

[REDACTED]

PART C – DECISION UNDER APPEAL

The Decision under Appeal is the Ministry's Reconsideration Decision dated January 13, 2010 which denied the Appellant Persons With Disabilities status.

The Ministry accepted that the Appellant is over eighteen (18) years of age and that the Appellant's medical practitioner has confirmed that the Appellant has an impairment that is likely to continue for two (2) years or more. The Ministry is not satisfied that the Appellant has a severe physical or mental impairment. The Ministry concludes that the Appellant's prescribed professional has not confirmed that this impairment directly and significantly restricts the Appellant's ability to perform his daily living activities (DLA) either continuously or periodically for extended periods of time. The Ministry also concludes, based on the information of the prescribed professional, that the Appellant as a result of significant and direct restrictions does not require help to perform daily living activities from an assistive device, an assistance animal, or with the significant help or supervision from another person.

The Ministry finds that the Appellant is not eligible for Persons With Disabilities designation, as all of the legislative criteria have not been met.

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 Regulations (EAPWDR), Section 2

PART E – SUMMARY OF FACTS

The evidence before the Panel was provided in part in the Appeal Record and in part through the oral testimony of the Appellant, a witness and the Ministry, which was admitted pursuant to Section 22 (4) of the EAA.

The Appeal Record as part of the evidence were copies of the following documents:

1. Notice of Appeal to the Employment and Assistance Appeal Tribunal signed by the Appellant January 20, 2010.
2. Release of Information form signed by the Appellant January 20, 2010.
3. Ministry's Reconsideration Decision dated January 13, 2010.
4. Employment and Assistance Request for Reconsideration form signed by the Ministry December 7, 2009 and signed by the Appellant December 14, 2009.
5. Letter from local advocacy office to the Appellant's prescribed professional dated December 14, 2009, requesting additional information on Appellant's condition and completed by the prescribed professional December 18, 2009.
6. Local pharmacy's personal medication history of the Appellant.
7. Ministry's letter dated November 26, 2009 denying the Appellant's designation as a PWD.
8. Persons with Disabilities Designation Application (PWDDA) signed by the Applicant July 17, 2009.
9. PWDA – Physician Report dated August 20, 2009.
10. PWDA – Assessor Report dated August 20, 2009.

The Appellant's advocate provided the following document at the Appeal Hearing:

- PWD eligibility criteria: Judicial Review set standards.

This document summarizes the Supreme Court of BC decision number 2009 BCSC 1461 Judicial Review of an EAPWD Employment and Assistance Appeal Tribunal hearing decision.

The Ministry objected to this evidence by stating that this decision is not a precedent setting decision and only is applicable to that decision. The Panel after considering the evidence admitted it into the hearing pursuant to section 22 (4) of the EAA.

The evidence provided by the Appellant as well as his Persons With Disabilities Application confirmed the Appellant is over eighteen (18) years of age and the Appellant's medical practitioner has confirmed that the impairment is likely to continue for a prescribed period of two (2) years or more. The physician's report indicates the Appellant suffers from degenerative disc disease since 1997 and anxiety and depression since 2007. The Physician's Report indicates the Appellant suffers severe pain similar to a knife into the back and becomes totally immobile when he gets pain incidents which can last a few days or weeks and that the pain is chronic in nature. The Appellant also suffers from secondary depression and anxiety due to the back pain which creates significant deficits with cognitive and emotional functioning. These deficits include consciousness, planning, organizing, sequencing, calculating, judgement, memory, emotional disturbance, motivation and attention or sustained concentration problems. The physician notes that these symptoms reflect the Appellant's subjective experience. The physician states that the Appellant can walk unaided 2 to 4 blocks, can climb 2 to 5 steps unaided, is limited to lifting under 2 kg, can remain seated less than 1 hour, and has difficulties in communicating because of a cognitive problem. The Physician also comments "*Subjective aspect of pain does not match up to objective clinical findings*".

The Appellant's physician also completed the initial Assessor's Report indicating that the Appellant lives alone. The Assessor indicates that the Appellant in addition to back pain and anxiety and depression also has a condition in his right hand, which affects his ability to communicate rated as poor by writing.

His abilities to communicate such as speaking and reading are rated as good but writing is poor due to pain in right hand.

