



## **PART C – DECISION UNDER APPEAL**

(State the reconsideration decision)

This appeal is from a reconsideration decision made January 8, 2010. The ministry has determined that the appellant is not eligible for the Persons with Disabilities (PWD) designation as he has met only two of the five legislated criteria.

Section 2 (2) and (3) of the Employment and Assistance for Persons with Disabilities Act lists five criteria that must be met in order for the ministry to grant the designation. Upon reconsideration, the ministry finds that the appellant has not met three of the five criteria. The following criteria have not been met:

- The minister is not satisfied that the appellant has a severe physical or mental impairment.
- A prescribed professional does not confirm that the appellant's impairment directly and significantly restricts his ability to perform daily living activities either continuously or periodically for extended periods.
- The appellant's prescribed professional does not confirm that as a result of direct and significant restrictions, he requires help to perform daily living activities.

## **PART D – RELEVANT LEGISLATION**

(State the relevant Legislation considered)

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| EAPWDA | Employment and Assistance for Persons with Disabilities Act        |
| EAPWDR | Employment and Assistance for Persons with Disabilities Regulation |

## **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 was:

- The appellant has met the age requirement.
- The appellant's medical practitioner confirms that the impairment is likely to continue for at least 2 years.
- In the Physician Report, the medical practitioner specifies diagnoses of advanced liver disease, left knee osteoarthritis and depression.
- The medical practitioner indicates that the appellant is able to walk less than 1 block unaided, climb no stairs unaided, lift 15 to 35lbs, and remain seated for less than 1 hour.
- The medical practitioner writes that the appellant requires a cane to ambulate due to osteoarthritis (a diagnosis of left knee osteoarthritis is specified). The medical practitioner reports that the appellant use a cane for walking indoors and outdoors, climbing stairs, standing, and carrying and holding. The ministry notes that use of a cane, in and of itself, does not establish severe impairment. The use of an assistance device is considered in conjunction with the other reported limitations and restrictions.
- The medical practitioner indicates in the assessor's report that the appellant requires a cane for going to and from stores, and periodic assistance with carrying purchases home. All other daily living activities are indicated to be performed independently, with no restrictions noted.

The ministry argues:

- The ministry finds that the appellant uses a cane and is limited in some activities such as ambulation and lifting, however the ministry is not satisfied that the degree of impairment reported is severe.
- The physician does not list any cognitive or emotional deficits in either the physician or Assessor's report.
- A medical practitioner does not confirm that the appellant's impairment directly and significantly restricts the appellant's ability to perform daily living activities either continuously or periodically for extended periods.
- As the ministry has found that the information does not establish that the appellant's daily living activities are significantly restricted by a severe impairment, it cannot be determined that the appellant requires the significant help or supervision of another person, the use of an assistive device or the services of an assistance animal.

The appellant argues that:

- The appellant suffers from chronic knee osteoarthritis, and advanced liver disease. The appellant is in a severely disabled state as a result of several deteriorating incidents.
- On May of 2004 he underwent surgery for necrotizing fasciitis, or flesh eating disease, from which he has only partially recovered.
- The appellant was involved in an motor vehicle accident on March 6<sup>th</sup> 2007, where he severely injured his left knee.
- In November of 2008 the appellant suffered multiple right rib fractures as well as a sternal fracture and is in pain day in and day out.
- As a result of his severely disabled physical condition, the appellant is significantly and continuously restricted in many activities of daily living.
- The ministry notes that the medical practitioner has identified a diagnosis of left knee osteoarthritis, and has reported a lifting limitation of 15 to 35 pounds.
- In a letter written on November 21, 2009, to a lawyer the prescribed professional indicates that the

appellant's prognosis is poor as he continues to have chronic pain of the knee as a result of his osteoarthritis.

- In the reconsideration submission the ministry writes that the medical reports do not provide information regarding daily living activity restriction or current physical impairment. It is submitted that these reports were not read in a broad and interpretive fashion as is required by law, and as a result the ministry has made an unreasonable decision with regards to the severity of The appellant's disability.
- The appellant is restricted in the following areas with regards to his daily living activities as indicated by the medical practitioner:
  - (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.
- In *Hudson v. Employment and Assistance Appeal Tribunal*, 2009 BCSC 1461, the Supreme Court of BC made several findings with respect to the eligibility criteria for designation as a person with disabilities ("PWD") under the Employment and Assistance for Persons with Disabilities legislation. The Court held that:
  - a) "The ordinary meaning of the plural 'activities'." dictates that there must be evidence from a medical practitioner indicating a direct and significant restriction on at least two daily living activities." There is no statutory requirement that more than two daily living activities be restricted.
  - b) The decision in *Hudson* is binding on the ministry and the Employment and Assistance Appeal tribunal in making any decision as to whether an applicant meets the definition of persons with disabilities in the *EAPWD Act*.
- The appellant receives a great deal of assistance in order to accomplish many of his daily living activities. Contained in this request for reconsideration is a copy of a letter from his landlady and friend.
  - cannot do laundry on his own, After any kind of activity such as stairs or groceries (and every night) his knees have to be wrapped with ice packs for the swelling and the pain. Social functions are not an option as he cannot walk any distances, do stairs without assistance or drive
- The appellant requires the use of a cane to assist him in any kind of mobility in and outside the home.

