

APPEAL #

### PART C – Decision under Appeal

The decision under appeal is the ministry's reconsideration decision dated September 27, 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 April 19, 2011, physician report dated April 19, 2011, and assessor report dated April 19, 2011;
- 2) Letter from the ministry to the appellant dated July 22, 2011 denying person with disabilities designation and enclosing a copy of the decision summary;
- 3) Questionnaire complete by the appellant's physician dated September 22, 2011;
- 4) Submission by an advocate on behalf of the appellant transmitted September 23, 2011; and,
- 5) Request for Reconsideration.

Prior to the hearing, the appellant provided an additional submission by an advocate on his behalf, transmitted November 3, 2011. The panel reviewed the submission and accepted it as argument, containing no new evidence.

In the Questionnaire completed by the appellant's physician dated September 22, 2011, the physician states that the appellant suffers from severe medical conditions including obesity, loss of vision (right eye), possible sleep apnea, and borderline learning disability, and that he is directly and significantly restricted in his ability to perform his daily living activities (DLA) continuously as a result of these conditions. The physician goes on to indicate that these restrictions include being periodically restricted with walking outdoors (2-4 blocks; experiences shortness of breath and fatigue, takes significantly longer), climbing stairs (5+ steps, experiences shortness of breath and fatigue, takes significantly longer), lifting, carrying and holding (15-35 lbs.; experiences fatigue and discomfort), standing (unable to stand for prolonged periods of time- 1 hour), daily shopping (difficulty choosing appropriate and healthy items, does most shopping at the food bank), meal preparation (does not plan meals, lack of motivation to prepare meals, makes simple meals, difficulty regulating diet), accessing community (requires transportation), getting in and out of vehicles (experiences discomfort, difficulty with seatbelts, requires support to get out of vehicles), and social interaction (difficulty interacting with others, isolates and withdrawn from others, most interacting done online). The physician also indicates that the appellant is continuously restricted with transfers (fatigue, difficulty getting into standing position, takes significantly longer), and with basic housekeeping (lack of motivation, experiences fatigue). The physician indicates that the appellant requires assistance with basic mobility (experiences fatigue and requires rest after 20 minutes walking outdoors, lack of depth perception due to right eye blindness, will bump into poles due to loss of vision, takes significantly longer to walk- 3 X slower, requires continuous use of transportation), climbing stairs (experiences fatigue, shortness of breath, requires use of handrails, elevator or escalator whenever possible), lifting and carrying (lifting restricted to under 30 lbs., requires assistance due to fatigue and discomfort, takes significantly longer- 2X- due to carrying items in smaller loads), preparing and cooking food (continuous restrictions due to lack of motivation, cooks simple meals that require no preparation), basic housekeeping (discomfort and fatigue, lack of motivation), daily shopping (continuous assistance with transportation, choosing appropriate items, walking, standing in line due to fatigue and memory deficits), support to build social network (support for planning social activities and socializing with others) and support for written communication (completing forms, writing a letter). The physician has not confirmed a requirement for assistance in the areas of sitting, standing, bodily functions, banking, transportation or support for coping with mental health conditions.

In the area of cognitive and emotional restrictions, the physician has added narrative in the Questionnaire that for lack of motivation, the appellant has no desire to perform DLA, has a lack of interest in activities, for cognitive function, the appellant has a hard time with comprehension and takes longer to process information, for attention/concentration, that the appellant has difficulty sustaining focus in order to complete tasks and is easily distracted, for executive functioning, that the appellant has difficulty to plan and organize, he does not initiate, has a lack of motivation, difficulty with problem solving and completing tasks without instruction, and lacks confidence to make his own decisions, and with accessing social support, that he is hesitant to ask for assistance from others. The physician has not confirmed restrictions in other areas of cognitive and emotional functioning, although given an opportunity to do so, such as for consciousness, memory, impulse control and

appropriate social interaction.

The physician who completed both the physician and assessor reports has confirmed that the appellant has been his patient for less than 1 year and that he has seen the appellant 2 to 10 times in that period. In the physician report, the physician confirms a diagnosis of morbid obesity (code 5.10), loss of vision right eye, and possible sleep apnea and notes "...globally function is poor." The physician report indicates that the appellant has not been prescribed any medication or treatment that may interfere with his ability to perform DLA, nor does he require any prostheses or aids for his impairment. The physician reports that the appellant can walk 4 or more blocks unaided on a flat surface, he can climb 5 or more stairs unaided, he can lift 15 to 35 lbs., and has no limitation with remaining seated. The physician indicates that there are significant deficits with cognitive and emotional function in the areas of motivation and attention or sustained concentration and comments that "...indecisive, procrastinates greatly; not cleaning home, self care poor."

