impairment, in the opinion of a prescribed professional, directly and significantly restricts his ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and as a result of direct and significant restrictions, he requires help to perform those activities.

PART D – RELEVANT LEGISLATION

Employment and Assistance for Persons with Disabilities Act (EAPWDA) – section 2

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR) – section 2

PART E – SUMMARY OF FACTS

Evidence before the ministry at reconsideration consisted of the following:

1. The appellant's PWD Application

The Application contained:

- A Medical Report (MR) dated 26 September 2018, completed by a general practitioner (GP) who indicates she has seen the appellant 2-10 times in the past 12 months and known the appellant for two years.
- An Assessor Report (AR) dated 26 September 2018, completed by the same GP.
- A Self Report (SR) dated 3 April 2019, completed and signed by the appellant.

The panel will first summarize the evidence from the PWD Application as it relates to the PWD criteria at issue in this appeal.

Duration

In the MR, the GP has indicated that the appellant's impairment is not likely to continue for two years or more.

Ability to perform DLA**MR:**

The GP indicates that the appellant has been prescribed medication that interferes with his ability to perform DLA, the duration of which is indicated as 1-2 weeks.

AR:

The GP indicates that the appellant is independent with the personal care activities of feeding and regulating diet and requires periodic assistance from another person with all other personal care activities, including: dressing; grooming; bathing; toileting; transfers in/out of bed and on/off chair.

The GP indicates that the appellant requires continuous assistance with all basic housekeeping tasks, all shopping activities and all meals activities.

The GP indicates that the appellant requires periodic assistance from another person for all pay rent and bills activities and all medications activities.

The GP indicates that the appellant requires continuous assistance getting in and out of a vehicle and the transportation activities are not applicable.

SR:

The appellant indicates that he has been on bed rest since June 2018; he cannot drive and requires assistance for showering, cooking and dressing on a daily basis. He can only walk short distances with a walker and uses a cane to climb stairs.

Help required**MR:**

The GP indicates that the appellant does require aids or prostheses, he was using a wheelchair and may require a cane or walker.

AR:

The GP indicates that the appellant receives assistance from family, health authority professionals and "other". The GP indicates that the appellant routinely uses a cane, crutches, walker and manual wheelchair to help compensate for his impairment.

The GP indicates that the appellant does not receive assistance from assistance animals.

2. Request for Reconsideration

The appellant submitted a signed Request for Reconsideration dated 20 June 2019. At reconsideration, the appellant also submitted a hand-written statement expanding on the information and updating the information provided in the SR.

At reconsideration the appellant also submitted:

- clinic notes from his health centre dated 17 May 2019 ("health centre notes");
- clinic notes from a hospital pain clinic dated 23 April 2019 ("pain clinic notes"); and
- a report from a physical medicine and rehabilitation doctor dated 12 April 2019 ("rehabilitation report").

Additional information before the panel on appeal consisted of the following:

Notice of Appeal

In the Notice of Appeal dated 24 July 2019, the following reasons for appeal are provided: *I have new medical documents and reason for my PWDs, etc... I have a complex and rare injury and am dealing with multiple doctors.*

Appeal Submissions

The appellant did not make appeal submissions.

The ministry relied on the reconsideration decision.

Admissibility

The panel finds that the information provided in the appellant's Notice of Appeal consists of argument, which does not require an admissibility determination in accordance with section 22 (4)(b) of the *Employment and Assistance Act*.

PART F – REASONS FOR PANEL DECISION

The issue in this appeal is whether the ministry reconsideration decision that determined that the appellant did not meet three of the five statutory requirements of Section 2 of the *EAPWDA* for PWD designation is reasonably supported by the evidence or is a reasonable application of the legislation in the circumstances of the appellant. Specifically, the ministry determined that the information provided did not establish that:

- the appellant's impairment, in the opinion of a medical practitioner or nurse practitioner, is likely to continue for at least 2 years;
- the appellant's severe mental or physical impairment, in the opinion of a prescribed professional, directly and significantly restricts his ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and
- as a result of those restrictions, he requires significant help or supervision of another person to perform those activities.

The following section of the *EAPWDA* applies to this appeal:

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.

(4) The minister may rescind a designation under subsection (2).

The following section of the *EAPWDR* applies to this appeal:

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.

DURATION

The legislation requires that for PWD designation, the person must have a severe mental or physical impairment that in the opinion of a medical practitioner or nurse practitioner is likely to continue for at least 2 years. The legislation makes it clear that the determination of duration is in the opinion of a medical practitioner.

In the reconsideration decision, the ministry determined that it was unable to confirm that, that the appellant impairment, in the opinion of a medical practitioner, is likely to continue for two or more years. In reaching this conclusion the ministry noted that the GP had indicated in the MR that the appellant's impairment was not likely to continue for two or more years. The ministry also considered the health centre notes, which indicated a guarded prognosis and pending MRI to determine whether the damage the appellant has suffered is permanent.

