

PART C – Decision under Appeal

The decision under appeal is the ministry's reconsideration decision dated April 7, 2011 which held that the appellant did not meet 2 of the 5 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 she had a severe physical or mental impairment that is likely to continue for 2 years. However, the ministry found that the appellant's daily living activities (DLA) are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods. The ministry also found that because it had not established that DLA are significantly restricted, it cannot be determined that the significant help or supervision of another person is required to perform her 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 at the time of the ministry's reconsideration decision dated April 7, 2011 was :

1. June 3, 2009 a medical note regarding an x-ray of the appellant's right hand.
2. October 18, 2009 a psychiatric consultation assessment of the appellant.
3. December 7, 2009 a letter from a neurosurgeon to the appellant's physician.
4. February 2, 2010 an anesthetic consult on the appellant.
5. March 16, 2010 the MRI exam results of the appellant's brain.
6. March 18, 2010 letter from a neurosurgeon to the appellant's physician regarding the above MRI.
7. January 28, 2010 medical report of a brain scan done on the appellant.
8. PWD application dated September 13, 2010 submitted by the appellant. The appellant reports that she suffered an eye injury in 1992 which resulted in an orbital fracture and which developed a traumatic cataract. She suffers from constant pain in the left eye, both blurred and double vision and ongoing headaches. Her pain in her left eye is debilitating due to numerous surgeries the last in 2008 for a cornea transplant. Physically she finds it hard to cope with reading, computer work, using scissors and knives, etc. The appellant notes that her loss of balance and depth perception affect her ability to go up and down stairs, to shower and the blindness in her left eye affects her ability to shave her underarms. She also reports dizziness of her medications, a ringing of the ears and tinnitus that affects her ability to sleep and concentrate. The appellant reports that she often needs help driving when taking narcotics. The appellant describes that she also had a brain tumour removal in 2008. She reports a loss of concentration and memory and has to always write notes, misses appointments, suffers anger outbursts and anxiety.
9. In the Physician's Report (PR) dated September 20, 2010 the appellant is diagnosed with meningioma surgery with post-operative chronic severe headaches, chronic left pain, impaired vision, Diplopic, anxiety disorder and depressive symptoms. The appellant's physician further notes the appellant suffers cognitive impairment, poor short term memory, inability to concentrate and anger outbursts. The physician reports chronic left orbit neuropathic pain, post corneal injury and left orbit fracture as well as left corneal transplant, "diplopia vision and 20/200 Left (sic) eye", The physician comments. "has been treated by psychiatrist-Major depressive disorder." And notes that her medications are ongoing and that it is a "chronic persistent condition and vision will not improve". With respect to functional skills it is indicated the appellant can walk unaided for 4+ blocks, climb 6+ stairs, lifting ability is ticked "unknown" and has no limitations sitting. The physician indicates cognitive difficulties with communication skills and indicates significant deficits with and emotional functions including executive functions, memory, emotional disturbance, motivation, impulse control and attention or sustained concentration
10. The Assessor Report (AR) dated September 30, 2010 was also completed by the appellant's physician, who comments that the appellant lives with her daughter and reports the appellant's

impairments as extreme fatigue, inability to concentrate, poor short term memory, poor vision, diplopia and poor depth perception. The assessor reports that the appellant's ability to communicate is good in reading and hearing and satisfactory in speaking and writing. The assessor reports that the appellant is independent with regard to mobility and physical abilities. With regard to cognitive and emotional functioning major impacts are noted with the aspects of attention/concentration, executive and memory; moderate impacts with the aspects of consciousness, emotion, motivation and other emotional or mental problems; minimal impacts with the aspects of impulse control, language and other neuropsychological problems and no impacts with the aspects of bodily functions, insight and judgment, motor activity and psychotic symptoms. With respect to all aspects of DLA the appellant is reported to be independent. The AR report allows a DLA assessment for social functioning to be completed if the applicant has an identified mental impairment or brain injury. The assessment for DLA related to social functioning indicates the appellant requires periodic support/supervision regarding the aspects of appropriate social decisions, interacts appropriately with others, able to deal appropriately with unexpected demands and able to secure assistance from others and continuous support/supervision with respect to the aspect of able to develop and maintain relationships. The assessor also indicates the appellant to have marginal functioning with immediate social networks and with extended networks and that help is provided to the appellant by family and friends. The assessor also indicates that assistance is provided by family, friends and a health authority professional and comments "clinical counselor".