The physician has also completed the assessor report and indicates that the appellant is independent with walking indoors and independent with walking outdoors, as well as with climbing stairs, while requiring periodic assistance from another person with lifting and carrying and holding. The physician reports that the appellant is independent with all tasks of personal care and that laundry/basic housekeeping take significantly longer than typical. The physician assesses the appellant as independent with shopping and taking significantly longer than typical with going to and from stores and making appropriate choices. The physician also indicates the appellant is independent with managing meals and takes significantly longer than typical with food preparation and cooking ("buys pre-made food"). The physician reports that the appellant requires continuous assistance from another person with paying rent and bills, with the note that "...brother has power of attorney." The physician also indicates that the appellant is independent with managing medications, and does not provide any additional comments. The assessment provided with respect to managing transportation is independent, while taking significantly longer than typical with getting in and out of a vehicle. In the assessor report, the physician reports major impacts to daily cognitive and emotional functioning in the areas of impulse control, attention/concentration, executive, motivation, with moderate impacts to insight and judgement and memory, and no impact to 8 other areas of functioning. The physician has added a comment that "...difficulties making decisions and acting on them, depends greatly on brother." In terms of social functioning, the physician has assessed the appellant as requiring periodic support/supervision with making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others, and securing assistance from others, while requiring continuous support or supervision with dealing appropriately with unexpected demands. The physician adds a note that the appellant "...needs help and supervision at house with cleaning, meal preparation." The assessor indicates that the appellant has marginal 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 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 criteria 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, 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 he suffers from a severe physical impairment as a result of loss of vision in his right eye and possible sleep apnea. The appellant also argues that the evidence establishes that he suffers from a severe mental impairment due to morbid obesity and a borderline learning disability. The appellant contends that the prescribed professional has provided sufficient evidence that the appellant's severe physical and mental impairment directly and significantly restricts his ability to perform many DLA, for which he requires the significant help and supervision of another person or an assistive device. 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.

With respect to the existence of a severe physical impairment, the panel finds that the evidence of a medical practitioner confirms a diagnosis of loss of vision right eye, and possible sleep apnea and notes "...globally function is poor." The physician report indicates that the appellant has not been prescribed any medication or treatment that may interfere with his ability to perform DLA, nor does he require any prostheses or aids for

his impairment. In the PWD application, the physician reports that the appellant can walk 4 or more blocks unaided on a flat surface, he can climb 5 or more stairs unaided, he can lift 15 to 35 lbs., and has no limitation with remaining seated. In the Questionnaire completed by the appellant's physician, dated September 22, 2011, the physician indicates that the appellant is periodically restricted with walking outdoors 2-4 blocks, that he requires rest after 20 minutes, has a lack of depth perception due to right eye blindness and will bump into poles due to loss of vision, taking significantly longer to walk (3 times slower). The physician indicates the appellant is restricted with climbing stairs (5+ steps), that he experiences shortness of breath and fatigue and takes significantly longer, requiring use of handrails, elevator or escalator whenever possible. As well, with lifting, carrying and holding (15-35 lbs.- lifting restricted to under 30 lbs.), the physician indicates that the appellant experiences fatigue and discomfort and takes significantly longer (2 times) due to carrying items in smaller loads. The panel finds that the updated information from the appellant's physician shows that the appellant takes significantly longer than typical with his functional skills, and that his lifting is limited to up to 30 lbs., but that he maintains a moderate level of independent mobility and physical ability, without the use of assistive devices. Overall, the panel finds that the ministry's determination that the evidence does not establish a severe physical impairment, 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, in the physician report, of morbid obesity under the category of mental disorders, with a diagnostic code indicating an eating disorder and, in the September 22, 2011 Questionnaire, with a borderline learning disability. The physician indicates that there are significant deficits with cognitive and emotional function in the areas of motivation and attention or sustained concentration and comments that the appellant is "...indecisive, procrastinates greatly; not cleaning home, self care poor." In the assessor report, the physician reports major impacts to daily cognitive and emotional functioning in the areas of impulse control, attention/concentration, executive, motivation, with moderate impacts to insight and judgement and memory, and no impact to 8 other areas of functioning. The physician has added a comment that "...difficulties making decisions and acting on them, depends greatly on brother." In the area of cognitive and emotional restrictions, the physician has added narrative in the September 22, 2011 Questionnaire that for lack of motivation, the appellant has no desire to perform DLA, has a lack of interest in activities, for cognitive function, the appellant has a hard time with comprehension and takes longer to process information, for attention/concentration, that the appellant has difficulty sustaining focus in order to complete tasks and is easily distracted, for executive functioning, that the appellant has difficulty to plan and organize, he does not initiate, has a lack of motivation, difficulty with problem solving and completing tasks without instruction, and lacks confidence to make his own decisions. The physician has not confirmed restrictions in areas of cognitive and emotional functioning for memory or impulse control that were assessed with moderate and major impacts, respectively, in the assessor report. The panel notes that the updated assessment by the physician indicates 3 major impacts to cognitive and emotional functioning and one moderate impact, with no impact in 10 other areas.