The Ministry representative spoke in support of the reconsideration decision and that the ministry has concluded that the appellant does not have a severe physical or mental impairment and the prescribed professional does not confirm that the impairment directly and significantly restricts the appellant's ability to perform daily living activities either continuously or periodically for extended periods. The Hudson decision is not in the ministry legislation and is not binding.

The panel finds that the appellant suffers from a number of medical conditions that the prescribed professional has confirm will continue for at least two years.

The panel is aware of the Hudson decision. The panel finds that the Hudson decision does give direction to the ministry and the tribunal in so far as section 2 of the EAPWD Act and section 2 of the EAPWD regulation is concerned and acknowledges that nothing in the EAPD Act prevents the Ministry or the panel from placing considerable weight on the Petitioner's evidence, provided the

statutory eligibility criteria are met. However the physician and assessor reports do not provide clear evidence of a significant restriction to the appellant's ability to perform daily living activities. The medical report clearly indicates by way of the ticked boxes that the appellant is independent in all daily living activities.

Two letters were submitted from the appellant in support of the appellant's physical impairment. Both the letters were from acquaintances but neither author was a prescribed professional. The ministry did not object to the submission of these letters and the panel accepts admissibility under s.22(4) of the EA Act.

ATTACH EXTRA PAGES IF NECESSARY

## PART F – REASONS FOR PANEL DECISION

(State the reasons for the panel decision)

The issue to be decided is the reasonableness of the Ministry's decision to deny the appellant a PWD designation based on the information available to the Ministry at the time of the reconsider decision. The Employment and Assistance for Persons with Disabilities Act Sec. 2 (2) and Sec. 2(3) provides for five criteria that must be met to be approved for PWD designation. The ministry has determined that the following criteria have not been met:

- The minister is not satisfied that the appellant has a severe physical or mental impairment.
- A prescribed professional does not confirm that the appellant's impairment directly and significantly restricts his ability to perform daily living activities either continuously or periodically for extended periods.
- The appellant's prescribed professional does not confirm that as a result of direct and significant restrictions, he requires help to perform daily living activities.

### Section 2 - Employment and Assistance for Persons with Disabilities Act

(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

"person with disabilities" means a person designated under section 2 (*persons with disabilities*); "prescribed professional" has the prescribed meaning. (B.C. Reg. 196/2007)

(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).

### Section 2 - Employment and Assistance for Persons with Disabilities Regulation

(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 has concluded that the appellant does not have a severe physical or mental impairment in the opinion of a medical practitioner (EAPWDA Sec. 2(2) (a)) and in the opinion of a prescribed professional, the physical impairment does not directly or significantly restrict the appellant's ability to perform daily living activities (EAPWDA Sec. 2(2) (b)). The ministry argues that:

- a medical practitioner does not confirm that the appellant's impairment directly and significantly restricts the appellant's ability to perform daily living activities either continuously or periodically for extended periods.
- that the information in the physician and assessor's report does not establish that the appellant's daily living activities are significantly restricted by a severe impairment,
- it cannot be determined that the appellant requires the significant help or supervision of another person, the use of an assistive device or the services of an assistance animal.

The ministry's argument is that the appellant is independent in all Daily living activities and the use of a cane does not restrict any daily living activities.

The appellant argues that he supersedes the legislative criteria and it was an unreasonable decision to determine that a prescribed professional has not confirmed that he is sufficiently restricted from performing daily living activities either continuously or periodically for extended periods. Due to the nature of the appellant's severe restrictions it is submitted that he clearly meets the legislative criteria for PWD designation pursuant to the Employment and Income Assistance for Persons with Disability Act sec. 2. It is further submitted that the MHSD made an unreasonable decision upon reconsideration for the appellant resulting in a denial of designation at the reconsideration decision.

The Panel finds the appellant has physical impairments that do have an influence on his daily activities. However, the prescribed professional does not indicate the severity of the impairments other than to indicate that a cane is required to help with mobility and physical activity. The appellant is able to perform physical ability skills provided he uses a cane. The prescribed professional indicates there are no significant defects with cognitive and emotional function. Other than the use of a cane to go to the store and the periodic assistance with carrying purchases home, all other daily living activities can be performed independently.

The panel finds that the ministry's decision was reasonably supported by the evidence in the circumstances of the appellant and confirms the decision.