

## PART C – DECISION UNDER APPEAL

(State the reconsideration decision)

The decision under appeal is the ministry's reconsideration decision dated December 10, 2008 which held 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 for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that her impairment is likely to continue for at least 2 years. However, the ministry was not satisfied that the appellant has a severe physical or mental impairment or that 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. The ministry also determined that, as the appellant is not significantly restricted with DLA, it could not be determined that she required the significant help or supervision of another person or the use of an assistive device or assistance animal.

## PART D – RELEVANT LEGISLATION

(State the relevant Legislation considered)

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

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 evidence before the ministry at the time of reconsideration included a PWD application comprised of a Self-report (SR), Physician Report (PR), and an Assessor Report (AR), an April 16, 2008 letter from a Podiatrist, and the Request for Reconsideration.

In the SR, the appellant (with the assistance of a scribe) writes that her disabilities leave her unable to work. Constant pain affects her DLA: it is difficult to get in and out of the bathtub for a shower and reaching to wash causes extreme shoulder and neck pain; showers are limited to 10 minutes as she can only stand for about 10 minutes; it is difficult to stand to prepare and cook meals; her hands go numb within minutes of chopping, peeling, mixing or stirring food, she cannot open cans or jars, and cannot move food from shelves to counters to stove due to numbness; and, she is unable to write due to hand numbness. She receives help with housework because of pain in her feet and extreme neck, shoulder and lower back pain caused by the motions of vacuuming and sweeping; additionally, due to numbness she cannot hold a vacuum or broom. Shopping is done by family members because she cannot walk on the cement floors (feet), cannot reach to take items from the shelves and place into a cart because of her back and hands, and cannot stand in line to pay for purchases or carry them. The appellant can no longer drive due to seizures and receives rides from friends; the fear of seizures has resulted in anxiety attacks. She has difficulty getting in and out of chairs/couches as it affects her back to get up. Things that are done independently take significantly longer. The appellant also states that the assessor was rushed and did not do a good job when completing the AR. The appellant completed a 'pain chart' in which she indicates that she has continuous horrible pain in her feet and excruciating neck pain which comes and goes depending on daily activity.

In the May 28, 2008 PR completed by the appellant's general practitioner of more than 5 years, the appellant is diagnosed with degenerative disc disease C-spine, "musculoskeletal system - # foot", arthritis, and epilepsy. The physician writes that ongoing pain and radicular symptoms are related to the degenerative disc disease and leave the appellant unable to do any work involving even moderately heavy lifting. Ongoing pain in the feet is related to arthritis/fracture. There has been a recent recurrence of seizures and the appellant is on anti-epileptic medication which may have side effects. The appellant does not require any prosthesis or aids for her impairment. Regarding Functional Skills, the appellant can walk less than 1 block unaided, climb 2-5 stairs unaided, lift 5-15 lbs and has no limitations remaining seated or difficulties with communication; no deficits with cognitive and emotional function are indicated. Regarding DLA, periodic restrictions are indicated for meal preparation, basic housework, daily shopping, and mobility outside the home; no restrictions are indicated for personal self care, management of medications, mobility inside the home, use of transportation, management of finances, and social functioning. Regarding the periodic restrictions, the physician writes that the appellant wears a hiking boot all of the time due to constant foot/ankle pain and that without the hiking boot there is increased pain and decreased mobility; the appellant would benefit from a custom orthotic. The appellant's neck problems are chronic and expected to flare up intermittently. The appellant cannot drive until she has been seizure free for 1 year.

