

PART C – DECISION UNDER APPEAL

(State the reconsideration decision)

The reconsideration decision of November 25, 2009 denied the appellant's request for a person with disabilities [PWD] designation because he failed to meet all five of the criteria prescribed in the Employment and Assistance for Persons with Disabilities Act, s. 2 and the Employment and Assistance for Persons with Disabilities Regulation, s. 2. The ministry determined that:

- the appellant is at least 18 years of age;
- his medical practitioner confirmed that his impairments are likely to continue for at least 2 years;
- the ministry is not satisfied that he has a severe physical or mental impairment;
- the appellant's prescribed professionals have not provided evidence that his impairments directly and significantly restrict his ability to perform daily living activities [DLAs] either continuously or periodically for extended periods; and,
- the appellant's prescribed professionals did not confirm that as a result of direct and significant restrictions, he requires help to perform his DLAs.

PART D – RELEVANT LEGISLATION

(State the relevant Legislation considered)

Employment and Assistance for Persons with Disabilities Act [EAPWDA], s. 2
Employment and Assistance for Persons with Disabilities Regulation [EAPWDR], 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 evidence before the ministry at Reconsideration was:

- the appellant's PWD application signed and dated June 25, 2009 by the appellant and received by the ministry on July 31, 2009, with the physician report and the assessor report signed and dated July 24, 2009 by his physician;
- authorization dated June 25, 2009 permitting the release of information to the appellant's advocate;
- the Health Assistance Branch [HAB] assessment dated September 24, 2009 and a letter dated September 25, 2009 from HAB to the appellant stating that he does not meet the legislative criteria for the PWD designation;
- the appellant's request for reconsideration dated October 16, 2009, faxed to the ministry on October 27, 2009, requesting additional time to submit additional medical documentation; and,
- an amended request for reconsideration with a note dated November 12, 2009, faxed to the ministry on November 12, 2009, attaching (a) a letter dated November 11, 2009 from the appellant's physician with further information on the severity of his impairments, and (b) a note dated October 29, 2009 from his physician stating that he needs orthotics for biomechanical foot problems.

The evidence of the physician in the physician report of July 31, 2009 was:

- the appellant was diagnosed with antero septal myocardial infarction [coronary artery disease], multifocal acquired demyelinating sensorimotor neuropathy [MADSAM], metatarsalgia [a form of neuralgia with inflammation of the nerves in the feet], and mild, situational depression;
- in commentary with respect to the diagnoses, the physician stated:
 - "patient is impaired by the combination of these illnesses and he requires significant assistance in ADLs";
 - patient feels generally weak and fatigued, finds daily chores difficult to undertake, and takes 2-3 times longer to do them;
 - his metatarsalgia makes walking and standing painful and very limited;
 - shoulder and arm pain makes lifting, carrying and grocery shopping very difficult;
 - his depression results in poor concentration, lack of motivation, poor quality sleep, and generalized fatigue;
 - the above combination produces the effect of someone who is significantly impaired;
- in terms of functional skills, the appellant can walk 4+ blocks and climb 5+ stairs unaided, lift from 5 to 15 lbs, and remain seated 2 to 3 hours;
- the physician noted significant deficits in cognitive and emotional functioning, specifically depression [emotional disturbance], loss of motivation, and lack of concentration, and stated that "emotional functional deficits reduce his ability to cope and manage everyday demands";
- in answer to the question "does the impairment directly restrict the person's ability to perform DLAs"; the physician responded "yes";
- the appellant is continuously restricted in daily shopping and mobility outside the home;
- in the narrative the physician stated that "daily activities are significantly restricted due to pain in shoulders and arm weakness", and "he would benefit from help with chores, he takes longer to do everything"; and,
- the appellant had to quit his dishwashing job because the manager said he was too slow, and he also gets musculoskeletal upper chest pain when doing it.

PART E – SUMMARY OF FACTS [cont'd]

The evidence of the physician in the assessor report of July 31, 2009 was:

- under “mobility and physical ability”, when asked to indicate the assistance required related to impairment(s) that directly restrict the appellant's ability to manage in the following areas, the physician indicated that walking indoors was independent, but that walking outdoors, climbing stairs, standing, lifting, carrying and holding all take significantly longer than typical to complete [in the physician report he indicated that these take 2 to 3 times longer];
- with respect to cognitive and emotional functioning, the appellant's mental impairments have a minimal impact on his bodily functions, consciousness, concentration, planning, and organizing; and a moderate impact on emotion [depression], and motivation;
- with respect to the assistance required related to impairment(s) that directly restrict the applicant's ability to manage DLAs, the physician indicated that:
 - the activities of personal care, meal preparation, finances, managing medications, and taking transportation were independent;
 - laundry, basic housekeeping, shopping, and carrying purchases home take longer than typical due to his impairments and require the assistance of another person to complete;
- he also requires orthotics for the metatarsalgia.

