

PART C – Decision under Appeal

On November 1, 2010 the Ministry decided that the Appellant was not eligible for the Persons with Disabilities (PWD) designation as the Appellant does not meet all of the criteria set out in sections 2(2) and (3) of the EAPWDA. Specifically the Ministry was not satisfied that the Appellant has a severe physical or mental impairment; that the Appellant's prescribed professional does not confirm that his impairment directly and significantly restricts his ability to perform daily living activities either continuously or periodically for extended periods; and, that the Appellant's prescribed professional does not confirm that as a result of direct and significant restrictions, he requires help to perform daily living activities.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act (EAPWDA) sections 2 (2) and (3).
Employment and Assistance for Persons with Disabilities Regulation (EAPWDR) section 2.

PART E – Summary of Facts

The evidence before the Ministry included the following:

- The PWD Designation Application which consisted of a Self Report (SR) dated February 25, 2010; a Physician's Report (PR) dated March 24, 2010; and an Assessor's Report (AR) completed by a Registered Social Worker and dated March 25, 2010.
- A letter from a disabilities advocate dated April 13, 2010.
- A 16 page submission prepared by a disabilities advocate and dated August 4, 2010

In the SR the Appellant describes his history of medical problems and attached hospital records as follows:

- July 13, 1993 – anxiety attack.
- September 15, 1993 – hand injury.
- June 17, 1998 – motor vehicle accident.
- August 5, 2009 – hand injury.
- August 31, 2009 – gallstones and Hepatitis C.
- October 3, 2009 – gallbladder pain.
- October 8, 2009 – gallstones surgery.
- November 18, 2009 – operation.
- November 28, 2009 – surgical pathology consultation.
- November 30, 2009 – abdominal pain, possible Hepatitis C liver problems.
- December 31, 2009 – abdominal pain.
- January 15, 2010 – medication allergy.
- February 24, 2010 – hospital visits.

In the PR the Appellant's Physician describes the specific diagnoses of the Appellant's disabilities as follows:

- Depression since December 2007.
- Street and prescription drug abuse since December 2007.
- Anxiety and Agoraphobia since December 2007.
- Hepatitis C since August 2009.

The Appellant's Physician describes the severity of the Appellant's medical conditions as "1-3 long standing depression/anxiety; Dec of 07 lost marriage/house/car/basically everything; he then spiraled into drug abuse & is only now trying to come clean & get proper treatment. Hep C - ? how long he has actually had it; likely picked up during his years of IV drug use; scheduled to be seen @ hep C clinic next mo & will likely be offered Rx."

The Appellant's Physician states that his impairment will likely last for two years or more and adds "Is just now starting into Rx for depression/anxiety and hep C." He describes the Appellant's functional skills as able to walk 4+ blocks; climb 5+ stairs; lift 2 – 7 kg; remain seated less than 1 hour because agitated and needs to move (not physical). The Appellant's Physician states that the Appellant does

have significant deficits with cognitive and emotional function as follows:

- Executive (planning, organizing, sequencing, calculations, judgment).
- Memory (ability to learn and recall information).
- Emotional disturbance (e.g. depression, anxiety)
- Motivation (loss of initiative or interest)
- Impulse control
- Attention or sustained concentration.

The Appellant's Physician comments that "Depression/anxiety are under very poor control @ present. He scores 28/28 on LEAPS functional testing."

In the section on Daily Living Activities the Appellant's Physician notes the following restrictions:

- Management of medications – continuous restriction.
- Use of transportation – continuous or periodic not indicated.
- Management of finances – continuous restriction.

In the comment section the Appellant's Physician makes the following remarks: "Difficulty with transportation due to agoraphobia; Agoraphobia – so has difficulties out in the public & tends to isolate himself @ home; Significant restrictions @ present. Poor results on functional testing – [] – LEAPS + social isolation."

The assistance the Appellant needs is "Girlfriend looks after his finances + meds."

The Appellant Physician adds this comment at the end of his report "Just getting started on Rx for depression/anxiety; hep C Rx likely to commence shortly; likely 1-2-3 years to recover provided he is able to remain off the street/prescription drugs."