Under Mobility and Physical Ability, the Assessor's Report indicates that the Appellant is independent in all areas but takes considerably longer walking indoors, outdoors and carrying and holding. The Appellant requires periodic assistance from another person in carrying and holding, lifting is restricted to lifting items under 5 lbs., and uses assistive device to climb stairs and standing.

Under the section Cognitive and Emotional Functioning, the Assessor has indicated that the Appellant suffers from a moderate impact in ten (10) areas of his cognitive and emotional functioning which includes his body functions, emotions, insight and judgement, attention-concentration, executive planning and organizing etc., memory, motivation, motor activity, language and other emotional or mental problems. In the category of minimal impact, the Assessor indicates that the Appellant's consciousness and impulse control are affected but the areas of psychotic symptoms and other neuropsychological problems have no impact. The Assessor notes that the Appellant suffers from depression and anxiety which affects the area above as indicated by the Appellant himself and no medication for any of these symptoms has been prescribed or a referral to a psychologist.

The Assessor has indicated that under DLA, the Appellant is independent in all personal care, basic housekeeping shopping meals, paying rent and bills, looking after his medications except transportation however the Appellant takes significantly longer that typical for dressing, grooming, bathing, toileting, transferring in/out of bed, transferring in/out of chairs, laundry, basic housekeeping, going to and from stores, carrying purchases home if under 5 lbs., food preparation, cooking, banking, filling/refilling prescriptions, getting out of vehicles.

Under Social Functioning the Appellant is reported to be independent in making appropriate social functioning, and being able to secure assistance from friends but, requires periodic support/supervision with interacting appropriately with others and continuous support/supervision in being able to develop and maintain relationships and able to deal appropriately with unexpected demands. The Appellant's mental impairment also impacts his relationship with his immediate social network because his major withdrawals are very disruptive and that he is marginally function in extended social networks.

The Assessor indicates that the Appellant receives assistance required for Daily Living Activities (DLA) from friends and family, but has not indicated that he receives any assistance through the use of assistive devices or an assistance animal.

In response to the questions asked by the Appellant's Advocate in the letter dated December 14, 2009 and signed by the Appellant's physician December 12, 2009, the physician agrees that when the Appellant is totally immobilized when he gets pain – pain that can last few days to weeks, he is unable to perform any of the DLA's such as dressing, laundry, basic housework, shopping, carrying groceries, preparing or cooking meals, banking, leaving his home or get in or out of his car. The Appellant's pain level ranges on a scale of 6 – 10, 6 being the least amount and 10+, and that 50% of the time the pain level is 8 and 30% of the time at 10%. However the physician notes that his agreement is based on what the Appellant has said and that he has not witnessed these situations.

The Appellant's Advocate in her testimony provided the additional information that the Appellant is in a lot of pain constantly and requires 40mg of Oxycodin, 4mg hydromorphone, 15mg mirtazepam daily in an attempt to reduce the pain. In the past month he is now also taking 500mg Ciproflox on a daily basis. The Advocate finds that the Appellant's physician is not very cooperative and appreciative of the pain that the Appellant is under. The Physician has not been helpful in providing clarification for many of the contradictions that are evident both in the original PWD application and his answers in the letter sent by the Appellant's Advocate dated December 14, 2009, requesting further information in regards to the Appellant's condition and the effect they have on his DLA. As a result, the Appellant is in the process of finding a new doctor. The Advocate confirmed that she has never seen the Appellant pain free and in the past week, he has been off his couch only one day. His bad days, lately, have been increasing in numbers and frequency, and when he is having

these episodes, he is unable to get off the couch. He is unable to perform any DLA's such as dressing himself, housework, bathing and preparing food. In fact unless he gets help from friends or family, he eats very little. On a good day, he is not pain free, but is able to perform some DLA's such as dressing himself, preparing meals, and bathing, but all these activities take considerably longer than a normal person.

The Appellant also gave evidence that in the past year or so, the pain in his back has been getting worse year after year. He experiences pain daily and has episodes lasting sometimes weeks where the pain is so severe that medications barely help. The amount of pain medication he is taking causes him to feel drowsy and lethargic as well as depressed and anxious. He has also recently been tested for prostate problems and is going through further tests in order to determine the exact problem. The Appellant stated that his physician's never discussed with him many of the questions and answers in the original PWD application. The Appellant also advised that he had recently moved back to the community from the northern part of the province where he had lived for a while, because he was not able to access the medical help he needed.

