

**PART C – DECISION UNDER APPEAL**

(State the reconsideration decision)

The decision under appeal is the reconsideration decision of July 27<sup>th</sup> 2009, determined that the appellant did not meet the criteria required for designation as a person with disabilities under Sections (2) and (3) of the Employment and Assistance for Persons with Disabilities Act. The ministry stated that the appellant met the age and duration requirements but

- did not have a severe mental or physical impairment or
- A prescribed professional did not confirm that his impairment significantly or directly restrict his ability to perform daily living activities either continuously or periodically for extended periods, and
- A prescribed professional did not confirm that, as a result of direct or significant restrictions, help is required to perform daily living activities, either continuously or for extended periods.

**PART D – RELEVANT LEGISLATION**

(State the relevant Legislation considered)

Employment & Assistance for Persons With Disabilities Act, Sections 2 (2) and (3)  
Employment and Assistance for persons with Disabilities Regulation (EAPWDR) section 2

**PART E – SUMMARY OF FACTS**

Please set out the facts as determined by the panel, based on the evidence at the hearing. Please note that subsection 22(4) of the Employment and Assistance Act states that, in a hearing referred to in subsection (3), a panel may admit as evidence only:

(a) the information and records that were before the minister when the decision was being made, and

(b) oral or written testimony in support of the information and records referred to in paragraph (a).

The ministry was not in attendance at the hearing. After confirming that the ministry was notified, the hearing proceeded under Section 86(b) of the EAPWDA.

The evidence before the ministry was:

- A physicians and assessors report, dated April 15<sup>th</sup> 2009
  - a document from a neurosurgeon, dated May 25<sup>th</sup>, 2009, regarding a consultation with the appellant on the same date, and addressed to the Workers Compensation Board, which was copied to appellants physician
  - A letter from an Osteopathic Physician\* dated February 12<sup>th</sup> 2009
- (\*The Osteopathic Physician is both a Certified member of the College of Family Physicians of Canada (CCFP) and a Fellow of that body (FCFP). The College of Family Physicians sets the standard for family physicians in Canada and members are licensed to practice in B.C.)

The evidence presented described the appellants condition as follows:

Physicians report:

- The appellant was diagnosed as suffering from cervical disc herniation and hepatitis C. The physician stated that the appellant was “disabled from work and daily living activities due to inability to use left arm effectively. His symptoms are severe, frequent and unresolved”. The hepatitis C is not treatable at this time. (Appellant is allergic to interferon, which is the only drug that can be used to treat hepatitis C)
- The appellant had a consultation with a neurosurgeon for cervical disc surgery and an ongoing assessment of the status of hepatitis C with a gastroenterologist.
- The narrative sections of the assessor's report indicate that the appellant has “a prolonged disability with delayed therapy” and “requires help with heavy tasks, lifting and carrying” The appellant is described as suffering from suffering from depression, pain, weakness and disability of arm and neck, and from hepatitis C. The assessor reports that the appellants impairment is likely to last more than 2 years (Section C – degree and course of impairment)

The assessors report

- In this report, the boxes which declare the degree of impairment indicate that the appellant had good ability to communicate in speaking, reading, writing and hearing. Mobility, walking indoors and outdoors, climbing stairs and standing are evaluated as independent. Lifting and carrying were both described as “requires periodic assistance from another person” and “takes significantly longer than typical” but the assessor failed to indicate how much longer, as requested in the form.

- As far as mental impairment was concerned, the categories of bodily functions, consciousness, insight and judgement, memory, motivation, motor activity, language psychotic symptoms, other neurological problems (visual/spatial problems, psychomotor, learning disabilities) and other mental problems are rated as "no impact". Attention/concentration, and executive (planning, organising, problem solving etc.) were rated as "minimal impact" and emotion (excessive anxiety, depression) was rated as "moderate impact."
  - Despite the statement in the physicians report that the appellant was "disabled from work and daily activities due to ability to use left arm effectively" and, in the assessors report that the appellant "requires help with heavy tasks, lifting, carrying", the daily living activities were all rated as independent, apart from going to and from stores and carrying purchases home, which were rated "requires continuous assistance from another person," or "takes significantly longer". Meal planning and preparation, cooking, safe storage of food were rated as independent, as were banking, budgeting, paying bills, activities associated with medications and the use of transportation were similarly rated.
  - The appellant was evaluated as independent in the categories of social functioning. These described such factors as acting appropriately in social situations, developing and maintaining relationships, dealing appropriately with unexpected demands, and ability to obtain assistance from others.
  - The appellant's relationship with his immediate social network (partner, family, friends) was described as "good functioning", as was his relationship with an extended network (neighbourhood contacts, storekeepers, public officials etc.)
  - The assistance provided for appellant was described as help required with heavy tasks, lifting, carrying, and the appellant wears a cervical collar and used splints.