In the AR the Appellant's Assessor, a registered social worker, provided the following information:

- The Appellant lives with family, friends or caregiver.
- The Appellant's mental or physical impairments that impact his daily living activities are hepatitis C; Anxiety & depression; panic attacks; agoraphobia and social anxieties.
- The Appellant's ability to communicate is good for speaking and hearing but poor for reading and writing. Her comments are "speaks very fast, rushed, anxious; needs glasses eyesight difficulties contribute to problems with reading and writing."
- The Appellant needs periodic assistance with all six categories of Mobility and Physical Ability due to chronic pain from hepatitis C. His anxiety and depression cause him to isolate himself at home. "Gets continuous assistance with most DLA's from girlfriend."
- Under the section for Cognitive and Emotional Functioning the Appellant scored a moderate or major impact in 13 of 14 categories. The Assessor's comments included the following statement "Client has struggled for years with mental health issues as a result of many personal challenges & has only recently agreed to try medication for anxiety & depression as a result of the severity of the difficulties he is having."

Under the section for Daily Living Activities the Appellant requires periodic or continuous assistance in 18 of 28 activities; he is independent in 4; he takes significantly longer in 4 and 2 activities; using public transit and using transit schedules, are not applicable to the Appellant because of his agoraphobia. The comments in this section indicate the following:

- The Appellant's girlfriend manages his diet as the Appellant has no interest in food and his appetite varies with his mental and physical health;
- The Appellant's girlfriend provides continuous assistance with laundry and basic housekeeping as the Appellant is chronically fatigued and in pain and cannot apply or complete these tasks.
- The Appellant has trouble with 4 of 5 shopping activities. He relies on his girlfriend because he has trouble with decision making and impulsiveness. He needs her help carrying purchases home because of chronic fatigue, tiredness, weakness and pain that affects his range of motion, strength, endurance & longevity.
- 3 of 4 meal activities require continuous assistance. The Appellant's girlfriend does all of the meal planning, food preparation and cooking for him and he helps if he feels up to it.
- The Appellant requires continuous assistance with all 3 activities related to paying rent and bills. The comments note that the Appellant is impulsive with finances and he needs his girlfriend's help to do the banking, budgeting and to pay rent and bills.
- The Appellant requires continuous assistance with all 3 activities related to medications. The comment states "Girlfriend handles all aspects of his medications as he has abused them in the past when in extreme pain. She monitors his intake, amounts and when to take them as a result."
- The additional comments provided by the Assessor include the following: "Personal care & basic housekeeping are kept to a minimal as he finds these too difficult to keep up with on his own due to chronic Hep C pain, tiredness, fatigue, weakness. Loses interest & motivation as a result of those difficulties. Gets frustrated & is easily agitated, provided as a result of trying to cope with health difficulties. All increase his anxieties & depression. Outings are impossible for him to manage & depend on the intensity of pain he is experiencing, his anxieties & depression.
- Under the section for comments about the type and amount of assistance required the Assessor wrote "Relies on the continuous support of his girlfriend for the majority of all DLA's. Chronic pain, fatigue, weakness affect his ability to accomplish tasks. Gets frustrated & overwhelmed trying. Isolates himself as a result as his increased lack of ability to complete tasks he once could do increases his anxieties & depression & further compound his difficulties."

Under the section for Social Functioning the Assessor has noted that the Appellant requires periodic or continuous assistance in 3 of 5 categories. Completion of this section is only required for persons with an identified mental impairment. The Assessor provided the following comments:

- Appropriate social decisions – [Appellant] requires constant monitoring & support. Is easily agitated & provoked. Monitors himself constantly when around others.
- Interacts appropriately with others – Physical and mental health issues do affect his ability to

sustain relationships but he does his best daily to cope & manage in spite of them.

- Able to deal appropriately with unexpected demands – Hesitant, easily provoked at times, prefers to pause, reflect and take his time responding.

The Assessor described the Appellant as having good functioning with his immediate social network which is his girlfriend and his child though "others [relationships] fluctuate, can be very disruptive at times." The Assessor described the Appellant as having marginal to very disrupted functioning with his extended social networks. "This will vary according to his ability to manage physical & health difficulties. Tends to avoid people, interact as little as possible with people outside of his support & trust circle."

The Assessor noted that the support and supervision that the Appellant needs to help maintain him in the community would be a wider support circle – counseling, mentoring, coaching – investigating alternative pain management strategies, diet & nutrition education & support. The Assessor noted the following safety issue: "Potential for overdose may exist if medications are not handled by someone else as client has the tendency to take 2 to 3 x more than he should when physical pain & mental health difficulties are especially challenging for him.

The Assessor notes that the Appellant gets assistance from Community Service Agencies and his girlfriend.

The Assessor provided additional information that the Appellant has recently been accepted into the Hepatitis C Clinic at the local hospital and is awaiting recommendations for treatment. "He had worked for many years in computer technology but found he had to leave this type of work because of increasing cognitive difficulties, executive planning trouble, memory, attention, concentration & inability to think clearly. He is chronically tired, fatigued, has a weakened immune system, has been experiencing chronic "all over body" aches & pains for years but did not know why until receiving the Hep C diagnosis recently."