The Appellant's witness, who has known the appellant for 9 years, indicated that she helps the Appellant 3 to 4 times a week with housework, laundry, ironing, grocery shopping and often with cooking because the Appellant is unable to get up from his couch. The Witness stated that she noticed a significant deterioration in his condition since he has moved back to the community. Socially, the witness stated that the Appellant rarely goes to her home and if he does, it's usually for a short time because his pain becomes severe. As a result, she mostly sees him at his home.

The Ministry provided no evidence in addition to that provided by the Appellant and the Ministry restated its position as set out in the Reconsideration Decision. The Ministry pointed out that some of the difficulties with this particular application by the Appellant were that the Physician Report, Assessors Report and the answers in the Advocate's letter of December 14, 2009 are contradictory. Consequently, the Ministry has not been able to confirm that the Appellant has a severe physical or mental impairment which directly and significantly restricts the Appellant's ability to perform DLA either continuously or periodically for extended periods of time or that as a result of direct and significant restrictions that he requires help to perform daily living activities.

The Panel recognizes that there are significant conflicts in the evidence both in the original PWD application and the answers that the physicians has provided on December 18, 2009, and in his reply to the Appellant's Advocate letter of December 14, 2009. In the original PWD application, Physician Report, the doctor has noted " *subjective aspect of pain does not match up to objective clinical findings*" and " *above reflects patient's subjective experience*" does not provide any clear indication which neither confirms or discounts the level of pain that the Appellant is experiencing. The Panel also noted from the Appellant's personal medication history included in the reconsideration record, that the physician started in June 2009 to prescribe very powerful painkillers in the form of Oxycodin and Hydromorphone and in August 2009 prescribed in addition to painkillers, Mirtazapine, a medication to treat major depression and Lorazepam for anxiety. In the reply to the Advocate's letter on December 18, 2009, the doctor states in answer to the question regarding the Appellant being unable to perform DLA's when he had bad days, " *based on what the patient tell us, I would agree- not witnessed*". The panel finds that the doctor is questioning the Appellant's description of how his condition affects his DLA's when he had bad days, yet he states in the Physician's Report that the Appellant is totally incapacitated when he gets pain and that the pain can last for days to weeks. Also in the same report, when completing the section regarding significant deficits with cognitive and emotional function, the doctor again notes that the areas that have been indicated as being affected, " *above reflects patient's subjective episodes*". However the doctor fails to provide his own clinical assessment of these conditions.

PART F – REASONS FOR PANEL DECISION

The issue on appeal is whether the Ministry's decision to deny the Appellant Persons with Disabilities status on this basis was reasonable.

The Ministry has taken the position that the Appellant has met the age requirement; his medical practitioner confirms that his impairment is likely to continue for at least two (2) years. However the Ministry states that in their view a prescribed professional does not confirm that the Appellant has a severe physical or mental impairment and that the Appellant's impairments does not directly or significantly restrict his ability to perform daily living activities either continuously or periodically for extended periods of time and a prescribed professional does not confirm that as a result of direct and significant restrictions the Appellant requires help to perform daily living activities. Under the EAPWDA, Section 62 it states that:

(A) Persons with Disabilities Designation Legislation

Section 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).

(B.C. Reg. 196/2007)

EAPWDR, Section 2, it states that:

Daily living activities

SECTION 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.

(B.C. Reg. 196/2007)

The Ministry in its Reconsideration Decision concluded that the Appellant met only two (2) of the five (5) requirements above. The Ministry concluded that the Appellant did meet the age requirement, that the Appellant has a condition which is likely to continue for at least two (2) years. The Panel examined the evidence to determine whether it was reasonable for the Ministry to find that the other three (3) criteria had not been met.

1. Does the Appellant have a severe physical or mental impairment?

The Ministry's position is that the information does not establish that the Appellant has severe physical or mental impairment. In the PWD application the physician reports that the Appellant can walk 2 to 4 blocks unaided, can lift under 5 lbs., and remain seated less than 1 hour although it takes longer walking outdoors but not how much longer. Although the physician reports that the Appellant requires help with lifting, the Appellant is independent in all areas of mobility or physical activity and that no assistive devices or assistance animals are required. Although the physician reports that on bad days he is unable to walk outdoors at all, he does not state how often and the Ministry does not consider use of handrails as an assistive device. When assessing the Appellant's cognitive and emotional function, the physician reports significant deficits in 6 out of 12 areas, but adds that these deficits are the Appellant's subjective experience.