11. October 6, 2010 a medical chart summary of the appellant.

12. February 14, 2011 letter from the appellant's physician. The physician reports that the appellant experiences major difficulties regarding her activities of daily living. The physician reports the appellant also has significant difficulties understanding recipes and labels, remembering to eat regular meals and a well balanced diet, to take the food off the stove or out of the oven on time, to take the right medications at the correct dose and times and getting these refilled on time. The appellant is further reported to have motivational difficulties to keep a clean home, experiences tremendous anxiety with line-ups and crowds making it difficult for her to shop for groceries and personal items. Finally, the physician indicates the appellant has difficulties with public transport and getting on and off a bus at the correct stop and experiences confusion and visual problems especially at night.

The ministry did not attend. After confirming that the ministry was notified, the hearing proceeded under Section 86 (b) of the Employment and Assistance Regulations (EAR).

At the hearing, the appellant's advocate was authorized to act for the appellant who did not attend.

The advocate presented a submission which referred to excerpts from the case Hudson v. Employment and Assistance Appeal Tribunal (2009, BCSC 1461) and legal arguments regarding the inappropriate handing of the appellant's Request for Reconsideration by the ministry and the appellant's denial of natural justice and procedural fairness and right to representation considering her mental impairment and disabilities. Specifically, that the appellant was discriminated against and prejudiced by the ministry's failure to accommodate her during the reconsideration process.

The submission from the advocate also elaborated on the information in the appeal record and that from a new letter dated March 1, 2011 from the appellant's physician attached to the submission. The

panel finds this aspect of the submission provided new information that was in support of the original information that was before the ministry at the time of reconsideration. As such, the panel admits the new information into evidence under Section 22(4) of the Employment and Assistance Act. The letter submits that the appellant meets all of the eligibility criteria for PWD designation. It notes that the appellant suffers from several severe and lifelong mental and physical disabilities. In the letter, the physician comments that the appellant "experiences a direct and significant impact to her daily living activities (DLA), is unable to complete many tasks or takes 4-5 times longer and requires ongoing, continuous assistance.has a high need for support with her DLA as well as numerous emotional supports from various health specialists." The letter outlines that the appellant suffers from a variety of conditions including ongoing chronic left eye pain, impaired vision, chronic anxiety disorder and depression. As a result, the physician reports that the appellant experiences severe cognitive impairments, including poor short-term memory with an inability to concentrate, mood swings, angry outbursts combined with feelings of fatigue and hopelessness. Also that the appellant experiences ongoing chronic pain in her left eye, impaired vision and feelings of disorientation or "fogginess" which causes her to feel fatigued, disoriented, confused and lethargic a majority of the time. As a result she must rest often. Because of the above the physician makes specific comments related to the appellant's restrictions to perform DLA and, as a result, her need for help and assistance to perform them:

- "...the (appellant) is significantly restricted in her ability to function on a day to day basis because of these conditions and resulting limitations. She requires assistance with planning tasks, appointments and interactions."..... "requires assistance throughout the day, and often takes significantly longer to attend to tasks because she forgets what she has to do or where she has placed something."
- "...the (appellant) requires an extremely high level of emotional support as she experiences angry outbursts and mood swings and is quickly exhausted as a result."
- "...it is difficult for her to focus or to feel as though she has the energy to attend to small tasks such as folding laundry or paying bills."
- "For the majority of the time, the appellant (sic) is unable to do basic tasks, such as meal preparation, shopping, travelling outside of her home, or interacting with others. The appellant(sic) experiences a severe disruption to her cognitive functioning as she has difficulty comprehending things, interacting with people, making decisions, setting appointments...."
- "as mental health issues commonly fluctuate, the appellant(sic) is unable to predict when she will experience an aggravation in symptoms, so it is necessary that she receive ongoing, continuous support. The appellant (sic) requires assistance with housekeeping, shopping, meal preparation, personal care in addition to other supports such as regular appointments with mental health specialists and physiotherapists."