At the hearing the Appellant gave the following evidence:

- He cannot use public transportation because he feels like everyone is looking at him as if there is something wrong with him and it feels like a terror and he feels like he has to fight everyone. "Once I'm in an environment with a lot of people I just have to go. I need to be at home with [my girlfriend]."
- Recently he thought his girlfriend was making fun of him and it resulted in criminal charges for assault. "I just start to vibrate and attack."
- These criminal charges have been dealt with and the Appellant received one year of probation. While on probation he is required to attend a course called R & R which is "beyond anger management" and is one on one coaching to help the Appellant with relationship and anger issues. He starts this course in January.
- The Appellant admitted to a lengthy criminal record for which he has received a pardon.
- If it wasn't for his girlfriend he would be a prisoner in his own home.
- He cannot handle his dietary needs. His girlfriend makes him three balanced meals each day.
- His girlfriend handles all the finances. The ministry's cheque goes directly into her account

and he has no access.

- He has had mental health issues for about 17 years.
- He has an 11 year old son from a previous relationship. He sees his son every week and has a good relationship but some months are better than others. Sometimes his son visits for a weekend but if it is not a good weekend for the Appellant then he cannot stay.
- He recently tried to go to his son's school and only lasted 4 minutes inside.

At the hearing the Appellant's girlfriend gave the following evidence:

- She lives with the Appellant in a common law relationship.
- She has known the Appellant for two and a half years.
- The Appellant has trouble with mental illness.
- She makes all the meals and does all the cleaning. She asks the Appellant to help but his moods are "all over the place" and she tries to avoid an adverse reaction from him.
- She makes sure the Appellant takes his anti depressant medication in the morning. He does not always think that he needs to take it or does not take it regularly.
- She takes the Appellant to his medical and other appointments. He has never taken a bus and cannot because of his agoraphobia and social anxieties.
- She handles all financial matters for the Appellant; paying rent and bills. The Appellant cannot go into a bank.

At the hearing the Ministry explained that the cheques go into the girlfriend's account because that is the name on the file and the Appellant was added later. That is the normal procedure.

The panel decided that this new information submitted by the Appellant and the Ministry at the hearing was admissible as testimony in support of the information that was before the Ministry on reconsideration pursuant to section 22(4) of the EAA.

PART F – Reasons for Panel Decision

The Panel must decide whether the Ministry's decision to deny PWD status to the Appellant was reasonable. The Ministry was not satisfied that the Appellant has a severe physical or mental impairment; that the Appellant's prescribed professional does not confirm that his impairment directly and significantly restricts his ability to perform daily living activities either continuously or periodically for extended periods; and, that the Appellant's prescribed professional does not confirm that as a result of direct and significant restrictions, he requires help to perform daily living activities.

The EAPWDA sections 2 (2) and (3) provide 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

(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.

The EAPWDR section 2 provides as follows:

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

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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 Appellant's advocate argued that the Hudson decision states that it is sufficient if either the physician or the assessor confirm the restriction of daily living activities. There is no statutory requirement that both must confirm the restriction of daily living activities. The Appellant relies on the Assessor's evidence in this respect to show that the Appellant has a severe mental impairment that directly and significantly restricts at least two daily living activities and that the Appellant requires the help of his girlfriend to perform these activities.

The Ministry provided a six page written submission. The Ministry argued that the Appellant's advocate cannot give evidence of symptoms which are not in the PR; that having to wear glasses to read is not a restriction; that no explanation was given for why the Appellant needs help with transfers in and out of bed; that there has been no diagnosis of a major eating disorder; that the Appellant has no physical mobility issues; that public transportation is not an issue because the Appellant's girlfriend has a car; that there are discrepancies between the PR and the AR that are not explained and therefore the Ministry decided that the Appellant does not meet the definition of a person with disabilities.

The panel notes that there are five criteria to be met for the Persons With Disabilities designation under EAPWDA section 2(2). The Ministry has already found that the Appellant meets criterion #1, 18 years or older and #3, that his impairment will last 2 or more years. Criterion #2 is that the

Ministry must be satisfied that the Appellant suffers from a severe physical mental or physical impairment. The evidence of the severity of the Appellant's mental impairment is contained in the Physician's evidence in the PR that the Appellant suffers from depression, anxiety and agoraphobia; that the Appellant suffers from 6 of 11 significant deficits with cognitive and emotional function being:

- Executive (planning, organizing, sequencing, calculations, judgment).
- Memory (ability to learn and recall information).
- Emotional disturbance (e.g. depression, anxiety)
- Motivation (loss of initiative or interest)
- Impulse control
- Attention or sustained concentration.