In the August 9, 2008 AR completed by a registered nurse (RN), the assessor writes that the appellant is limited in the distance she is able to walk, has pain in the right foot and aching in the upper spine. The appellant's family does her shopping. She has weakness with fine motor movement necessitating help with meal preparation (cooking and chopping). The appellant's Ability to Communicate is good for speaking, reading, writing, and hearing. Regarding Mobility and Physical Ability, the appellant is independent with walking indoors, walking outdoors ("short distances only"), climbing stairs, and standing ("limited to time");

periodic assistance is required for lifting and carrying/holding. No major impact is noted for any aspect of Cognitive and Emotional Functioning and a minimal impact is noted for 2 aspects (bodily function and emotion). Regarding DLA, the appellant is independent with all aspects of personal care, basic housekeeping, paying rent and bills, and medications, 3 of 5 aspects of shopping (reading prices and labels, making appropriate choices, paying for purchases) and 2 of 4 aspects of meals (meal planning, safe storage of food); periodic assistance is indicated for the remaining 2 aspects of shopping (going to and from stores, carrying purchases home "father does her shopping") and meals (food preparation, cooking); no information is provided for the remaining 2 aspects of transportation. Assistance is provided by family and friends. The assessor writes that walking is limited due to pain and weakness - pain from degenerative disc disease and pain in the right foot due to previous surgery and damage (requires orthotics to assist with correct foot placement). Tingling and numbness in hands and feet "affects ability to accomplish fine motor movements, lift pots/pans while cooking".

The April 16, 2008 letter from a podiatrist, who is not a prescribed professional within the meaning of the legislation, reflects a post-operative period less than one month after surgery.

In the December 4, 2008 Request for Reconsideration, the appellant writes that her daily living is impaired by chronic degenerative disc disease and foot impairments. She writes that she has to slide across the floor sitting to get things done. Additionally, epilepsy impairs her daily living. Many things are done independently but it takes significantly longer. She requires help in some areas but has no one to help her so she does the best she can.

At the hearing, the appellant's advocate submitted 2 additional letters from the appellant's physician, dated October 8 and November 24 of 2009, a copy of *Hudson v. Employment and Assistance Appeal Tribunal*, 2009 BCSC 1461, and a 3-page summary of the court's reasons prepared by an advocate. In the October 8, 2009 letter, the physician writes that the appellant's osteoarthritis affects her ankles, feet and left wrist and leads to ongoing pain and limited function. The physician reports that the use of orthotics has not "made a huge difference to her pain level". Surgery is being considered for the left wrist. The degenerative disc disease, mostly affects the cervical spine, resulting in pain and limited range of motion with "intermittent radiculopathy resulting in severe unremitting pain radiating to the arms"; this condition is chronic and degenerative and will likely worsen over time. The physician reports that the appellant has post traumatic stress disorder following a motor vehicle accident and is receiving counseling which will hopefully be helpful. The appellant's epilepsy is reasonably well controlled with medication. In the November 24, 2009 letter, the physician writes that the appellant "may need extra help performing activities of daily living or take a significantly longer time to complete them on her own" and that the osteoarthritis will affect her ADL more in the future. The panel accepted the submissions and admitted the physician's letters under section 22(4) of the Employment and Assistance Act as being in support of the information and records before the ministry at reconsideration. The advocate stated that the appellant is clearly disabled but that the PR does not reflect the restrictions with mobility indoors. The appellant gets assistance with shopping and while she may be able to do laundry, she must slide along the floor sitting to move the laundry basket. The advocate states that the appellant "voiced herself" to the physician who has better knowledge of the appellant than the assessor who met the appellant once. The advocate argues that when read together, the evidence of the PR and AR establishes that the appellant has continuous restrictions in 2 DLA and requires continuous assistance with those DLA and that the court made a clear finding that the appellant met the eligibility requirements respecting the restriction with DLA and the need for help.

At the hearing, the appellant stated that she does not have a mental impairment or brain injury but does have a severe physical impairment. She stated that she has difficulty getting in and out of the tub (uses grab bars) and brushing her hair. She uses a cane walking outdoors and wears hiking boots with orthotics, the latter of which has helped to reposition her feet so that she is steadier but has not reduced the pain. She states that her

family members do her shopping and that she receives approximately 3 hours per day of assistance from family and has had to rely on her young child for assistance. She also stated that she has a complicated relationship with her physician and has not been completely forthcoming with the physician. Additionally, she feels that the assessor, who came to her home to complete the AR, rushed through, quickly ticking the boxes on the pages.

At the hearing, the ministry summarized the reconsideration decision and stated that the evidence should be read in its entirety but that, when read as a whole, the evidence does not establish a severe impairment.