PART F – Reasons for Panel Decision

At issue is the reasonableness of the ministry's decision to deny the appellant Persons with Disabilities designation on the basis that she failed to meet the following legislative criteria:

- the appellant's daily living activities are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods
- a prescribed professional has confirmed that as a result of direct and significant restrictions, the appellant requires help to perform daily living activities.

The criteria for being designated a Person with Disabilities (PWD) are set out in Section 2 of the EAPWDA. It states:

2(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.

Section 2(3)(b) of the EAPWDA states that 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.

Section 2(1)(a) of the EAPWDR defines daily living activities:

(a) in relation to a person who has a severe physical impairment or a severe mental impairment as preparing own meals, managing personal finances, shopping for personal needs, using public or personal transportation, performing housework to keep one's residence in acceptable sanitary condition, moving about indoors and outdoors, performing personal hygiene and self care and managing personal medication.

Section 2(1)(b) adds two additional activities for a person with a severe mental impairment: making decisions about personal activities, care or finances; and, relating to, communicating or interacting with others effectively.

As noted in the issue under appeal there are 2 legislative requirements that the ministry determined were not met and the panel's reasons and findings will be focused and based on these.

The ministry argues that the appellant's ability to perform DLA are not directly and significantly restricted by her severe physical or mental impairment continuously or periodically for extended periods, and, that as a result, the appellant does not require help performing DLA. The ministry referred to the appellant's application for PWD designation and the indications by her physician that she is independently able to manage all areas of personal care, basic housekeeping, shopping,

meals, paying rent and bills, medications and transportation. The ministry acknowledges that the appellant requires continuous support/supervision with developing and maintaining relationships and periodic support/supervision with all other areas of social functioning, but that the information supplied did not describe the type, degree or duration of the of the support/supervision required to manage social functioning and that the degree of the appellant's restriction is unclear. The ministry also acknowledges the letter of February 14, 2011 from the appellant's physician that outlines significant difficulties the appellant has with various areas of DLA, but that the frequency, degree and the duration of these restrictions is also unclear. It argues that it is not established that the appellant's DLA are significantly restricted, and, therefore, it cannot be determined that significant help is required to manage DLA.

The appellant through her advocate argues that she was denied natural justice and procedural fairness during the reconsideration procedure. The panel finds this matter falls outside the scope of its jurisdiction. It finds that its jurisdiction is solely the ministry's reconsideration decision and not the process by which it occurs. This is guided by section 24 (1) of the Employment and Assistance Act which states:

“ After holding the hearing required under section 22 (3) [panels of the tribunal to conduct appeals], the panel must determine whether the decision being appealed is, as applicable,

(a) reasonably supported by the evidence, or

(b) a reasonable application of the applicable enactment in the circumstances of the person appealing the decision.”

The appellant also through her advocate makes the following arguments regarding her satisfying the legislative requirements for PWD designation:

- In answer to the question, “Has the applicant been prescribed any medication and/or treatments that interfere with his/her ability to perform DLA?” In the PR, the physician answers “yes”.
- In the AR, the physician indicates that the appellant lives with 11 year old daughter and has severe impairments which impact her ability to manage DLA, has only satisfactory speaking and writing abilities and experiences severe impacts to her daily functioning and notes those listed a moderate and severe including consciousness, emotions, attention/concentration, executive functioning, memory, motivation and experiences other emotional problems.
- The advocate refers to the DLA under Social Functioning in the AR and that the appellant requires periodic support making appropriate social decisions, interacting appropriately with others, to deal appropriately with unexpected demands and to secure assistance from others. Reference also is made to the appellant's requirement for continuous support to develop and maintain relationships and has marginal abilities to function in relation to personal and extended social networks.
- The advocate refers to the appeal record that summarizes the appellant's use of 7 different medications and takes 8 pills per day as a result of the conditions.
- The advocate refers to the February 14, 2011 letter from the appellant's physician. In the letter, the physician reports that the appellant experiences major difficulties regarding her activities of daily living. With regard to DLA the advocate points out that the physician reports the appellant to have significant difficulties understanding recipes and labels, remembering to eat regular

meals and a well balanced diet, to take the food off the stove or out of the oven on time, to take the right medications at the correct dose and times and getting these refilled on time. The advocate also notes the physician's remarks that the appellant has difficulties motivating herself to keep a clean home and experiences tremendous anxiety with line-ups and crowds making it difficult for her to shop for groceries and personal items. Finally, that the physician indicates the appellant has difficulties with public transport and getting on and off a bus at the correct stop and experiences confusion and visual problems especially at night as well as confusion and short term memory.