The Appellant takes the position that his physical and mental impairments are significant. He experiences pain every day which requires him to be on a regiment of strong painkillers which affects his daily functioning and often does not stop the pain at all. In the past year the pain in his back has steadily worsened and he has many bad days sometimes lasting weeks when he is only able to lie on his couch. Because of the constant pain and heavy use of pain killers, he finds that he is depressed and anxious all the time and this depression affects his consciousness, judgement, memory and attention span.

The Panel on considering the evidence presented by the Appellant, his Advocate, his witness as well as his prescribed professional, concludes that the Appellant does have a severe physical. In the Physician Report, the doctor reports that the Appellant has been suffering from degenerative disk disease since 1997 which causes chronic pain, as well as depression and anxiety since 2007 due to the back pain. The physician confirms that when the pain gets severe the Appellant is totally incapacitated and that these episodes can last for days to weeks. The Appellant's testimony confirms the severity of these pain episodes and that these episodes can last for weeks. The Appellant also has confirmed the effect of the constant use of powerful pain killers on his mental state, causing depression and anxiety. The Appellant's need for powerful painkillers prescribed by the doctor also indicates the severity of the physical impairments.

2. Has the prescribed professional confirmed that the impairment significantly and directly restricts the Appellant's ability to perform DLA either continuous or for extended periods?

Ministry's position is that the prescribed professional has not confirmed that the Appellant's impairment directly and significantly restricts her ability to perform daily living activities either continuously or periodically for extended periods. The assessments provided by the Appellant's physician in the PWD application indicate that the Appellant is independently able to manage all daily living activities including personal care, basic housekeeping, shopping, meals, paying rent and bills, medications and transportation. The Prescribed professional reports that the Appellant needs periodic assistance with carrying purchases home and that most DLA takes significantly longer and that with social functioning the Appellant requires periodic support or supervision in interacting appropriately with others but there are no details provided that explain the degree

and duration of the support or supervision. The Prescribed Professional has also noted in his reply to the letter sent by the Appellant's advocate of December 14, 2009 included in the Request for Consideration, that although the Appellant has stated that he is totally immobilized when he has pain – pain that can last weeks, that this pain is "based on what (you tell) me I would agree – not witnessed".

Appellant takes the position that his friends and family assist him when he has "bad days" and is not able to do anything but lay on his couch. During these periods which can last for days or weeks, the pain medication does not relieve the severe pain in his back. He is unable to dress himself, make meals, do any kind of housework, laundry, shopping or going outside. In addition the heavy doses of pain medication which causes him to feel very lethargic, depressed and anxious. Without friends to help him he would not be able to feed himself and look after his home.

3. Does the Appellant require help in relation to a DLA if, in order to perform if, he requires an assistive device or supervision of another person or the service of an assistance animal?

The Assessors' Report indicate that assistance is provided to the Appellant through his friends and family. The evidence of the Appellant and his witness indicated she provides most of the assistance and comes to the Appellant's home three to four times a week. The Panel concludes that a prescribed professional has confirmed that as a result of the restrictions the Appellant does require the significant help or supervision of another person to conduct his daily living activities. The Prescribed professional has been treating the Appellant since April 2009 and has seen him 11 times or more in that period. The Prescribed Professional confirms that he has not witnessed the appellant in his home during the severe pain episodes.

The Panel finds that there are contradictions in the evidence provided by the Prescribed Professional and as the Appellant's evidence confirms that his impairments are more serious than indicated in the original PWD application, the Panel must apply the legislation in the Interpretation Act, which requires in cases where there are conflicts in evidence, that the broadest interpretation must be made and in favour of the Appellant.

The Panel, after reviewing all of the evidence finds that the decision of the Ministry is not reasonable based on the evidence and that there has not been a reasonable application of the Act and Regulation in the circumstance of the Appellant. The Panel therefore rescinds the decision of the Ministry pursuant to Section 24 (2) (b) of the EAA.