The Appellant's physician comments "Depression/anxiety are under very poor control @ present. He scores 28/28 on LEAPs functional testing." No evidence was given as to the meaning of a score of 28/28 on the LEAPs test but it clearly underscored the physician's observation that the Appellant's depression and anxiety were not well controlled at present. The Appellant's physician specifically noted that 4 of 10 daily living activities were restricted:

- Management of medications
- Use of transportation
- Management of finances
- Social functioning

The physician's comments on daily living activities were "Difficulty with transportation due to agoraphobia. Girlfriend looks after his finances and monitors medications." Social Functioning – "Agoraphobia – so has difficulties out in the public and tends to isolate himself @ home." Degree of restriction – "Significant restrictions @ present. Poor results on functional testing" Assistance required – "Girlfriend looks after his finances & meds."

The Appellant suffers from physical impairments too from the hepatitis C that is just now being treated. The Appellant's physician does not indicate that the Appellant has any significant mobility restrictions.

The most compelling evidence as to the severity of the Appellant's mental impairment is his Physician's evidence that he suffers from six significant deficits with cognitive and emotional function. The evidence of the Assessor goes farther than the Physician in describing the severity of the Appellant's mental impairment. As well, the Assessor describes physical impairments from the hepatitis C. The Appellant's evidence and his girlfriend's evidence augment the physician's and assessor's evidence with respect to the severity of his mental impairment. The panel finds sufficient evidence in the Physician's report to establish that the Appellant suffers from a severe mental impairment. It was not reasonable for the Ministry to find that the Appellant does not suffer from a severe mental impairment. The Appellant has met criterion #2.

The Ministry found that the Appellant's prescribed professional does not confirm that his impairment directly and significantly restricts his ability to perform daily living activities either continuously or

periodically for extended periods. The prescribed professional in this case can be either the Appellant's Physician or the Assessor who is a social worker and thus within the definition in section 2(2) of the EAPWDR. As noted above the Appellant's physician's evidence is that the Appellant is restricted in 4 of 10 daily living activities. The degree of restriction was described in the comments. In addition to this the Appellant's Assessor's evidence is that the Appellant is restricted in 18 of 28 activities requiring periodic or continuous assistance. Where there are discrepancies between the PR and the AR with respect to daily living activities, the panel prefers the evidence of the AR as the Assessor provided much more information and detail about the amount and degree of restriction the Appellant with daily living activities. The panel agrees with the Appellant's submission that, based on the decision in Hudson, it is sufficient for the legislative test that either the Physician or the Assessor confirm the restrictions in daily living activities and that it need not be both. Hudson as well states that the Physician's and Assessor's reports can be read together and not discretely. The Hudson decision states that a direct and significant restriction in as few as 2 daily living activities can be sufficient to meet the legislative test. The panel finds that the Appellant's mental impairment directly and significantly restricts the following six of eight daily living activities from section 2(1) of the EAPWDR: prepare own meals; manage personal finances; shop for personal needs; use public or transportation; perform housework and manage personal medication. Therefore it was not reasonable for the Ministry to find that the Appellant's mental impairment does not directly and significantly restrict his daily living activities. Therefore, the Appellant meets criterion #4.

The Ministry found that the Appellant's prescribed professional does not confirm that as a result of direct and significant restrictions, he requires help to perform daily living activities. Both the Appellant's Physician and the Assessor documented the continuous assistance the Appellant receives from his girlfriend. The Physician's evidence is simply "Girlfriend looks after finances & meds." The Assessor goes into much more detail with the following comments: "Gets continuous assistance with most DLA's from girlfriend... Girlfriend manages his diet... Girlfriend handles these [basic housekeeping]... Relies on girlfriend, has trouble with decision making, impulsive [shopping]... Girlfriend does all of this for him [meal planning, food preparation and cooking]... Girlfriend does [banking, budgeting, pay rent and bills]... Girlfriend handles all aspects of his medications... She monitors his intake, amounts & when to take them... Relies on the continuous support of his girlfriend for the majority of all DLA's"

The panel finds that the Appellant's prescribed professionals both confirm that as a result of his direct and significant restrictions he requires help from his girlfriend to perform daily living activities. Assistance from another person is defined as "help" within section 3(b)(ii) of the EAPWDA. It was not reasonable for the Ministry to find otherwise. The Appellant meets criterion #5.

Therefore, this panel finds that the Ministry's decision was not reasonably supported by the evidence. The Ministry's decision is rescinded. The Ministry's decision is overturned in favour of the Appellant.