In terms of social functioning, the physician has assessed the appellant as requiring periodic support/supervision with making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others, and securing assistance from others, while requiring continuous support or supervision with dealing appropriately with unexpected demands, but has not included an indication of the support and supervision required in order to gauge whether it is for extended periods of time. The physician does add a note that the appellant "...needs help and supervision at home with cleaning, meal preparation." The assessor indicates that the appellant has marginal functioning in both his immediate and extended social networks. In the Questionnaire, the physician adds that the appellant is periodically restricted with social interaction, and that he has difficulty interacting with others, isolates and withdraws from others, and that most interacting is done online. The physician indicates that the appellant requires assistance/support to build a social network, which includes support for planning social activities and socializing with others, and support for written communication (completing forms, writing a letter). However, the physician does not confirm a need for support to cope with mental health conditions, although given an opportunity to do so in the Questionnaire. The panel finds that the evidence demonstrates that the appellant's eating disorder/morbid obesity and his

borderline learning disability have a moderate impact on his daily functioning. 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 provided in the PWD application and the September 22, 2011 Questionnaire. In terms of preparing his own meals, the physician has indicated in the assessor report that the appellant is independent with all tasks while taking significantly longer than typical with food preparation and cooking. In the Questionnaire, the physician indicates that the appellant is periodically restricted with meal preparation in that he does not plan meals, that he lacks motivation to prepare meals and makes simple meals that require no preparation. For managing personal finances, the physician reports in the assessor report that the appellant requires continuous assistance with all tasks, including banking, budgeting and paying rent and bills, with the comment that "...brother has power of attorney." However, in the updated Questionnaire, the physician has not confirmed a need for assistance in the area of banking and budgeting, although given an opportunity to do so. The physician's handwritten note in the assessor report states that the appellant's brother has a power of attorney but the panel finds that it is equivocal whether this is as a result of a need for assistance. In terms of shopping for his personal needs, the appellant's physician has reported that the appellant is independent with all tasks, while taking significantly longer than typical going to and from stores and making appropriate choices. In the Questionnaire, the physician indicates the appellant is periodically restricted by difficulty choosing appropriate and healthy items and that he requires continuous assistance with transportation, choosing appropriate items, walking, and standing in line, due to fatigue and memory deficits. The panel finds that the physician has not confirmed memory deficits in the Questionnaire, although given the opportunity to do so.

For use of public or personal transportation facilities, the physician has indicated in the assessor report that the appellant is independent with all tasks but takes significantly longer than typical with getting in and out of a vehicle. In the Questionnaire, the physician indicates that the appellant is periodically restricted with getting in and out of vehicles because he experiences discomfort, difficulty with seatbelts, and requires support. The panel notes that the physician has not confirmed a need for "continuous transportation assistance", to access the community for daily shopping, community resources, medical appointments or banking, although given an opportunity to do so in the Questionnaire. For performing housework to maintain the appellant's place of residence in an acceptable sanitary condition, the physician reported in the assessor report that the appellant takes significantly longer than typical with laundry/housekeeping. In the Questionnaire, the physician indicates that the appellant is continuously restricted with basic housekeeping as a result of a lack of motivation and that he experiences fatigue. With respect to performing personal hygiene and self care, in the assessor report the physician indicates that the appellant is independent with all tasks including dressing, grooming, bathing, toileting, feeding self, regulating diet, transfers in/out of bed and transfers on/off a chair. In the Questionnaire, the physician reports that the appellant is continuously restricted with transfers due to fatigue, difficulty getting into standing position and periodically restricted as a result of difficulty regulating diet. The panel notes that regulating diet was included in the Questionnaire as part of managing meals rather than an item of personal care, which the note to the application explains is for issues related to eating disorders characterized by major disturbances in eating behaviour. With respect to managing his personal medications, the physician indicates in the assessor report that the appellant is independent with all tasks, and this assessment has not been modified in the Questionnaire.

Looking at the evidence of the physician, the panel finds that it demonstrates that the appellant experiences continuous restrictions in 2 of 8 tasks of personal care (transfers), with basic housekeeping, and with 1 of 5 aspects of social functioning. The physician has indicated periodic restrictions with 2 of 4 tasks of managing meals, one task of shopping (making appropriate choices), one task of personal care (regulating diet) and one task of using transportation (getting in and out of a vehicle), and the panel finds that the ministry reasonably determined that there was not sufficient information on the extent of assistance to show that it is required for extended periods of time for each of these tasks. The Hudson decision held that the legislation requires that the appellant is directly and significantly restricted in two or more DLA, and the panel finds that the ministry has

APPEAL #

reasonably concluded that the available evidence does not demonstrate a direct and significant restriction in two or more DLA. 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.

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 alone and that assistance is provided by his brother. 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 pursuant to Section 24(2)(a) of the Employment and Assistance Act.