

PART C – Decision under Appeal

The decision under appeal is the ministry's reconsideration decision dated April 11, 2011 which found 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 that 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 dated November 25, 2010, physician report dated December 4, 2010, and assessor report dated December 4, 2010;
- 2) Letter from the ministry to the appellant, dated February 12, 2011, denying his request for persons with disabilities designation and enclosing the decision summary;
- 3) Letter from the physician who completed the reports in the PWD application, dated March 17, 2011, adding that the appellant lives with a roommate, that he requires continuous assistance in order to carry purchases home and the appellant's roommate assists him with carrying groceries home, and that the appellant relies on a cane periodically for walking outside; and,
- 4) Reconsideration Submission dated March 18, 2011.

At the hearing, the appellant's advocate provided a copy of the decision in *Hudson v. British Columbia (EAAT) 2009 BCSC 1461*, and an excerpt from *Hansard* consisting of comments made by the Honourable Murray Coell MLA dated May 8, 2002, which the panel accepted as argument only and not evidence.

The appellant stated that he finds it very difficult to do his daily living activities and he needs to take pain killers just to prepare meals. The appellant stated that his roommate helps him with getting his groceries, but she is 76 years old with Parkinson's and she's stronger than he is. The appellant explained that he sometimes has to hold on to his roommate's walker for support. The appellant stated that he has been in denial about his conditions and he is always trying to do more than he should. The appellant explained that when he tries to do too much, he gets flare-ups in his hips and back and then he cannot do anything. For example, the appellant stated, he tried to cut his own toe nails and put his hip out and had to lay down. When he has a flare-up, the appellant stated that he uses his cane and that he will have to take a nap a couple of times in a day. The appellant also explained that lately he has been seeing his doctor on a weekly basis because of his emotional problems. For the last 3 months, the appellant stated, he has been taking anti-depressants. The appellant explained that his roommate has also helped him with his emotional state but that she will be moving soon to a nursing home. The appellant stated that he did not know what he would do when his roommate moves out, but that he has his name in with B.C. Housing.

The physician who completed the physician report has confirmed that the appellant is diagnosed with osteoarthritis of the back and hips, degenerative disc disease- lumbar spine, hepatitis C, chronic pain-musculoskeletal, depression, remote fracture/dislocation- left hip, and a remote right shoulder dislocation. The physician adds that the appellant was severely injured in a motor cycle accident in 1985, resulting in life-threatening injuries including a fracture- dislocation of his left hip and, since then, the appellant has struggled to maintain instrumental activities of daily living and full-time employment. The physician notes that despite the input of physicians and a multidisciplinary pain clinic, the appellant's symptoms have escalated to the point that he is unable to sit or stand for periods longer than 15-30 minutes. In the Physician Report, the physician indicates that the appellant can walk 1-2 blocks unaided on a flat surface, can climb 5+ steps unaided, and can lift items weighing between 5-15 lbs. and can remain seated for less than 1 hour. In the Assessor Report, the physician reports that the appellant requires periodic assistance and takes significantly longer with lifting and carrying/holding and prolonged standing (longer than 15-30 minutes) causes significant pain. The physician also indicates that the appellant takes significantly longer with walking outdoors and with standing but that he is independent when walking indoors and climbing stairs. The physician reports that the appellant has significant deficits with cognitive and emotional functioning in the areas of emotional disturbance and motivation. The physician indicates a major impact on motivation, moderate impacts to consciousness and executive and no impact on the remaining 10 areas of daily functioning. The physician further comments that "...mood symptoms are episodic but when present can have significant impact on motivation, concentration and goal-directed tasks and planning ability." With respect to social functioning, the physician indicates that the appellant is independent in all areas and he has good functioning with both his immediate and extended social networks. In the Assessor Report section of the PWD application, the appellant's doctor indicates that the appellant takes significantly longer with dressing, feeding himself, laundry, basic housekeeping, going to

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and from stores, carrying purchases home and using public transit. Additional notes in the Assessor Report also qualify the restriction on the use of public transit to "periods" where symptoms are more severe "...can limit patient's ability to use public transit." The physician indicates that the appellant is independent in 24 out of 28 daily living activities, including all areas related to social functioning.

PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry reasonably concluded that the appellant is not eligible for designation as a person with disabilities (PWD) as he 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 as set out in the legislation, 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 also points out that although the physician report states that the appellant takes significantly longer to perform some of his DLA, the information supplied by the physician does not describe how much longer it takes for the appellant to complete these tasks.

The appellant argues that the evidence establishes that he suffers from a severe physical impairment as a result of osteoarthritis of the back and hips, degenerative disc disease- lumbar spine, hepatitis C, chronic pain-musculoskeletal, remote fracture/dislocation- left hip, and a remote right shoulder dislocation. The appellant's position is that the evidence also establishes that he suffers from a severe mental impairment as a result of the diagnosis of depression. The appellant contends that the prescribed professional has provided sufficient evidence that the appellant's severe mental and physical impairments directly and significantly restrict his ability to perform many DLA, for which he requires the significant help and supervision of another person, namely his roommate. Further, the advocate argues that the notes in Hansard from May 8, 2002 clarified that in order to meet the criteria in the legislation the medical assessment does not need to establish that assistance is received, but only that it is required. Also the advocate pointed to the Hudson decision as authority for the position that not every DLA must be significantly restricted, but the meaning of plural is more

than one, and also that the narrative in the assessment and by the appellant must also be considered along with the checklists in the application.