The letter from the neurosurgeon stated:

- The letter consists of a series of answers to questions posed by the WCB. Summarising the answers, it was established that the appellant suffered from a C5-6 disc protrusion, and this would explain the symptoms (weakness, loss of function) in his left arm). The disc protrusion was "highly likely" caused by a work related injury that occurred in August 2006. (The surgery was performed on April 7<sup>th</sup> 2009, four weeks after seeing the neurosurgeon) In response to the question "Are the appellant's ongoing symptoms of pain and impairment a result of the work accident which occurred on August 30<sup>th</sup> 2006?" The neurosurgeon responds that "In my opinion they are..... There is a greater than 50% chance favouring this conclusion. The appellant has sustained a long period of pain and disability from his disc protrusion-he appears to have a good result from surgery. The subtle spinal cord signs will probably persist but he does not have spinal cord dysfunction".

- The letter from the osteopathic specialist, dated February 12 2009, states that the appellant consulted him on February 11th 2009. An examination in September 2008 revealed that the weakness in the appellants left arm was consistent with a nerve root compression injury. He had significant weakness in the left tricep musculature and visible fasciculations of this muscle. He had secondary pain of the wrist and hand with a range of motion tests. As the appellant had an appointment with a neurosurgeon, the follow up did not take place until February 2009.

The MRI confirmed that he had a large disc herniation and confirmed that he continued to have a marked weakness of the left tricep musculature. He continues to have difficulty performing and any significant tasks with his left extremity (arm). Manoeuvres such as coughing and sneezing significantly increased his radicular symptoms. It is suspected that the appellant will have to undergo surgery to obtain resolution of this problem.

The appellant tabled as evidence;

- a letter from a neurosurgeon, dated July 22, 2008,
  - an MRI (Magnetic Resonance Imaging) report
  - a letter from the Together Against poverty Society (TAPS) written by the appellants advocate, and
  - a letter from a relative of the appellant, testifying as to the amount of help the appellant requires
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- He had delivered some letters from medical specialists to the ministry, but did not obtain a receipt. These letters did not appear in the file. These documents included an MRI report, the results of a CAT scan, and a letter from a consulting neurologist. The appellant tabled some of these documents, which the panel admitted under section 22(4) of the Employment and Assistance Act as evidence in support of the information and records before the ministry at reconsideration.
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- The letter from the consulting neurosurgeon stated that the appellant had been assessed by the medical practitioner on July 22<sup>nd</sup> 2008, after being referred from a local hospital, where he had been examined in emergency. He had gone to emergency with increased pain in his left hand. The neurosurgeon stated that the appellant has normal tone in all four limbs. Although testing of the muscle groups of the left arm caused pain, there was no definite weakness in biceps, triceps, deltoids, shoulder abductors, internal and external rotator or finger and wrist flexors and extensors. Examination of the lower limb indicated normal functioning. The consultant explained to the appellant that it was possible that many of his symptoms were related to a displaced disc, which had been identified during a CAT scan (date unspecified). The consultant concluded by stating that the appellant would be seen in follow up after an MRI. However, there is no further documentation from this source.

The report on the MRI, which was addressed to the consulting neurosurgeon in the previous paragraph, contained information as to the appellants condition but did not come to any conclusions regarding any impairment caused by these conditions.

The letter from TAPS described the difficulties which the appellant suffers and testifies that :

- The appellant suffers severe pain as a result of an accident in August 2006. He is, from that time, frequently debilitated due to the severity of this injury, which is easily aggravated by day to day activities. Once aggravated, it takes 2-3 weeks for the pain to subside. The appellant takes a strong pain killer daily, but it is ineffective.
- The appellant has no feeling in the palm of his left hand but the back was supersensitive. He had little control over his left hand and arm, which was subject to unpredictable movement. This made activities like shaving, washing dishes cleaning, personal hygiene etc. extremely difficult and he experiences severe pain from simple tasks like wiping down a counter. The lack of feeling in his palm meant that he was unaware of trauma e.g. cuts or burns, to his hand. He is continually in a state of severe pain and this affects his sleep.
- His brother, who acts as the appellant's caregiver, has testified as to the difficulties the appellant is experiencing, as outlined below.

The letter from the appellant's brother, who is his caregiver, testifies that:

- the writer has had to offer significant ongoing assistance to the appellant in areas such as shopping, cleaning, laundry, preparing meals etc.
- The appellant has been witnessed in an extreme amount of pain and discomfort.
- He has sleep difficulties with sleep.

The appellant further testifies that:

- He is having difficulty obtaining physiotherapy treatment, because of the challenge of finding a physiotherapist who is not fully booked.
- The appellant had consulted a chiropractor, but she was reluctant to work on him because the unknown extent of his injury.
- A rehabilitation organisation had performed some work but the appellant considered that they concentrated on the wrong area.
- The appellant contracted hepatitis C in 1982 as a result of a blood transfusion. This disease makes him very tired and doctors sometimes have difficulty in discerning whether the tiredness is as a result of the hepatitis or his long term injury. However, he does not claim that the hepatitis was a factor in his impairment.

**PART F – REASONS FOR PANEL DECISION**

(State the reasons for the panel decision)

The issue to be decided is whether or not the ministry's decision to deny designation as a person with disabilities was reasonable.

