

**PART C – DECISION UNDER APPEAL**

(State the reconsideration decision)

The Reconsideration decision of April 12, 2010 denied the Appellant's request for a Persons with Disabilities ("PWD") designation. The ministry found upon reconsideration that:

- 1) The minister was not satisfied that the appellant has a severe physical or mental impairment as the severity of his medical conditions relevant to impairment was described by his physician in terms that the ministry did not consider severe. The ministry stated that information provided by the appellant's physician did not contain sufficient information of current severe impairments or restrictions to daily living activities.
- 2) The appellant's prescribed professional had not confirmed that the appellant's impairment directly and significantly restricted the appellant's ability to perform daily living activities either continuously or periodically for extended periods citing as evidence information submitted on the appellant's application.
- 3) The appellant's prescribed professional had not confirmed that, as a result of direct and significant restrictions, the appellant required help to perform daily living activities.

**PART D – RELEVANT LEGISLATION**

(State the relevant Legislation considered)

Employment and Assistance for Persons with Disabilities Act (the "Act"), s. 2.  
Employment and Assistance for Persons with Disabilities Regulation (the "Regulation"), s. 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 information before the Ministry on reconsideration was:

- PWD Designation Application received by the Ministry September 24, 2009 (the "PWD Application")
- Request for Reconsideration dated March 8, 2010 and documents enclosed therewith, including:
  - Written submission by Community advocate
  - Excerpts from Hansard (2pgs)
  - BC Benefits Appeal board decision of 1998 (6pgs)
  - Copy of *Hudson v BC (EAAT)*; 2009 BCSC 1461 (26pgs)
  - Summary of *Hudson* decision (1 pg)
  - Excerpts from Employment and Assistance Act
  - Pamphlet: "Assisting Clients with reconsideration" (3pgs)

Section 1 of the PWD Application contains the Appellant's Self Report dated August 11, 2009 and includes the following evidence:

- The Appellant has eleven 3-inch screws and 14 inches of titanium in his left hip socket to the fibula. Eighteen years ago, doctor at a hospital trauma unit informed him that at best he would only have the use of his leg no longer than 5 yrs.
- The doctor told him that arthritis would be irreversible and that he would be confined to a wheelchair.
- The Appellant is concerned that the day for confinement in a wheelchair is just about here as he can hardly walk 2 blocks with a cane. His pain is so severe he is on morphine. He cannot sit or stand for any length of time.
- He cannot do housekeeping or shopping. He needs assistance to bathe. His meals are prepared by his local church.
- His ex-wife does his laundry and cleaning and helps him twice a week. Unfortunately her health is also poor, so the Appellant feels that he is going to need help now.
- The circulation in his left leg is very poor; He is constantly massaging it just to keep it warm, and also from the numb tingling.

Section 2 of the PWD Application contains the Physician's Report dated September 15, 2009, wherein the Physician states the following as evidence:

- The Appellant has been the physician's patient since January, 2009 and he had seen the Appellant eleven or more times in the previous 12 months.
- The specific diagnosis from the physician include:
  - 1985 - deafness
  - 1994 - fracture pelvis and left hip from fall from ladder
  - 2006 – (Dec) fracture right clavicle and ribs by being run over by a car
  - 2006 – chronic bronchitis and early emphysema
  - 2006 – depression; smokes crack cocaine
  - He also suffers from gastroesophageal reflux.
- The medical conditions impair the Appellant in numerous ways:
  - In 1994, fracture pelvis and left hip treated with [??] reduction and internal fixation, resulting in chronic pain.
  - In 2006, he was run over by a car, resulting in fractured ribs and pulmonary contusion
  - In 2007, he was assaulted by a group resulting in laceration of the left parietal region