The panel finds that the ministry's determination was reasonable. The panel finds that there was no information from a medical practitioner before the ministry at reconsideration, or before the panel on appeal, indicating that the appellant's impairment is likely to continue for two years or more. The appellant has indicated in his Notice of Appeal that he has new medical documents, but he has not described the content of these documents nor has he submitted them to the panel. The panel finds that the ministry's determination, that the appellant has not established that his impairment is likely to continue for two years or more, is reasonably supported by the evidence.

Direct and significant restrictions in the ability to perform DLA

The legislation specifies that the minister assess direct and significant restrictions in the ability to perform DLA in consideration of the opinion of a prescribed professional, in this case the GP. This does not mean that other evidence should not be considered, but it is clear that a prescribed professional's evidence is fundamental. At issue in this assessment is the degree of restriction in the appellant's ability to perform the DLA listed in section 2(1)(a) and (b) of the EAPWDR. The panel notes that, according to the legislation, the direct and significant restriction in the ability to perform DLA must be due to a severe mental or physical impairment.

The ministry was not satisfied that the appellant established that, in the opinion of a prescribed professional, his impairment directly and significantly restricts his ability to perform DLA. In reaching this conclusion, the ministry noted that the appellant's PWD application was completed shortly after his surgery in September 2018 and found that it did not speak to his current functioning. The ministry also considered the medical reports submitted on appeal and noted that while these reports that indicate that appellant is mostly bed bound, they do not speak to his ability to perform DLA as set out in legislation.

The panel finds that the ministry's determination that the assessments provided do not establish that a severe impairment significantly restricts the appellant's ability to perform DLA continuously or periodically for extended periods was not a reasonable application of the legislation nor was it reasonably supported by the evidence. The

panel notes that the legislation specifies that direct and significant restrictions to DLA must be in the opinion of a prescribed professional. The panel notes that the GP has indicated in the PWD application that the appellant is restricted continuously or periodically with almost all tasks included in the PWD application. The panel notes that the BC Supreme Court stated, in *Hudson v. British Columbia (Employment and Assistance Appeal Tribunal)*, 2009 BCSC 1461 at para. 43, that:

Section 2(2) of the EAPDA requires evidence from a "prescribed professional" that a severe physical impairment "directly and significantly restricts the person's ability to perform daily living activities." There is no indication that every one of the daily living activities listed must be affected. The ordinary meaning of the plural "activities" in this section dictates that there must be evidence from a prescribed professional indicating a direct and significant restriction on at least two daily living activities.

The panel notes that the GP has indicated in the PWD application that the appellant is restricted, either continuously or periodically, in relation to some or all of the tasks listed for each category of DLA set out in the legislation. The panel finds that this evidence amounts to "*evidence from a prescribed professional indicating a direct and significant restriction on at least two daily living activities*" as described by the court in *Hudson*. The panel also finds that there was no evidence before the ministry at reconsideration, or before the panel on appeal, that is inconsistent with this assessment or that contradicts it in any way. To the contrary, the panel notes that the SR, which was completed by the appellant in April 2019 and the appellant's reconsideration submission from June 2019 confirm that these restrictions to his ability to perform DLA have persisted. In addition to this, the panel notes that the health centre notes and pain clinic notes submitted at reconsideration also confirm that the appellant is mostly bed bound and walks with a walker. In light of the original assessments and later consistent evidence, the panel finds that a medical practitioner has confirmed that the appellant has a severe physical impairment that directly and significantly restricts his ability to perform daily living activities continuously or periodically for extended periods. The ministry's conclusion on this criterion was not reasonably supported by the evidence or a reasonable application in the appellant's circumstances.

Help required

The legislation requires that, as a result of being directly and significantly restricted in the ability to perform DLA either continuously or periodically for extended periods, a person must also require help to perform those activities. 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, significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

In the reconsideration decision, the ministry determined that because it had not been established that the appellant's ability to perform DLA were significantly restricted, it could not be determined that significant help with DLA is required. The panel has concluded (above) that the ministry's conclusion that direct and significant restrictions in the appellant's ability to perform DLA have not been established was not reasonable. As a result, the panel must assess the ministry's conclusion on the "help" criterion in light of that finding.

The panel finds that the information provided by the appellant in his original PWD application and at reconsideration demonstrates that the appellant does receive assistance from family, friends, health care workers and others and that he relies on assistive devices, including a cane and walker in order to perform the directly and significantly restricted DLA. As such, the panel finds that the ministry's conclusion, that it cannot be determined under section 2(2)(b)(ii) of the EAPWDA, that the appellant requires help to perform DLA is not reasonably supported by the evidence.

Conclusion

The panel finds that the ministry's reconsideration decision, determining that the appellant had not met all of the legislated criteria for PWD designation, was a reasonable application of the legislation in the circumstances of the appellant and was reasonably supported by the evidence. The panel confirms the ministry's reconsideration decision. The appellant is not successful on appeal.

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

Jennifer Smith

SIGNATURE OF CHAIR

DATE (YEAR/MONTH/DAY)

2019/09/11

PRINT NAME

Anil Aggarwal

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/09/11

PRINT NAME

Reece Wrightman

SIGNATURE OF MEMBER

DATE (YEAR/MONTH/DAY)

2019/09/11