## PART F – REASONS FOR PANEL DECISION

(State the reasons for the panel decision)

The issue under appeal is whether the ministry reasonably concluded that the appellant does not have a severe physical or mental impairment and that her DLA are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods, and that the appellant does not require help to perform DLA. The ministry determined that the age requirement had been met and that the appellant has an impairment that will last for 2 years.

The criteria for being designated as a person with disabilities (PWD) are set out in section 2 of the EAPWDA. The minister may designate a person as a PWD when the following requirements are met. Pursuant to section 2(2) the applicant must have reached the age of 18 and the minister must be satisfied that the person has a severe mental or physical impairment. Under section 2(2)(a) the impairment must be likely, in the opinion of a medical practitioner, to continue for at least 2 years. Section 2(2)(b)(i) requires that the impairment, in the opinion of a prescribed professional, directly and significantly restricts the person's ability to perform daily living activities (DLA) either continuously or periodically for extended periods. Section 2(2)(b)(ii) states that as a result of those restrictions the person must require help to perform DLA. Section 2(3)(b) of the EAPWDA states that a person requires help in relation to a DLA if the person requires an assistive device, the significant help or supervision of another person, or the services of an assistance animal.

Section 2(1)(a) of the EAPWDR defines DLA for a person who has a severe physical or mental impairment as preparing own meals, managing personal finances, shopping for personal needs, using public or personal transportation, performing housework to keep one's residence in acceptable sanitary condition, moving about indoors and outdoors, performing personal hygiene and self care and managing personal medication. Section 2(1)(b) adds two additional activities for a person with a severe mental impairment: making decisions about personal activities, care or finances; and, relating to, communicating or interacting with others effectively.

The ministry's position is that the appellant is not eligible for designation as a PWD because the evidence does not establish the existence of a severe physical or mental impairment that, in the opinion of a prescribed professional, directly and significantly restricts DLA and necessitates help with DLA.

The appellant's position is that, when viewed in its totality, the evidence establishes that she has a severe physical impairment which directly and significantly restricts her ability to manage DLA and that she requires the continual support and supervision of another person as well as the use of assistive devices to perform many DLA.

In considering whether the ministry reasonably determined that a severe mental impairment has not been established, the panel finds that the physician has not diagnosed a mental impairment and indicates no deficits with cognitive and emotional function or restrictions with social functioning. The assessor indicates a minimal impact in 2 aspects of cognitive and emotional function which cannot reasonably be seen as establishing a severe mental impairment. Further, it is the testimony of the appellant that she does not have a mental impairment. Therefore, the panel finds that the ministry reasonably determined that a severe mental impairment has not been established under section 2(2) of the EAPWDA.

In considering whether the ministry reasonably determined that a severe physical impairment has not been established, the panel finds that the evidence of both the physician and assessor is that the appellant is limited to walking short distances, which the physician indicates is less than one block on a flat surface.

Further, the physician indicates that the appellant is limited to climbing 2-5 steps unaided and the assessor indicates that the appellant is limited in the time she can remain standing, which the appellant states is 10 minutes. Both the physician and the assessor indicate that the appellant's ability to lift is limited, with the physician indicating 5-15 lbs. In the October 8, 2009 letter, the physician reports that osteoarthritis in the appellant's ankles, feet and left wrist results in chronic pain and, that degenerative disc disease results in pain and limited range of motion and intermittent radiculopathy causing severe unremitting pain radiating to the arms; the physician also writes that the use of orthotics has not made a huge difference to the level of pain experienced by the appellant. Based on the above evidence, the panel finds that the appellant's physical functioning is limited by chronic pain in her ankles, feet, left wrist and back due to osteoarthritis and degenerative disc disease, with additional intermittent severe unremitting pain associated with radiculopathy, which results in constant limitations with standing, lifting, climbing stairs and, most notably, an inability to walk one block on a flat surface. Therefore, the panel finds that the ministry did not reasonably determine that a severe physical impairment has not been established under section 2(2) of the EAPWDA.

