

APPEAL #

PART C – Decision under Appeal

The decision under appeal is the ministry's reconsideration decision dated October 11, 2011 which found that the appellant did not meet two 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, and the ministry was also satisfied that the evidence establishes that the appellant has a severe physical and mental impairment. However, the ministry was 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) Operative Report from hospital dated November 18, 2010 regarding the results of a rectal exam procedure for the appellant;
- 2) Person With Disabilities (PWD) Application: applicant information dated January 4, 2011, physician report dated January 10, 2011, and assessor report dated January 25, 2011;
- 3) Letter from the ministry to the appellant dated July 21, 2011 denying person with disabilities designation and enclosing a copy of the decision summary; and,
- 4) Questionnaire completed by the physician who completed the PWD application dated September 6, 2011.

Prior to the hearing, the appellant provided a two additional letters as follows:

- 1) Questionnaire completed by the appellant's physician dated October 12, 2011; and,
- 2) Letter from a community support organization 'To Whom It May Concern' dated November 7, 2011 which states in part that the appellant has attended counseling for his concern of his drug and alcohol use, attending sessions on July 13, August 26, and November 8, 2010 and October 4, 2011. The ministry did not object to admission of the Questionnaire completed by the physician but did object to the admissibility of the references to substance abuse and panic attacks, as this was not specified at the time of application nor on reconsideration. The ministry objected to admission of the letter from the community support organization as only relating to the substance abuse issue.

At the hearing, the appellant tendered a handwritten page from his daily journal covering the period December 3 through December 9, 2011. The ministry objected to admission of this document as not being relevant and not being provided three days prior to the hearing. The panel reviewed the new documents and admitted the appellant's journal entries and the Questionnaire completed by the physician, with the exception of the references to substance abuse and panic attacks, pursuant to Section 22(4) of the Employment and Assistance Act as relating to the impact of the appellant's impairments on his daily activities (DLA) and being in support of the information before the ministry on reconsideration. The panel did not admit the letter from the community support organization dated November 7, 2011 as it relates only to the appellant's substance abuse, that was not before the ministry on reconsideration.

At the hearing, the appellant's mother stated that the appellant was diagnosed with Crohn's disease when he was 11 years old and they noticed that he was very pale and was on the toilet all the time. They were told that his condition would get worse and that his life expectancy would be shorter. The appellant's mother explained that the appellant had surgery when he was 15 years old and that helped for a while but he also had some complications and another surgery at the age of 16, and he is now 31 years old. The appellant's mother explained that the body does not absorb the nutrients from foods that it should so the brain becomes deprived of nutrients that it needs to function properly. The appellant's mother stated that they were told that the condition would also have an impact on the appellant's mental capabilities and she finds that he becomes violent when he does not get his way. She stated that the appellant's memory has become a problem, that the appellant lives with her, and she worries if he has gone out and left the stove on or the heat turned up. The appellant's mother stated that the appellant depends on her to manage his medications, to cook his meals, to take him shopping, and to help him pay his bills. She stated she has seen her son go from being a star hockey player with lots of friends to locking himself in his room and not wanting to live. The panel admitted the oral testimony pursuant to Section 22(4) of the Employment and Assistance Act as relating to the impact of the appellant's impairments and being in support of the information before the ministry on reconsideration.

The appellant stated that he cannot sleep at night because he is constantly worried and upset, and he does not have energy and his confidence is low. The appellant stated that when he worries, he gets cramps all the time and this drives him into major depression. The appellant stated that he secludes in his bedroom quite often, that he only makes himself simple meals, like microwave instant meals. The appellant stated that he used to have drive but he now feels like a broken person and he has considered suicide many times and believes that his depression is worse than the Crohn's disease. The appellant stated that his mother will help him with

banking but then he will get into an argument with her and yell and that he knows he cannot control his anger. The appellant stated that he will be out with his father and he will ask about how the appellant has spent his money, and the appellant will get mad and disappear for a while. The appellant stated that his mother helps him with getting his prescriptions and he also does not remember appointments so she helps with that, although he states this also relates to his other problem with substance abuse. The appellant stated that his mother does all the grocery shopping and cooks the meals and makes sure his bills get paid, like his car payments. The appellant stated that with the Crohn's disease, he will have to go to the washroom 5-7 times a day, he will be in pain and he smells up the washroom and this condition is embarrassing and humiliating. The appellant stated that if he cannot get to the washroom, he will have an accident, which happened on the bus once. The appellant stated that his desire to escape from the reality of his conditions is what drives his other problems. The appellant stated that he can tell by looking at food whether it is going to upset his system and he tries to control his diet. The appellant stated that it was about 3 years ago that the symptoms of Crohn's disease started to get much worse and to have an effect on his DLA.