In order to be designated, a person must meet the criteria outlined in Section 2(2) & (3) of the EAPWDA and Section 2 of the EAPWDR.

The EAPWDA stipulates:

(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 (B.C. Reg. 196/2007)

(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).

ATTACH EXTRA PAGES IF NECESSARY

## EAPWDR

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 authorized under an enactment to practice the profession of

- (a) medical practitioner,
- (b) registered psychologist,
- (c) registered nurse or registered psychiatric nurse,
- (d) occupational therapist,
- (e) physical therapist,
- (f) social worker,
- (g) chiropractor, or
- (h) nurse practitioner.

The ministry argues that, based on the evidence in the physicians report and assessors report, while the appellant meets the age and duration criteria, he:

- does not have a severe mental or physical impairment
- his impairment does not, in the opinion of a prescribed professional, significantly restrict his ability to perform daily living activities
- he does not, in the opinion of a prescribed professional, require significant help or supervision of another person to perform daily living activities restricted by his impairment.

The ministry's conclusion rests upon the evaluation of sections A through D of the assessors report. These "tick boxes" indicate a high degree of independence in all categories, except:

- lifting – takes significantly longer, periodic assistance required
- carrying and holding – takes significantly longer, periodic assistance required
- emotion (depression) – moderate impact
- attention/concentration – minimal impact
- executive ( planning, organising) – minimal impact
- going to and from store – takes significantly longer
- carrying purchases home – takes significantly longer

The evaluations, however, are contradicted to some degree by the narratives in both the physicians report and the assessors report, both of which were completed by the appellants personal physician. In the physicians report, the appellant is described as "disabled from work and daily living activities due to inability to use left arm effectively. His symptoms are severe, frequent and unresolved". In the assessors report, completed by the same physician, the appellants is diagnosed as suffering from depression pain, weakness, disability of neck and left arm, and with hepatitis C. He requires help with heavy tasks, lifting, carrying. However, the amount and duration are not identified. The Additional Information section (E) states that the appellant has a "prolonged disability with delayed therapy. The hepatitis C is unfortunately not treatable at this time". The appellant is allergic to Interferon, which is the only medication currently available to treat this condition.

The ministry did not quote from any of the evidence contained in the letters from the prescribed specialists described above, some contained in the file and others which the appellant claims to have delivered to the ministry.

The neurosurgeon states that the appellant " sustained a long period of pain and disability from his disc protrusion but... he appears to have good result from surgery. The subtle spinal cord signs will probably persist...." Although the prescribed professional sates that the appellant has had a good result from the surgery, there is no indication that this has alleviated the pain or disability in any way.

The osteopathic specialist states that the appellant " continues to have difficulty performing an significant task with is left extremity. Valsalva manoeuvres such as coughing and sneezing significantly increase his radicular symptoms. Previous bone scan and radiologic studies also suggest the development of RSD in the left hand and wrist"

To summarise the prescribed professionals opinions, the appellant

*"is disabled from work and daily living activities due to inability to use left arm effectively. His symptoms are severe, frequent and unresolved"* (Physicians report)

*"suffers from depression, weakness, disability of neck and left arm, and hepatitis C"* (Assessors report)

*"requires help lifting with heavy tasks, lifting, carrying"* (Assessors report)

*"prolonged disability with delayed therapy"* (Assessors report)

The neurosurgeon's report confirms that appellant has ongoing symptoms of pain and impairment.

The panel considers that the letters from the various prescribed professionals along with the narratives in the physicians and assessors report indicate an impairment that is severe and prolonged.

In considering whether or not the appellant meets the criteria for designation, the panel considered each factor. The ministry agrees that the appellant is over 18 years of age. The further legislative requirements are:

(a) in the opinion of a medical practitioner (the impairment) is likely to continue for at least 2 years

*The panel agrees with the ministry that the impairment is likely to continue for at least two years.*

(b) in the opinion of a prescribed professional (B.C. Reg. 196/2007) the impairment

(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.

While the panel took into account the narrative which described the severity of the appellant's condition, the physicians report, which evaluated the functional skills which comprise daily living activities, indicated that the said impairments did not meet the test that they directly and significantly restricted the appellant's ability to perform those activities.

In the assessor's report, the daily living activities were all rated as independent, apart from going to and from stores and carrying purchases home, which were rated "requires continuous assistance from another person," or "takes significantly longer". The appellant had a moderate impact from emotional impairment, and minimal impact from deficiencies in attention and executive (planning, organising etc.) Meal planning and preparation, cooking, safe storage of food were rated as independent, as were banking, budgeting, personal care, basic housekeeping, paying rent and bills, handling medications and using transportation and social functioning. In no case was a prescribed professional of the opinion that the impairment directly and significantly restricts the person's ability to perform daily living activities either continuously, or periodically for extended periods, and as a result of those restrictions, the appellant requires help to perform those activities.

The panel found that there was no evidence from a prescribed professional that the appellant met the criteria for designation as a person with disabilities. The panel, therefore, finds that the ministry's decision was a reasonable application of the applicable enactment in the circumstances of the appellant and confirms the ministry's decision.