

PART C – Decision under Appeal

The decision under appeal is the ministry's reconsideration decision dated September 29, 2010 which held that the appellant did not meet three of the five 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 his impairment is likely to continue for at least two years. However, the ministry was not satisfied that the evidence establishes he has a severe physical or mental impairment. The ministry was also not satisfied 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. As the ministry found that the appellant is not significantly restricted with DLA, it could not be determined that he requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

PART D – Relevant Legislation

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 at the time of the reconsideration decision consisted of:

- 1) Person With Disabilities (PWD) Application: applicant information, 4 pages (including 1 added typewritten page), dated May 3, 2010, physician report, 7 pages, dated May 3, 2010, assessor's report, 10 pages, dated May 3, 2010;
- 2) Outpatient Report for appellant, 2 pages, dated February 16, 2010;
- 3) Patient Referral Form for "physio to spine", 1 page, dated March 1, 2010;
- 4) Physiotherapy Initial Notification, 1 page, dated March 2, 2010;
- 5) Spinal Assessment, 2 pages, dated March 2, 2010;
- 6) Handwritten notes of Physiotherapy, 5 pages, covering period from March 4, 2010 through April 7, 2010;
- 7) Letter from physiotherapist to physician, 1 page, dated April 6, 2010;
- 8) Medical Certificate for appellant, 1 page, dated April 7, 2010;
- 9) Handwritten notes of Physiotherapy, 4 pages, covering period from April 8, 2010 through April 30, 2010;
- 10) Letter from physiotherapist to Worksafe B.C., 1 page, dated April 30, 2010;
- 11) Patient Referral Form for "physio- spine & jaw", 1 page, dated May 14, 2010;
- 12) Handwritten notes of Physiotherapy, 10 pages, covering period of May 3, 2010 through July 27, 2010;
- 13) Physiotherapy Report for the appellant, 2 pages, dated July 14, 2010;
- 14) Letter from the ministry to the appellant denying PWD designation, 3 pages, dated July 14, 2010;
- 15) Patient Referral Form for "physio- jaw", 1 page, dated July 19, 2010;
- 16) Prescriptions for the appellant, 2 page, dated August 31, 2010; and,
- 17) Request for Reconsideration- Reasons.

The appellant was not in attendance at the hearing. After confirming that the appellant was notified, the hearing proceeded under Section 86(b) of the Employment and Assistance Regulation. The appellant states under Reasons in his Notice of Appeal, dated October 6, 2010, that he is still on disabilities and unable to work a full time job and he is still having great pain in his neck and face. The appellant states that he did not deserve these injuries/ attack by the job site bully. The appellant did not provide any additional documentary evidence prior to the hearing.

In his written statements included with the original PWD application and on the reconsideration, the appellant explains that he was severely beaten up and attacked at work in 2005. His face and neck were fractured in several places and he was in hospital for 3 weeks. The appellant reports that he was also seriously assaulted in July of 2007, which aggravated the injuries and added new ones. The appellant states that his eye socket, nose, jaw, and teeth were all broken in several pieces and that he has had multiple surgeries and that he still suffers from chronic pains. The continuous facial pain and the pinched nerve in his spine cause pain in the appellant's right arm and hand. The appellant explains that his face and chin are sometimes so sore that he has trouble talking and some days the pain feels as high as 8 on a scale where 10 would be the highest amount. The appellant states that he has been attending regular physiotherapy sessions but that the pain is ongoing and that there are some mornings that he can hardly move, especially if he has not taken pain medications. The appellant explains that he will likely have to continue taking pain management medication for the rest of his life to deal with the pain in his face, spine and neck. The physician has confirmed a diagnosis of chronic neck and facial pain secondary to trauma from fractured nasal and jaw bones, anxiety, and suspected depression. The physician comments in the PWD application that "...due to facial contusion and multiple facial fractures, he has had multiple facial surgery; he still suffers from chronic facial pain, needs narcotics for pain relief." The appellant also states that he feels anxious that another hit to his face, accidental or not, would fracture the operated parts of his eye, nose and jaw and that he has "...severe anxiety when I am in open spaces and with unknown people", that he has become socially isolated and hardly has any friends at all. The physician also indicates deficits with cognitive and emotional function in the areas of executive (judgement), emotional disturbance (depression, anxiety), thought disorders, and impulse controls and adds the notations "...poor impulse control" and "...poor frustration tolerance."

With respect to the impact on DLA, the appellant states that the incident (assault) has severely impacted his life and that he has lost his job and is undergoing constant hospital and other treatments which prevent him from leading a regular life. The appellant states that he has poor concentration and cannot focus on any tasks and that "...although I can do some tasks like laundry and housekeeping, most of the time, my being unable to get out of my room, prevents me from doing these tasks. I retreat a lot in my room, just to stay out of trouble and any danger that can impact my current situation." The appellant also explains that the pain he experiences keeps him from doing everyday and routine activities like getting up and moving around and getting out of the house and that he has been prescribed a brace to wear on his neck. Prior to his injuries, the appellant worked as a pipefitter and a fabricated high pressure welder and that he has not been able to work since the assault in his workplace.