- In 2007, he fell on ice resulting in low back strain
- In 2009, he fell off bicycle fracturing 7 right ribs
- He suffers from some shortness of breath and wheezing
- He suffers from deafness in both ears; noise exposure from guns(?); lung discharge (??) and loud music
- He uses cigarettes --10/day and no alcohol
- He uses crack cocaine on a daily basis = 0.5 gr/day.
- The Appellant has been prescribed medications including but not limited to Naprosyn, Tylenol, Metzon 60 mg, Trazodone 50 mgs at night and other "unidentified" medications. The Appellant will need Nsaid on and off indefinitely.
- The Appellant sometimes use a cane. His impairment is likely to continue for two years or more and surgical revision is not being considered for left hip or clavicle.
- The Appellant can walk unaided 2 to 4 blocks; can climb 5+ steps unaided; can lift 2 to 7kgs; can remain seated for less than one hour.
- He has decreased hearing in both ears.
- The Appellant has 3 of 12 significant deficits with cognitive and emotional function, namely, memory, emotional disturbance and attention or sustained concentration
- The Appellant completed grade 10; has had head injury in the past; and has limited memory recall.
- Although the physician is not required to complete this question if, as is the case here, the physician and assessor are the same person, he does begin to note that the Appellant is restricted in seven out of ten of the listed DLAs. The physician further notes specifically with respect to meal preparation that the restriction is continuous.
- The Appellant has difficulty organizing himself and difficulty carrying shopping bag. With respect to social functioning, he is quite isolated, depressed and lacking motivation. His walking is limited by his hip pain.
- The Appellant has a friend who lends assistance with DLAs.
- The Appellant has insomnia associated with pain. The doctor has prescribed an "unidentified" medication, including Trazodone 50 mg. The Appellant has pain in his right clavicle if he lifts more than 5 lbs. He smokes less than 20 cigarettes per day. His gastroesophageal reflux is treated with an "unidentified" medication. He suffers from parasthesia of the left thigh. He is prescribed an "unidentified" medication for his depression.
- Requesting more [??] therapy for the Appellant.

Section 3 of the PWD Application contains the Assessor's Report dated September 15, 2009. The Physician and the Assessor are one and the same person. The Report includes the following evidence:

- The Assessor has seen the Appellant eleven or more times in the previous 12 months.
- The Appellant lives alone.
- The Appellant's ability to communicate by way of speaking, reading and writing is described as satisfactory; however his hearing is described as poor. He suffers from significant hearing loss x25yrs in his right and left ears. No hearing aid.
- The Appellant uses a cane as an assistive device
- The Appellant requires continuous assistance from another person in the lifting, carrying and holding of items. He is able to carry 32 oz [approx 1 litre] carton of milk then loses feeling in right clavicle.
- With respect to cognitive and emotional functioning, the Appellant's depression and sleep disturbance are identified as having a major impact on his daily functioning; concentration, motivation, memory,

organization are identified as having a moderate impact; and eight remaining items are identified as having no impact.

- The Appellant's ex wife does his laundry, shopping and clean his home for him.
- The Appellant has been prescribed Trazodone 100 mg for his insomnia and Effexor 150 mg/day for his depression.
- The Appellant has poor organizational skills. He does some window cleaning job – has poor motivation.
- The Appellant is identified as taking significantly longer to do a range of DLAs, namely mobility, personal care, basic laundry and shopping. He has slow movements, has difficulty getting off [????]; his left hip is stiff and with pain.
- The Appellant sometimes falls because of right hip pain and gives way.
- The Appellant requires continuous assistance from another person with respect to his basic housekeeping, shopping, meal preparation – including his ex-wife and 2 girl friends.
- The Appellant eats prepared food and goes to neighbourhood church to eat; He only banks with cheques; He has a good appetite with no change
- With respect to transportation, the Appellant is independent, requiring no assistance; he doesn't travel by private vehicle.
- The Appellant requires virtually no support or supervision in respect of his social functioning. He is described as having 2 friends; as being friendly and outgoing; as having no problem dealing appropriately with unexpected demands. With respect to securing assistance from others – confrontation.
- The Appellant has marginal functioning with both his immediate and extended social network.
- The Appellant cannot climb a ladder; will clean windows for few hours.
- The help required by the Appellant for DLAs is provided by his family. The Appellant and his ex-wife have 2 adult children who reside in another municipality and are too busy to help him.
- The Appellant routinely uses a cane to help compensate for his impairment.
- The Appellant does not have an assistance animal.
- The Appellant feels that his mobility is limited; that his right shoulder separates from his body; and that his left leg has caused him to fall three times in the past six months.

At the Hearing, the Ministry stood by the reconsideration decision and stated that the evidence of the prescribed professional does not indicate a severe physical or mental impairment which creates a significant restriction with daily living activities (“DLA”) or the need for significant assistance from either another person or an assistive device.