The evidence of the physician in the letter dated November 11, 2009 was:

- the appellant takes 2 to 3 times longer to do any physical activity, from personal hygiene to shopping
- he needs to take rest breaks on a regular basis during the day
- his depression further restricts his daily functioning; he worries about finances, his health conditions, and his social isolation;
- his level of activity, in all DLAs is significantly reduced as a direct result of his impairments;
- he depends on his roommate to do personal cleaning and looking after the household;
- weakness and pain in his distal limbs make all activities difficult;
- in response to the statement, “as a result of his restrictions, the patient needs significant help from other people and assistive devices with DLAs - taking into account that when this support is not available he takes significantly longer to do things on his own”, the physician stated “yes, I do confirm this”.

The ministry decided that there was insufficient evidence to determine that the appellant has a severe physical or mental impairment. They found that his prescribed professional did not provide sufficient evidence that his impairments directly and significantly restrict his ability to perform DLAs either continuously or periodically for extended periods, nor that as a result of direct and significant restrictions, he requires help to perform his DLAs.

At the hearing the appellant's advocate submitted, on behalf of the appellant, the following documents:

- the appellant's submission to the tribunal;
- a summary of a judicial review decision in a PWD case; and,
- definitions of the impairments “MADSAM” and “metatarsalgia”.

The panel did not admit these documents as evidence pursuant to s. 22(4) of the Employment and Assistance Act [EAA], but accepted them as submissions to the tribunal. The ministry concurred.

The advocate presented the appellant's submission to the tribunal, highlighting evidence from the PWD application, the letter dated November 11, 2009 from the appellant's doctor, the doctor's note dated October 29, 2009 prescribing orthotics, and the summary of the judicial review decision, to argue that the appellant meets the legislative criteria for PWD designation.

The ministry reiterated the reconsideration decision and had no further evidence to submit.

PART E – SUMMARY OF FACTS [cont'd]

With respect to the severity of the appellant's impairments the panel's findings of fact were:

- the physician is a prescribed professional pursuant to the EAPWDR, s. 2(2)(a);
- the physician's evidence stated that the appellant's diagnoses include antero septal myocardial infarction [coronary artery disease], multifocal acquired demyelinating sensorimotor neuropathy [MADSAM], metatarsalgia [a form of neuralgia with inflammation of the nerves in the feet], and mild, situational depression and that this combination produces the effect of someone who is significantly impaired;
- the combined evidence in the physician's report, the assessor's report, and the letter of November 11, 2009 from the appellant's doctor confirmed that the appellant has a combination of severe physical and mental impairments that will last more than two years.

With respect to appellant's restrictions, the panel's findings of fact were:

- the evidence in the physician's report stated that the patient is continuously restricted in daily shopping and mobility outside the home; he feels generally weak and fatigued, finds daily chores difficult to undertake, and takes 2-3 times longer to do everything; weakness and pain in his distal limbs make all activities difficult; the metatarsalgia makes walking and standing painful and very limited; shoulder and arm pain makes lifting, carrying and grocery shopping very difficult; and, his depression results in poor concentration, lack of motivation, poor quality sleep, and generalized fatigue, and he requires rest breaks on a regular basis during the day;
- the evidence in the letter of November 11, 2009 stated that the appellant's level of activity in all DLAs is significantly reduced as a direct result of his impairments;
- the assessor's evidence stated that walking outdoors, climbing stairs, standing, lifting and carrying takes 2 to 3 times longer than typical and that walking is extremely painful; and,
- the combined evidence in the physician's report, the assessor's report, and the letter of November 11, 2009 from the appellant's doctor confirmed that the appellant's severe impairments directly and significantly restrict his ability to perform DLAs continuously, and in cases where he can perform DLAs independently, he takes 2-3 times longer than is typical to complete them.