The ministry relied on the reconsideration decision. The ministry acknowledges that the appellant has had multiple facial surgeries as confirmed in the Outpatient Report dated February 16, 2010, including a "...closed reduction and splinting of his nasal fracture and an open reduction and internal fixation of the right parasymphseal fracture with two plates." The ministry points out that there was contradictory evidence in the PWD application regarding the appellant's functional skills as the physician had indicated that the appellant cannot walk at all unaided on a flat surface and that he cannot climb any stairs unaided, yet it is also reported that he can lift 15 to 35 lbs., and that there is no limitation with remaining seated. In terms of mobility and physical ability, the ministry highlights that the physician's report that the appellant is independent with all activities including walking outdoors and indoors, climbing stairs, standing, lifting, carrying and holding. Although the physician indicates deficits with cognitive and emotional functioning, there is no further information to describe the severity of these deficits or how they impact on the appellant's ability to function. The ministry points out that the physician reports moderate impacts to 3 aspects of daily cognitive and emotional functioning including emotion, impulse control and other emotional or mental problems, 3 areas of minimal impact and 8 areas with no impact on functioning.

With respect to the impact on daily living activities (DLA), the ministry states that although there is a tremendous amount of evidence, including the detailed notes from physiotherapy sessions, the medical reports do not describe how the appellant's impairments restrict his ability to function or demonstrate a significant restriction on his ability to perform DLA. The ministry points out that the notes from the physiotherapy sessions, on the contrary, provide evidence that the appellant was put on a relatively rigorous physical exercise regime and that he had some success with the physiotherapy treatments as the Physiotherapy Report dated April 30, 2010 recommends a return to work conditioning program and the Report dated July 14, 2010 "highly" recommends "...a return to work program incl. psych. counselling." In addition, in response to a question about the use of an assistive device to help compensate for a physical impairment, the physician has indicated "none" and that there is no one to provide any help that is required for DLA.

PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry reasonably concluded that the appellant does not have a severe mental or physical impairment and that his daily living activities (DLA) are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods and that, as a result of those restrictions, it could not 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 to perform DLA.

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 person 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. The impairment must also, in the opinion of a prescribed professional, directly and significantly restrict the person's ability to perform daily living activities (DLA) either continuously or periodically for extended periods, as set out in Section 2(2)(b)(i). As a result of those restrictions, the person must require help to perform DLA, pursuant to Section 2(2)(b)(ii). Section 2(3)(b) sets out that a person requires help in relation to DLA if, in order to perform it, 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: prepare own meals, manage personal finances, shop for personal needs, use public or personal transportation facilities, perform housework to maintain the person's place of residence in acceptable sanitary condition, move about indoors and outdoors, perform personal hygiene and self care, and manage personal medication. In relation to a person who has a severe mental impairment, there are two additional activities, namely: making decisions about personal activities, care or finances, and relating to, communicating or interacting with others effectively.

The ministry's position is that although the appellant meets criterion 1 and 3, in that he has reached the age of 18 and his impairments are likely, in the opinion of a medical practitioner, to continue for at least 2 years, the evidence does not establish that he has met criterion 2, 4 and 5. In particular, the ministry argues that the evidence does not show that the appellant has a severe mental or physical impairment and the prescribed professional did not confirm that the appellant's physical or mental impairment directly and significantly restricts his ability to perform DLA either continuously or periodically for extended periods so that he requires the significant help or supervision of another person to perform these activities. The ministry points out that the appellant's self-reports mostly focus on the appellant's inability to work and the impact on his financial situation but that employability is not a criterion for the PWD designation.

The appellant's position is that the evidence establishes that he suffers from a severe physical impairment as a result of chronic neck and facial pain secondary to trauma from fractured nasal and jaw bones. The appellant also argues that the evidence establishes that he suffers from a severe mental impairment as a result of anxiety and suspected depression. The appellant contends that the prescribed professionals, along with the appellant, have provided sufficient evidence that the appellant's severe physical and mental impairments directly and significantly restrict his ability to perform many DLA, for which he requires the significant help and supervision of another person.