In his self-report, the appellant adds that he is a painter by trade and had his own business for 8 years. The appellant states that he is in the process of handing his customers over to his father who is also a self-employed painter. The appellant explains that his customers have become concerned about his frequent trips to the washroom and his line of work has become more unmanageable. The appellant states that he has not worked much in the past year and needs help. In his daily journal covering December 3-9, 2011, the appellant states his activities as going to a community centre to meet his father, to going for drinks, to staying home and being depressed, to attending meetings, to not feeling well, to going out with friends for meals and drinks, to feeling sick with Crohn's and hung over, to going to the hospital for an appointment, getting into an argument with his mother, and to getting more anti-depressants from his doctor.

In the Questionnaire completed by the appellant's physician dated September 6, 2011, the physician indicates that the appellant suffers from severe medical conditions, including Crohn's disease, depression and anxiety disorder. Although the physician has not confirmed that the appellant is directly and significantly restricted in his ability to perform daily living activities (DLA) continuously as a result of these conditions, he has noted "see below." The physician goes on to indicate continuous restrictions with toileting and a handwritten note that "...patient feels he is periodically restricted from all the above activities since he frequents washroom a lot", but has not confirmed restrictions in the other listed areas, including walking indoors/outdoors, climbing stairs, lifting, dressing, grooming, bathing, transfers, laundry, basic housekeeping, accessing community, getting in and out of vehicles, using public transit. The physician confirms restrictions with sleep disturbance and bodily functions and that the appellant has undergone a colonoscopy in November 2010 at which time he had a fistula and an infection and had Crohn's disease present in both his small and large intestine. The physician has crossed out the statement that "...constant and ongoing infection in the groin area cause intense pain and restrict [the appellant's] ability to perform all physical DLA."

In the Questionnaire completed by the appellant's physician dated October 12, 2011, the physician indicates that the appellant is directly and significantly restricted in his ability to perform his DLA continuously as a result of several medical conditions, with a handwritten note "...as described below." The physician goes on to indicate that the restrictions include, as a result of Crohn's disease, the requirement to be near a toilet at all times due to the possibility of unpredictable bowel movement, that he will be forced to rush to the bathroom or experience an accident and this causes him to be restricted for any time period of 30 minutes up to 45 minutes, and the physician has added a handwritten note that "...this is what the patient states." The physician indicates that the appellant is periodically restricted with shopping, as if he experiences a sudden movement he must stop shopping, and that he is continuously restricted with going to and from the store because he has to take a break when he experiences an immediate bowel movement or severe pain, and he is periodically restricted with carrying purchases home as he has to stop this activity to use the washroom. The physician confirms that the appellant is restricted with toileting as he uses the toilet up to 10 times a day, approximately once every 2 hours. The physician also confirms that the appellant is restricted with using transportation as if he is in traffic he has to go to the bathroom in his car and he has been unable to prevent an accident from occurring on

public transit. The physician indicates that, as a result of these restrictions the appellant requires "not continuous, but sometimes" assistance with going to and from the store, carrying purchases home, and using public or private transportation. The physician adds a note that "...these statements are according to what the patient has expressed to me."

The physician who completed the physician report has confirmed that the appellant has been his patient for 1-2 years and that he has seen the appellant 2 to 10 times within the last 12 months. In the physician report, the physician confirms the impairment directly restricts the appellant's ability to perform daily living activities (DLA), and then goes on to indicate that there is no restriction in the areas of personal self care, meal preparation, management of medications, basic housework, daily shopping, mobility inside the home, use of transportation, management of finances and social functioning. The physician reports that the appellant is continuously restricted with mobility outside the home, with the note that it is "...difficult to mobilize outside home due to frequent trips to washroom 7-10 X/ day." Regarding assistance with DLA, the physician comments "...no assistance required- needs disease controlled."

In the assessor report, the physician indicates that the appellant is independent with all tasks of personal care, while taking significantly longer than typical with toileting ("secondary to diarrhea cramps"), regulating diet ("watch food triggers"), and transfers in/out of bed ("decreased energy"). The physician indicates that the appellant is independent with laundry and takes significantly longer than typical with basic housekeeping ("lack of energy"). The physician reports that the appellant is independent with all tasks of shopping with the note added that "...no assistance required, some days can't go shopping due to GI [gastro intestinal] issues, depressive symptoms about situation." Further, the physician reports that the appellant is independent with all tasks of managing meals but takes significantly longer than typical with meal planning and food preparation ("has to be careful"). The physician indicates that the appellant is independent with all tasks of paying rent and bills, and managing medications and transportation with the additional comment that the appellant is "...presently back living with mother, different meals since patient's diet is restricted, mother assists patient with his activities." In terms of social functioning, the assessor has assessed the appellant as independent in all aspects, with good functioning in both his immediate and extended social networks.

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 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 criteria 1, 2 and 3 as set out in the legislation, in that he has reached the age of 18, his impairments are likely, in the opinion of a medical practitioner, to continue for at least 2 years, and he has a severe physical and mental impairments, the evidence does not establish that he has met criteria 4 and 5. In particular, the ministry argues that the evidence does not show that the prescribed professional confirms that the appellant's severe physical and mental impairments directly and significantly restrict his ability to perform DLA either continuously or periodically for extended periods so 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 these activities.