With respect to the existence of a severe physical impairment, the panel finds that the evidence of a medical practitioner confirms a diagnosis of osteoarthritis of the back and hips, degenerative disc disease- lumbar spine, hepatitis C, chronic pain- musculoskeletal, remote fracture/dislocation- left hip, and a remote right shoulder dislocation. The physician adds in the report that the appellant was severely injured in a motor cycle accident in 1985, resulting in life-threatening injuries including a fracture- dislocation of his left hip. Since then the appellant has struggled to maintain instrumental activities of daily living and full-time employment. The physician notes that despite the input of physicians and a multidisciplinary pain clinic, the appellant's symptoms have escalated to the point that he is unable to sit or stand for periods longer than 15-30 minutes. In the Physician Report, the physician indicates that the appellant can walk 1-2 blocks unaided on a flat surface, can climb 5+ steps unaided, and can lift items weighing between 5-15 lbs. and can remain seated for less than 1 hour. In the Assessor Report, the physician reports that the appellant requires periodic assistance and takes significantly longer with lifting and carrying/holding and prolonged standing (longer than 15-30 minutes) causes significant pain. The physician also notes that the appellant has a limited ability to perform these tasks, "often" needs assistance, to move objects that are larger or heavier than 10-20 lbs. The physician also indicates that the appellant takes significantly longer with walking outdoors and with standing but that he is independent when walking indoors and climbing stairs. In the physician's letter dated March 17, 2011, he clarifies that the appellant relies on a cane periodically for walking outside. The appellant explained that when he tries to do too much, his back and hips will "flare up" to the point that he can hardly walk, that he will need his cane, and he may need to lay down. The panel finds that the physician's notes along with the assessment and the appellant's evidence demonstrate that the appellant's physical impairment is triggered by over-exertion, that it is not clear how often this occurs, the appellant remains independent with climbing stairs unaided and walking indoors, that his restriction with lifting is for heavier objects (more than 10-20 lbs.), and that his use of a cane is periodic. Overall, the panel finds that the ministry's determination that the appellant's physical impairment was not severe 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 depression. In the Physician Report, the physician indicates that the appellant has significant deficits with cognitive and emotional functioning in the areas of emotional disturbance and motivation and he notes that "...mood symptoms have tended to evolve because of chronic pain/disability." In the Assessor Report, the physician indicates that motivation (e.g. lack of initiative, loss of interest) has a major impact on the appellant's daily functioning. The physician also indicates moderate impacts to daily functioning as a result of executive (e.g. planning, organizing, sequencing, abstract thinking, problem solving, calculations) and emotion (e.g. excessive or inappropriate anxiety, depression, etc.). The physician further comments that "...mood symptoms are episodic but when present can have significant impact on motivation, concentration and goal-directed tasks and planning ability." The physician has reported no impact on the remaining areas of daily functioning. The appellant explained that he has been struggling more lately with his emotional problems, that he has been taking anti-depressants for the past 3 months, and that he has been seeing his doctor on a weekly basis. However, with respect to social functioning, the physician indicates that the appellant is independent in all areas including making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others, dealing appropriately with unexpected demands, and securing assistance from others. The physician also indicates that the appellant has good functioning with both his immediate and extended social networks, and the physician has not addressed any changes in this assessment of the appellant's ability to cope in his letter dated March 17, 2011. Overall, 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 in the PWD application, both the checklist assessments and the narrative, along with the physician's updated letter dated March 17, 2011. In the Assessor Report section of the PWD application, the

appellant's doctor indicates that the appellant takes significantly longer with dressing, feeding himself, laundry (also independent), basic housekeeping (independent), going to and from stores, carrying purchases home and using public transit. In his letter of March 17, 2011, the physician changes his assessment of carrying purchases home to requiring continuous assistance and that his roommate assists him with carrying purchases home. The physician did not re-assess restrictions to any of the other DLA as set out in the PWD application. The appellant has stated that he manages most of his housework "little by little" and that he and his roommate have a housecleaner do the "heavier stuff" twice a month. In the notes to the Physician Report, the appellant's doctor has indicated that the appellant's symptom severity slows his ability to perform activities of daily living such as dressing, bathing and food preparation and "...instrumental activities such as banking and shopping and laundry take much longer to perform." The panel notes that the physician has identified that additional DLA take longer for the appellant, in the areas of bathing, food preparation, and banking, that were not set out in the Assessor Report. However, additional notes in the Assessor Report also qualify the restriction on the use of public transit to "periods" where symptoms are more severe "...can limit patient's ability to use public transit". None of the DLA are assessed by the physician as requiring periodic assistance for extended periods of time, only one DLA is assessed as requiring continuous assistance (carrying purchases home), and the remaining 23 aspects of DLA are assessed as capable of being performed independently by the appellant. The panel finds that the ministry's determination that the evidence of a prescribed professional does not establish a direct and significant restriction on the appellant's ability to perform DLA either continuously or periodically for extended periods, 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 use of an assistive device or the services of an assistance animal, the panel relies on the information from the physician in the application that he receives help from family and friends, and the physician has clarified in his letter of March 17, 2011 that this is primarily the appellant's roommate. The panel finds the appellant has stated he has used a cane "on and off over the years" and the physician confirms in his March 17, 2011 letter that the appellant uses a cane "periodically". The appellant also stated he has been taking anti-depressant medications for the past 3 months, as well as seeing his doctor on a weekly basis. As it has not been established that the appellant's DLA are directly and significantly restricted, the panel also finds that the ministry's conclusion, that the requirement for significant help or supervision of another person to perform DLA under Section 2(2)(b)(ii) of the EAPWDA, has not been met was reasonable.

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