At the Hearing, the Ministry acknowledged that the Appellant suffered from a number of individual matters which could possibly together amount to severe impairment. The Ministry went on to declare that the Appellant's submission was missing concrete evidence that might allow the Ministry to assess the accumulated injuries and pain. The Ministry declared further that it was looking for MRIs, X-rays or audiology reports and that the Appellant needed to provide hard evidence. The Ministry suggested to the Appellant that he might consider re-applying with the assistance of an Advocate.

At the Hearing, the Appellant stood by the submission made on his behalf by his Advocate for the reconsideration decision.

The following additional evidence was submitted by the Appellant at the Hearing and was admitted by the panel under section 22(4)(b) of the Act, as information in support of information and records before the reconsideration officer:

- X-ray/Ultrasound Report dated March 23, 2010

At the Hearing, the Appellant provided evidence that:

- He must use his cane all of the time to get around and that his walking has been significantly worsened since last Fall due to his worsening arthritis. His leg has given out three times since the Fall resulting in his falling down and on at least one occasion injuring himself.
- He has significant difficulty sitting down due to his pelvic/hip injury and injury to his 4<sup>th</sup> and 5<sup>th</sup> lumbar.
- He tried to obtain a copy of his X-ray Report to bring to the Hearing, but he did not have the \$35.00 required.
- The impact of his hearing impairment is that he is embarrassed, demoralized and feels frustrated. He has been told that he does not qualify for a hearing aid.
- He has recently started acupuncture treatment and has had some success.
- He is currently taking 180mg of morphine per day to address his pain; and in addition, is taking anti-depressant medication and medication for reflux.
- He recently has relied on his male neighbour from across the hall (the "Neighbour") to help him with bathing.
- He eats three meals per day at the neighbourhood church. The Neighbour has also on occasion shared his cooked meals with the Appellant.
- He and his wife separated some time ago on good terms; she suffers from her own disabilities; and has now moved to another municipality. She will no longer be able to assist him.
- The maximum he can lift is a loaf of bread and a carton of milk, otherwise he has pain
- He offered to the Ministry representative to sign a Release form to release medical information.
- He stated that the PWD Application, which is the subject of this appeal, is his second time of applying and that his Advocate assisted him in completing the form.

The panel finds as fact that:

- The Appellant uses his cane all of the time.
- The Appellant is unable to prepare his own meals.
- The Appellant requires assistance in order to get in and out of the tub to bathe himself, which assistance is currently being provided by his male Neighbour from across the hall.
- The Appellant is unable to lift and carry without sustaining further injury or pain, any amount greater than the equivalent of a loaf of bread and a carton of milk.

**PART F – REASONS FOR PANEL DECISION**

(State the reasons for the panel decision)

The issue to be decided in this case is the reasonableness of the Ministry's reconsideration decision to deny the Appellant's application for the Persons with Disabilities designation.

Section 2 (2) and (3) of the Act sets out five eligibility criteria for the PWD designation as follows:

(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.

Section 2 of the Regulation defines "daily living activities" and "prescribed professional" as those terms are used in s. 2 of the Act and states as follows:

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

**ATTACH EXTRA PAGES IF NECESSARY**

In his Self Report portion of the PWD Application and at the Hearing, the Appellant argues that the cumulative effect of his many significant injuries sustained over a sixteen year period and as described by his Physician on page 8 of the PWD Application, results in his experiencing severe disabling pain. The Appellant argues that his physical impairment is severe in nature.

The Appellant and his Advocate argue in the Self Report and the Request for Reconsideration, respectively and the Appellant argues at the Hearing that his severe physical impairment and the continuous pain he experiences severely restricts him from performing the very basic of daily living activities as described in the Regulation:

- (a) "prepare own meals" - He argues that he cannot prepare any meals of significance for himself, consequently he eats three meals a day at his neighbourhood church or sometimes his Neighbour will make a meal and share it with him.
- (b) "shop for personal needs" - He argues that he cannot lift, carry or walk any distance with any items of any significant weight.
- (c) "perform housework to maintain his place" - He argues that he is unable to vacuum or clean his home nor make his bed as any repetitive motion causes pain that is debilitating. His ex-wife used to come periodically to tidy his home and do his laundry; however she has recently moved to another municipality and is no longer available to assist him. His Neighbour did his laundry for him most recently.
- (d) "move about indoors and outdoors" - He argues that he continually requires the use of his cane and now uses it everyday. He has fallen without warning several times and is now fearful of injuring himself.
- (e) "perform personal hygiene and self care" - He argues that he is unable to get in and out of the tub by himself, requiring assistance provided now by his Neighbour .