With respect to the appellant's requirement for help to perform DLAs the panel's findings of fact were:

- the evidence in the physician's report stated that "the patient is impaired by the combination of his illnesses and he requires significant assistance in ADLs";
- the evidence in the assessor's report stated that the activities of personal care, meal preparation, finances, managing medications, and taking transportation were independent, but that laundry, basic housekeeping, shopping, and carrying purchases home take longer than typical due to his impairments and require the assistance of another person to complete; he also requires orthotics for the metatarsalgia;
- the evidence in the letter of November 11, 2009 stated that the appellant depends on his roommate to do personal cleaning and looking after the household chores;
- the prescription dated October 29, 2009 also confirms the need for orthotics for his feet impairment; and,
- the combined evidence in the physician's report, the assessor's report, the letter of November 11, 2009, and the prescription of October 29, 2009 from the appellant's doctor confirmed that as a result of the restrictions due to his impairments, the appellant requires the significant help of another person to perform the DLAs of walking outdoors, standing, carrying, lifting, shopping and basic household chores, as well as the use of an assistive device for his metatarsalgia.

PART F – REASONS FOR PANEL DECISION (State the reasons for the panel decision)

The issue under appeal is whether the ministry reasonably denied the appellant's application for a PWD designation pursuant to the EAPWDA, s. 2 and the EAPWDR, s. 2 because he failed to meet all of the necessary criteria for the designation.

Sections 2 of the EAPWDA states:**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;

"health professional" repealed

"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).

Sections 2 of the EAPWDR states:**Daily living activities**

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.

PART F – REASONS FOR PANEL DECISION [cont'd]

The ministry argued that the appellant's prescribed professional did not establish a severe physical or mental impairment, that the prescribed professional did not provide evidence that the appellant's impairments directly and significantly restrict his ability to perform DLAs either continuously or periodically for extended periods and that as a result of direct and significant restrictions, he requires the help of another person or an assistive device to perform his DLAs.

The advocate, on behalf of the appellant, argued that the PWD application, including the appellant's report, the physician's report and the assessor's report list symptoms of weakness, fatigue, and pain that affect the appellant's feet, chest, shoulders and arms. His doctor stated that he is restricted in his walking, standing, lifting, and carrying, and his depression results in poor concentration, lack of motivation, poor sleep, and generalized fatigue. The doctor stated that "this combination produces the effect of someone who is significantly impaired". In both the application and in his letter of November 11, 2009, the doctor stated that the appellant is significantly restricted in performing DLAs, giving examples of restrictions including "any physical activity from personal hygiene to shopping", and "household activities", almost all mobility activities, and social functioning. The doctor confirmed that the appellant takes 2 to 3 times longer than normal with all his activities, and needs significant assistance in performing his DLAs, including the use of orthotics, which is an assistive device, for his metatarsalgia. The advocate also referred to the summary of the supreme court decision #2009-BCSC-1461 to argue that the evidence in the physician's report and the assessor's report should be read together to confirm the degree of impairment and the help required, and that the appellant's own evidence in the PWD application should also be weighed. The supreme court decision also stipulates that there is no statutory requirement that more than two DLAs be restricted.

The panel finds that the ministry's decision that the appellant's impairments were not severe was not a reasonable application of s. 2(2)(a) of the EAPWDA because the evidence of his prescribed professional was sufficient to determine that the appellant has severe physical and mental impairments that will likely continue for at least two years. The physician stated that the combination of the appellant's physical and mental impairments produces the effect of someone who is significantly impaired. This statement was supported by the physician's evidence in the physician's report, the assessor's report, and the physician's letter of November 11, 2009.

The panel finds that the ministry's decision that the appellant's prescribed professional did not confirm that his impairments directly and significantly restrict his ability to perform DLAs either continuously, or periodically for extended periods was not a reasonable application of s. 2(2)(b)(i) of the EAPWDA because the medical evidence of his prescribed professional indicated that the appellant's impairments directly and significantly restrict his ability to perform the following DLAs continuously: basic housework, daily shopping, and mobility outside the home. The physician confirmed that the appellant requires significantly longer than is typical [2-3 times longer] to complete his DLAs and that "daily activities are significantly restricted due to pain in shoulders and arm weakness.

The panel also finds that the ministry's decision that the appellant's prescribed professional did not confirm that he requires significant help to complete those DLAs that are restricted by his impairment was not a reasonable application of sections 2(2)(b)(ii) and s. 2(3)(ii) of the EAPWDA. The physician's evidence confirmed that as a result of the restrictions due to his impairments, the appellant requires the significant help of another person to perform the DLAs of walking outdoors, standing, carrying, lifting, shopping, and basic household chores. He also requires an assistive device for his metatarsalgia. Thus the ministry did not reasonably apply s. 3(b)(i) of the EAPWDA.

Therefore, the panel finds that the ministry's decision was not a reasonable application of the applicable enactment in the circumstances of the appellant and rescinds the ministry decision.