The appellant argues that the evidence establishes that the prescribed professional has provided sufficient evidence that the appellant's severe physical and mental impairments directly and significantly restrict his ability to perform many DLA, for which he requires the significant help and supervision of another person. The appellant's advocate also argued that the legislation must be applied with a benevolent purpose and that the decision in *Hudson v. B.C. (EAAT)* 2009 BCSC 1461 is authority for the position that the appellant need only show he is directly and significantly restricted in more than one DLA.

Regarding the appellant's ability to manage daily living activities (DLA), the panel has relied on the evidence of the physician provided in the PWD application, as well as in the subsequent Questionnaires dated September 6, 2011 and October 12, 2011. In terms of preparing his own meals, the physician indicates no restriction in this activity in the physician report and, in the assessor report, that the appellant is independent with all tasks but takes significantly longer than typical with meal planning and food preparation with the note that he "...has to be careful." Although the appellant stated that he only prepares instant microwave meals and that his mother cooks most of the meals for him, the physician has not confirmed a restriction or need for assistance in

this DLA in either Questionnaire. For managing personal finances, the physician indicates in the physician report that the appellant is not restricted in this activity and, in the assessor report, that the appellant is independent with all tasks of paying rent and bills. In the Questionnaires, the physician has not confirmed a restriction or need for assistance with this DLA, although given an opportunity to do so. Although the appellant stated that he relies on his mother to remind him to pay his bills, this is not reflected in the information from the appellant's physician, as required by the legislation. In terms of shopping for his personal needs, in the physician report the appellant's physician has reported that the appellant is not restricted and, in the assessor report, that the appellant is independent with all tasks of shopping with the note added that "...no assistance required, some days can't go shopping due to GI [gastro intestinal] issues, depressive symptoms about situation." However, in the Questionnaire dated October 12, 2011, the physician indicates that the appellant is periodically restricted with shopping, because if he experiences a sudden movement he must stop shopping, and that he is continuously restricted with going to and from the store because he has to take a break when he experiences an immediate bowel movement or severe pain, and he is periodically restricted with carrying purchases home as he has to stop this activity to use the washroom.

For use of public or personal transportation facilities, in the PWD application, the physician reports that the appellant is not restricted and is independent in all tasks but, in the Questionnaire dated October 12, 2011, the physician confirms that the appellant is restricted with using transportation because if he is in traffic he has to go to the bathroom in his car and he has been unable to prevent an accident from occurring on public transit. For performing housework to maintain the appellant's place of residence in an acceptable sanitary condition, the physician indicates in the physician report that there is no restriction and, in the assessor report, that the appellant is independent with laundry and takes significantly longer than typical with basic housekeeping. In the physician report, the physician indicates that the appellant is continuously restricted with mobility outside the home, with the note that it is "...difficult to mobilize outside home due to frequent trips to washroom 7-10 X/ day" and that he is not restricted with mobility inside the home. The panel notes that, despite these restrictions, the appellant describes mobility in the community over a one week period in his daily journal, with trips to the community centre, to meetings, to restaurants, to a pub, to the hospital, and to his doctor. With respect to performing personal hygiene and self care, the physician indicates in the PWD application that the appellant is not restricted in the area of personal self care and, in the assessor report, that the appellant is independent with all tasks of personal care, while taking significantly longer than typical with toileting ("secondary to diarrhea cramps"), regulating diet ("watch food triggers"), and transfers in/out of bed ("decreased energy"). In the October 12, 2011 Questionnaire, the physician has confirmed that the appellant is restricted with toileting as he uses the toilet up to 10 times a day, approximately once every 2 hours. The physician reports that the appellant is not restricted with managing his personal medications and there is no need for assistance. For making decisions about personal activities, care or finances, and relating to, communicating or interacting with others effectively, the physician has reported no restrictions in the areas of social functioning, assessing the appellant as independent with making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others, dealing appropriately with unexpected demands and securing assistance from others.

Looking at the evidence as a whole, the panel finds that it demonstrates that the appellant experiences restrictions in some of the tasks of the DLA of shopping, in 1 out of 8 tasks of personal care, and with mobility outside the home and with using public transit. The panel finds that the evidence of the prescribed professional consistently indicates that the appellant performs a majority of his DLA without restriction and that periodic assistance is required from another person for some of the tasks of DLA. The appellant's advocate argues that the Hudson decision is authority for the position that only 2 DLA need to be restricted, however the evidence of a prescribed professional must establish that the severe impairment "directly and significantly" restricts the person's ability to perform DLA, and that restrictions are found to a minimum of 2 DLA, which the panel finds was not shown in the appellant's case. Therefore, 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.

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In determining whether the ministry reasonably concluded that the appellant does not require the significant help or supervision of another person or the use of an assistive device, the panel relies on the information from the physician that the appellant lives with his mother and receives assistance from her. As it has not been established that DLA are significantly restricted, the panel finds that the ministry's conclusion that the requirement for significant help or supervision of another person, an assistive device, or the services of an assistance animal 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.