In the Hearing, the Ministry argues that the Appellant is missing concrete, hard evidence that would allow the assessor to assess the cumulated injuries and pain. The Ministry notes that there are a number of individual impairments which when taken together could amount to severe impairment.

The Ministry argues that the Appellant's prescribed professional, namely his physician, has not confirmed that the Appellant's physical and mental impairments are severe, as his initial application for PWD characterizes him as able to walk two to four blocks, climb more than 5 steps, lift 5 to 15lbs, remain seated for less than one hour and having no impact on eight out of 14 aspects of cognitive and emotional functioning, with only two in the major impact range.

The Ministry further argues that no additional medical consultations, x-rays, MRIs, auditory assessments etc., were included in the Physician's Report or the Request for Reconsideration that could confirm the severity of the Appellant's physical impairments.

In addition, the Ministry argues that they are not satisfied that the Appellant's DLAs are directly and significantly restricted either continuously or periodically for extended periods as his physician on his initial application characterized him as restricted in his ability to complete the majority of his DLAs but did not indicate if these restrictions are continuous or periodic.

The Ministry further argues that the physician indicates that the Appellant is independent and does not require assistance with the majority of his social functioning.

Finally the Ministry argues that the appellant's physician has not confirmed that as a direct result of his restrictions, he requires assistance or the use of assistive devices.

In terms of a mental impairment, the Ministry argues that the information provided by the Physician does not sufficiently describe severe impairment; and further argues that the evidence indicates that the related impairments have moderate, minimal or no impact on the majority of the Appellant's cognitive and emotional

functioning but no confirmation of severe impairment.

The panel finds that the evidence of the Physician on pages 8 and 9 of the PWD Application confirm that the Appellant has had a lengthy history of injuries. The Appellant's Self Report on pages 3 and 4 of the PWD Application describe the cumulative affect on the Appellant from the injuries, particularly the hip injury, as resulting in severe pain requiring morphine and causing physical impairment. The Appellant confirmed in the Hearing that 180mg of morphine is taken daily. The Physician's report states that in addition to the pain killers prescribed, the Appellant finds it necessary to self medicate daily.

The panel finds that the evidence of the prescribed professional, in the partially completed Physician's Report, on page 11 of the PWD Application indicates that the Appellant experiences a direct significant restriction in 7 of the 9 DLAs described. The Assessor's Report on page 17, indicates in addition that the Appellant's impairment affects his dressing, grooming, bathing, toileting and his movement in and out bed or on and off of a chair, all of these activities take him significantly longer than typical to perform.

On pages 17 and 18 of the PWD Application the evidence of the prescribed professional, namely the Assessor, indicates that in at least five DLAs the Appellant is restricted and requires assistance on an ongoing and continuous basis, such as his laundry and basic housekeeping; going to and from the store and the carrying of purchases home; his meal planning, food preparation and cooking and goes on to say that he needs continuous assistance in respect of these DLAs. The panel finds further that the Appellant requires help to perform some of his DLAs by way of an assistive device, namely his cane, which is used all of the time.

The panel finds that:

- the Ministry's decision that the Appellant does not have a severe physical impairment is not reasonably supported by the evidence.
- the Ministry's decision that the Appellant does not have a severe mental impairment is reasonably supported by the evidence;
- the Ministry's decision that the prescribed professional had not confirmed that the Appellant's impairment directly and significantly restricted the Appellant's ability to perform DLAs either continuously or periodically for extended periods is not reasonably supported by the evidence.
- the Ministry's decision that the Appellant does not require assistance to perform DLAs is not reasonably supported by the evidence.

In conclusion, the panel finds that overall the Ministry's reconsideration decision was not reasonably supported by the evidence and rescinds the ministry's decision. Therefore, the Ministry's decision is overturned in favour of the Appellant.