- The advocate refers to the most recent letter dated March 1, 2011 from the appellant's physician to demonstrate the appellant's severe impairment as confirmed by a prescribed professional, directly and significantly restricts her ability to perform DLA and confirms that she requires assistance to perform them. Specifically with regard to this criterion in the legislation the advocate indicates the following clarifications of the physician. The appellant is significantly restricted in her ability to function on a day to day basis because of her conditions and resulting limitations. She requires assistance with planning tasks, appointments and interactions. Because she has short term memory impairments coupled with an inability to concentrate the appellant requires assistance throughout the day and often takes significantly longer to attend to tasks. The appellant has difficulty focusing or to feel she has the energy to attend to small tasks such as laundry or paying bills. That for the majority of the time, the appellant is unable to do basic daily tasks such as meal preparation, shopping, travelling outside of her home or interacting with others. Because the appellant is unable to predict when she will experience an aggravation in symptoms, it is necessary that she receive ongoing, continuous support. The appellant requires assistance with housekeeping, shopping, meal preparation, personal care in addition to other supports and experiences a direct and significant impact to her DLA, is unable to complete many tasks or takes at least 4-5 times longer and has a high need for support with her DLA.

Regarding the ministry's position that the appellant's ability to perform DLA are not directly and significantly restricted by her severe impairment continuously or periodically for extended periods, the panel relies on the new information contained in the physician's letter dated March 1, 2011. It finds this written testimony as a more current and one providing a more clearly defined explanation regarding the appellant's restrictions to DLA and the need for help to perform them over the evidence contained in the original AR and the physician's former letter of February 14, 2011. The the letter states that the appellant "is significantly restricted in her ability to function on a day to day basis" because of her conditions and limitations... "that she requires assistance throughout the day and often takes significantly longer to attend to tasks...". In the letter, the physician confirms that because the appellant experiences severe disruption to her cognitive functioning and because mental health issues commonly fluctuate and cannot be predicted she has difficulty comprehending things, interacting with people, making decisions, setting appointments. The physician notes the appellant has difficulty with small tasks such as folding laundry or paying bills and notes in particular that the appellant "requires assistance with housekeeping, shopping, meal preparation, personal care, in addition to other supports, such as regular appointments with mental health specialist and physiotherapists." The physician further comments that "For the majority of time, the (appellant) is unable to do basic daily tasks such as meal preparation, shopping, travelling outside of her home, or interacting with others." The physician further confirms that as a result of the appellant's severe and lifelong impairment that the appellant "experiences a direct and significant impact to her daily living activities, is unable to complete many tasks or takes 4-5 times longer, and requires ongoing,

continuous assistance." The panel finds that the physician's letter of March 1, 2011 when viewed as a whole as confirming that the appellant is unable to perform aspects of DLA associated with housekeeping, shopping, meal preparation, personal care, laundry, paying bills, transportation (noted by the physician as traveling outside the home) and interacting with others and satisfies a level of quantification and duration for these particular aspects of DLA.

The panel further finds that, as a result of the new information provided by the appellant's physician in her letter dated March 1, 2011, the ministry was not reasonable in its decision to conclude that the appellant's impairment does not, in the opinion of a prescribed professional, directly and significantly restrict her ability to perform DLA either continuously or periodically for extended periods.

As a result of her restrictions and because the evidence demonstrates the appellant requires periodic or continuous assistance with the aspects of housekeeping, shopping, meal preparation, personal care, laundry and paying bills, and transportation (noted by the physician as traveling outside the home). As a result, the panel finds that the ministry's determination that the appellant does not require help to perform DLA was unreasonable.

The panel notes that the ministry determined that the appellant qualified for the age requirement and that her impairment will continue for at least 2 years and that she does suffer from a severe impairment. In addition, the evidence in this appeal confirms the requisite level of restriction regarding the appellant's ability to perform DLA and that she requires significant help to perform DLA. As a result, the panel finds that the ministry's determination that the final two criteria have not been met as unreasonable.

The panel finds, therefore, that the ministry's reconsideration decision is not reasonably supported by the evidence and rescinds the decision in favour of the applicant.