Regarding the existence of a severe physical impairment, the panel finds that the evidence of a medical practitioner confirms chronic neck and facial pain secondary to trauma from fractured nasal and jaw bones. The panel finds that the appellant's evidence is that he experiences pain on a periodic basis, such that his face and chin are "sometimes" so sore that he has trouble talking and "some days" the pain feels as high as 8 on a

scale where 10 would be the highest amount. The appellant has stated that he has been attending regular physiotherapy sessions but that there are still "some mornings" that he can hardly move, especially if he has not taken pain medications. The appellant has not provided evidence as to the frequency that he experiences the more debilitating levels of pain and states that "...after several years of pain medication, I stopped using them because I do not wish to get addicted to them and I am afraid of getting addicted to them". However, the appellant's physician has prescribed pain medications and states that the appellant needs them for pain relief, so that the appellant's experience of periodic higher levels of pain may be a function of his reluctance to take the medications. Although the physician reports in the PWD application that the appellant cannot walk at all unaided on a flat surface and cannot climb any stairs unaided, these assessments are inconsistent with the evidence of the appellant as to his own mobility and with the notes of the appellant's progress with ongoing physiotherapy sessions. It is also reported that the appellant is able to lift 15 to 35 lbs., and that he has no limitation with remaining seated. The notes made of the regular physiotherapy sessions that the appellant has attended refer to reports of soreness, stiffness and discomfort with "neck still bothering him", "difficulty sleeping" but the notes also refer to: "doing push-ups X 200/day", "O.K. with gym ex.'s", "lots of walking this week, increased exercise, tired", "doing ex.'s @ home", "R arm getting better", and "running stairs for fitness". The panel finds that although the appellant has suffered physical impairments as a result of 2 separate assaults in 2005 and 2007, the evidence is not sufficient to support the finding of a severe physical impairment. Therefore, the panel finds that the ministry's decision, which concluded that the evidence does not establish a severe physical impairment, was reasonable.

With respect to the existence of a severe mental impairment, the panel finds that the evidence of a medical practitioner confirms a diagnosis of anxiety with suspected depression. In the original PWD application, the physician reported that there are significant deficits with cognitive and emotional function, including emotional disturbance (depression, anxiety), executive (judgement), thought disorders and impulse control and these deficits were reflected in the more specific impacts to daily functioning. However, the assessor report does not assess any major cognitive and emotional impacts to daily functioning; rather the assessment is for moderate impacts in the area of emotion (excessive or inappropriate anxiety, depression), impulse control (inability to stop doing something or failing to resist doing something) and other emotional or mental problems which are identified as "frustrated". The assessor also reports minimal impacts to daily functioning in bodily functions, insight and judgement and attention/concentration, but there is no impact found in all other areas of cognitive and emotional functioning. In terms of social functioning, the physician has evaluated the appellant as being independent with making appropriate social decisions, with his ability to develop and maintain relationships, with interacting appropriately with others, with his ability to deal appropriately with unexpected demands and with his ability to secure assistance from others. As well, the appellant is assessed as having good functioning overall with both immediate and extended social networks but that the appellant is "...very frustrated with the injuries." The panel finds the evidence is not sufficient to support the finding of a severe mental impairment. Therefore, the panel finds that the ministry's decision, which concluded that the evidence does not establish a severe mental impairment, was reasonable.

Regarding the appellant's ability to manage daily living activities (DLA), the panel has relied on the evidence of the physician and the assessor's report in the PWD application as well as the explanation provided by the appellant. The physician's opinion in the PWD application is that the appellant independent on all aspects of DLA, namely: personal self care, basic housekeeping (including laundry), shopping, meals (planning, preparation and cooking), paying rent and bills, managing medications, transportation and social functioning. The appellant admits that he can do some tasks like laundry and housekeeping most of the time, it is his anxiety about leaving his room that prevents him from doing these tasks and that he retreats "a lot" in his room. However, the appellant has not described the frequency of the times that he retreats to his room or to whom he looks for help when he is unable to perform certain tasks. The panel finds that the evidence is not sufficient to establish that, in the opinion of a prescribed professional, the appellant's impairments have directly and significantly restricted the appellant's ability to perform DLA. Therefore, the panel finds that the ministry's decision, which concluded that the evidence of a prescribed professional does not establish a direct and significant restriction on the appellant's ability to perform DLA, as required by Section 2(2)(b)(i) of the

EAPWDA, was reasonable.

In determining whether the ministry reasonably concluded that the appellant does not require the significant help or supervision of another person, the panel relies on the information from the medical practitioner who reports that the appellant lives alone and that no one provides help to the appellant for his DLA and no equipment or devices are routinely used to help compensate for the appellant's impairments. Although the appellant states that a brace was prescribed for his neck, he does not provide evidence as to how often the brace is worn. Further, although there is a recommendation that the appellant receive psychological counselling, there is no evidence that the appellant has received help from a specialist in this area. Since the evidence of a prescribed professional establishes that the appellant is independent with all aspects of daily living activities, the appellant's need for help has not been established. As the panel finds that the evidence does not establish a direct and significant restriction to DLA, the panel finds that the ministry reasonably concluded that the requirement for significant help or supervision to perform DLA under Section 2(2)(b)(ii) of the EAPWDA has not been met.

The panel finds that the ministry's reconsideration decision was reasonably supported by the evidence and confirms the decision.