Regarding the degree to which the appellant's DLA are restricted by her impairments, the panel finds that the evidence of the physician in the PR is that the appellant is periodically restricted with 4 DLA (meal preparation, basic housework, daily shopping and mobility outside the home). In the subsequent November 24, 2009 letter, the physician writes that the appellant may need "extra" help performing DLA or take a significantly longer time to complete them on her own. In the AR, the appellant is reported to be continuously restricted with 2 of 5 aspects of shopping (going to and from store and carrying purchases home) and requires periodic assistance with 2 of 4 aspects of meals (food preparation and cooking) but is independent in the vast majority (22) of all other aspects of DLA. The panel finds that the evidence of the physician and assessor is somewhat inconsistent; in order to determine the weight to be given to the evidence of the prescribed professionals where it conflicts, the panel considered both the internal consistency of each prescribed professional's report (PR and AR) and the external consistency of all evidence. Additionally, the panel accepts the argument that the totality of the evidence be considered rather than reading the PR and AR discretely.

The panel accepts the evidence of the assessor that the appellant requires continuous assistance with the DLA shopping, rather than periodic assistance as indicated by the physician, because (i) both prescribed professionals indicate a significant limitation in the distance the appellant can walk outdoors (less than 1 block is reported by the physician – "short distances only" is reported by the assessor), which can reasonably be seen as placing a continuous restriction on the ability to shop. Additionally, as a continuous restriction with the physical aspect of going to and from stores has been established, the panel finds that it is reasonable to conclude that this reflects the same degree of restriction with mobility outdoors because, by virtue of the appellant being able to walk less than one block on a flat surface and being continuously restricted in the ability to go to and from stores, it is unreasonable to view the appellant as not being continuously restricted with mobility outdoors. The panel next considered the conflicting evidence respecting basic housework – the physician reports a periodic restriction while the assessor reports independence. Given that the evidence of both prescribed professionals establishes physical function limitations in terms of walking and lifting, and that the appellant's oral and written testimony of restrictions with housework, due to neck, shoulder, back and foot pain as well as numbness of hands, is consistent with being restricted, the panel relied on the evidence of the physician and finds that a restriction with basic housework has been established. Further, the panel questions how the assessor can report problems with fine motor movement resulting in difficulty with lifting pots and pans when cooking, but indicate no difficulty with washing the pots and pans or loading them into a dishwasher. Regarding meal preparation, the panel finds that the evidence of both prescribed professionals is that the appellant is restricted, with the assessor specifying that the appellant needs help chopping ingredients and that her ability to accomplish fine motor movements, such as lifting pots and pans, is affected by tingling and numbness in her hands. Both prescribed professionals report independence with personal care, management

of finances and medications; the assessor's evidence respecting transportation is incomplete and, as such, the panel finds that the evidence of the physician establishes independence with transportation. Therefore, the panel finds that the evidence of a prescribed professional establishes that the appellant is continuously restricted with shopping and mobility outdoors. Additionally, the panel finds that the evidence of a prescribed professional establishes that the appellant is directly and significantly restricted with basic housework and meal preparation and that, as basic housework and meal preparation are activities performed on a frequent and regular basis, the restriction is continuous. Therefore, as the evidence establishes that the appellant is directly and significantly restricted on a continuous basis in her ability to perform 4 of 8 DLA respecting a physical impairment, the panel finds that the ministry did not reasonably determine that the appellant's DLA are not directly and significantly restricted as required under section 2(2)(b)(i) of the EAPWDA.

Regarding the need for help, the panel finds that the evidence of the prescribed professionals establishes that the appellant is continuously restricted with shopping and mobility outdoors necessitating assistance, and requires periodic assistance with basic housekeeping and meals. The assessor indicates that help is provided by family and friends and, in the letter of November 24, 2009, the physician writes that "extra" help may be required, which can reasonably be interpreted as assistance in addition to that previously indicated in the PR which was completed more than a year earlier. Therefore, the panel finds that the ministry did not reasonably conclude that the significant help or supervision of another person was not required to perform DLA under section 2(2)(b)(ii) of the EAPWDA.

The panel finds that the ministry's reconsideration decision was not reasonably supported by the evidence and rescinds the decision.