

[]

PART C – DECISION UNDER APPEAL

(State the reconsideration decision)

The reconsideration decision dated January 5, 2010 was to deny the appellant a Persons With Disabilities (PWD) designation. The decision confirmed the appellant had met the age requirement and a medical practitioner had confirmed impairment is likely to continue for two years, however the other criteria set out in the Employment and Assistance for Person with Disabilities Act (EAPWDA) section 2 and Employment and Assistance for Persons with Disabilities Regulation (EAPWDR) section 2 had not been met, specifically:

- a) the minister was not satisfied the appellant had a severe physical or mental impairment
- b) prescribed professionals had not confirmed impairment directly and significantly restricts daily living activities (dla)
- c) prescribed professionals do not confirm that as a result of direct and significant restrictions in the ability to do dla the appellant requires help to perform these activities, or an assistive device, or an 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

The evidence before the ministry was:

- June 4, 2009 assessor's report
- July 31, 2009 physician's report
- August 25, 2009 application for PWD
- November 12, 2009 ministry denial of application for PWD
- December 3, 2009 doctor's letter
- December 17, 2009 request for reconsideration
- undated advocate's submission
- January 5, 2010 reconsideration decision

The appellant provided evidence that he suffers from osteoarthritis in both knees, hands and back; he has severe lower back pain, hypertension, is morbidly obese and is socially isolated. The arthritis is progressive and since the initial application for PWD designation the appellant finds it increasingly difficult to prepare his own meals (especially cut vegetables), walk for any distance, or remember to take medications. He now has his groceries delivered because of the pain in his back; he has had suicidal thoughts recently.

The physician's report confirmed the appellant's medical conditions and listed 3 out of 10 dla as independent and the restrictions severe; socially isolated and would benefit from support group and weight watchers. The doctor states: "I believe symptoms are only likely to worsen". The report concludes: "This man absolutely should qualify for disability".

The doctor's letter December 3, 2009 provided clarification including:

"I confirm that the physical impairments are both permanent and severe and will continue for more than 2 years."

"The impairments listed (as described in the appellant's evidence) directly and significantly restrict his ability to perform daily living activities periodically and continuously and as a result of those restrictions he requires the significant assistance of another person to perform those activities specifically: basic housework, laundry, daily shopping, mobility outside the home, transportation very difficult, social functioning, meal preparation and self care with great difficulty and could use assistance."

"Assistive aides required would include: use of a cane continuously, bathroom aids such as bars for the shower and by the toilet."

The assessor's report showed 22 out of 34 dla as independent; he has no family or friends nearby and is socially isolated. He could use help from a dietician to address morbid obesity; he uses a wheeled cart for laundry and groceries; he needs grab bars for the shower; he uses a cane due to severe arthritis. The appellant has depression and possibly sleep apnea.

The ministry was not in attendance at the hearing: after confirming that the ministry was notified the hearing proceeded under section the Employment and Assistance Regulation section 86(b).

The evidence given by the appellant was not challenged and it was accepted pursuant to Employment Assistance Act section 22(4).

PART F – REASONS FOR PANEL DECISION

(State the reasons for the panel decision)

The issue in this case is the reasonableness of the ministry's decision to deny the appellant's application for a designation of PWD on the basis the appellant had not established a severe mental or physical impairment; that the impairment directly and significantly restricts the ability to perform dla; and that the appellant required help to perform dla or an assistive device or assistance animal for this purpose.

The legislation provides:

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 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

(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).

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 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 while appellant met the age requirements of the legislation, and the medical practitioner confirmed impairment will last for two years, the appellant had not met the remaining requirements:

- i) the minister is not satisfied the appellant has a severe physical or mental impairment,
- ii) the prescribed professionals do not confirm impairment directly and significantly restricts dla either continuously or periodically for extended periods,
- iii) prescribed professionals do not confirm as a direct result of significant restrictions the appellant requires help to perform dla in the form of an assistive device, help from another person or assistance animal

In support of their position the ministry asserts:

- a) the physician's report notes less impact in psychological sphere than the assessor and the doctor should be given precedence because he has known the appellant longer,
- b) since there is no diagnosis of a mental illness there can be no conclusion there has been a severe impact in the area of mental impairment,
- c) the physician's report lists no restriction in 7 out of 10 categories and this does not support a direct or significant restriction in the ability to perform dla either continuously or periodically for extended periods,
- d) the prescribed professionals do not confirm help is required to perform dla: using a cane or a wheeled cart do not qualify as significant assistance.

The appellant argues:

- a) the legislation does not allow the ministry to prefer one health professional over another as they purport to do here by saying the doctor's report should receive more weight than the assessor in the area of mental impairment,
- b) the legislation does not require the diagnosis of a mental illness as a pre-condition to establishing severe mental impairment,
- c) the reconsideration decision does not refer to the doctor's letter December 3, 2009 which categorically confirms a direct and significant restriction to dla and moves the restrictions to 6 out of 10 not 3 out of 10 as referred to in the decision,
- d) the prescribed professionals have confirmed assistive devices are required by the appellant as well as help with 7 distinct areas of dla as summarized in the doctor's letter

The panel finds that submissions made on behalf of the appellant are accepted in their entirety including the reliance on the case of Hudson v EAAT 2009 BCSC 1461 which confirms there is no authority to give precedence of one health professional over another in the legislation, and when dla are 3 items or more then that has the potential of qualifying as a direct and significant restriction continuously or periodically for extended periods. Further, there is nothing in the legislation to say an applicant must be diagnosed with a mental illness before they can establish they are suffering from a severe mental impairment.

The panel finds the ministry was selective in it's reading of the material presented by the appellant to support his entitlement to the designation of PWD. Specifically, the ministry appears to have chosen to ignore the doctor's letter of December 3, 2009 which leaves no doubt of the appellant's qualification for PWD under the legislated criteria. For greater certainty the panel makes the following findings in this case:

- i) The appellant meets the age requirement to qualify for PWD
- ii) The appellant has established through the opinion of a health professional that he has a severe physical impairment that will continue for at least two years and this impairment directly and significantly restrict his ability to perform dla continuously or periodically for extended periods: this is what the doctor says in his letter of December 3, 2009.
- iii) The appellant requires help to perform dla including basic housework, laundry, daily shopping, mobility outside the home, transportation is difficult, social functioning, meal preparation. This is confirmed by the doctor's letter of Dec 3, 2009. The appellant himself explained the problem as one of pain and restriction of movement from the osteoarthritis in his knees and his hands . He walks with a cane and has a distinct limp. Additionally, the assessors confirms there is depression and withdrawal which need to be addressed by a counselor.
- iv) The doctor and assessor confirm the appellant requires assistive devices to help him perform dla including: cane, wheeled cart, bathroom bars for shower and toilet.

The panel's findings result in the conclusion that the appellant has met all the legislated criteria required to receive the designation PWD therefore the panel finds that the ministry's decision was not reasonably supported by the evidence and was not a reasonable application of the applicable enactment in the circumstances of the appellant and rescinds the decision.