

Employment and Assistance Appeal Tribunal
Guideline for Members

Evidence

December 2008

In legal arguments and through oral and written testimony, parties often provide the Tribunal or the panel with new evidence that is not part of the information and records that were before the minister when the reconsideration decision was made. However, the panel should not admit any new evidence unless they determine that it is supporting evidence, being evidence that is “in support of” the information and records that were before the minister at reconsideration.

The role of the panel is to:

1. determine whether the new evidence is admissible as supporting evidence;
2. determine the weight to be given to the admissible supporting evidence; and,
3. make findings of fact.

Determining whether the New Evidence is Admissible

Section 22(4)(b) of the *Employment and Assistance Act* states:

... a panel may admit as evidence only

- a. the information and records that were before the minister when the decision being appealed was made, and
- b. oral or written testimony in support of the information and records referred to in paragraph (a).

The “information and records that were before the minister when the decision being appealed was made” is referred to as the record of the ministry decision. The appeal record is initially comprised of the Notice of Appeal and the record of the ministry decision. As the appeal progresses, it also includes submissions, any new information admitted into evidence at the hearing, and the Tribunal decision.

The purpose of section 22(4)(b) is to strike a balance between a pure appeal on the record of the ministry decision and a hearing *de novo* (a new hearing). It contemplates that while a party may wish to submit new evidence to the panel at appeal, the panel is only authorized to admit “oral or written testimony in support of” the record of the ministry decision.

New evidence should not be admitted if it introduces an entirely new issue that is not related to the issue in the appeal record, in other words, the subject of the appeal. For example, an appellant may be appealing a reconsideration decision to deny a request for a wheelchair. At appeal, the appellant may present a doctor's prescription for two items, a wheelchair and a hearing aid. The new evidence is admissible because the prescription is in support of the request for a wheelchair; it is supporting evidence. However, the portion of the new evidence that prescribes the hearing aid is inadmissible because it raises a new issue, a request for a hearing aid that is not "*in support of*" the record of the ministry decision.

Another example of admissible evidence is if an appellant appealing the denial of the PWD designation submits a doctor's note verifying that the appellant requires help with daily living activities. The doctor's note could properly be admitted as it is written testimony "*in support of*" the record of the ministry decision that does not raise any new issues.

Panel members often deal with cases where the admissibility is not so clear. In PWD cases, for example, appellants frequently bring evidence of a new medical condition, one that was not submitted at reconsideration. If the new evidence establishes a new medical diagnosis or condition "*in support of*" the request for the PWD designation (the subject of the appeal), the evidence does not raise new issues and it may be admitted.

Panels should hear both parties' views on the admissibility of any information that is tendered as new evidence, note the positions of the parties, and provide reasons for the panel's determination with respect to the admissibility or inadmissibility of such evidence.

Determining Weight and Findings of Fact

If there is contradictory evidence, the panel will need to determine what evidence it accepts and state why it prefers or gives more reliance or weight to some of the evidence over other evidence. The panel must make findings of fact based on the evidence. Findings of fact are the primary relevant facts that are "at issue" between the parties and which must be established before the legislation can be applied.

Panels have considered credibility in weighing evidence and the courts caution against this, providing some factors to consider in weighing evidence and making findings of fact.

Credibility

There are two common errors made when determining credibility of evidence based on the demeanour of a witness or party:

- mistakenly believing someone who is lying
- mistakenly disbelieving someone who is telling the truth.

The following information (presented at the 2008 annual conference of the BC Council of Administrative Tribunals) may assist the panel in weighing evidence, particularly when the evidence conflicts with other evidence.

Faryna v. Chorny, [1952] D.L.R. 354 contains the classic statement for resolving issues of credibility. It downplays the idea that demeanour is an indicator of truthfulness or credibility. Credibility, particularly in cases where there is a conflict in the evidence, cannot be gauged solely by the test of whether personal demeanour carried conviction of the truth. The real test of the truth of a story is whether it is in harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

Consequently, if demeanour is not a good indicator of truthfulness, then it should be possible for a decision maker to resolve credibility issues with some degree of confidence without ever laying eyes on the witnesses or parties.

Some factors to weigh:

- ability to perceive, to recall or to communicate about the testimony
- internal consistency
- external consistency
- consistency with undisputed facts

To resolve a conflict in the evidence, test the evidence before you and test the evidence against all of the surrounding circumstances. Obtain further information if you can. Ultimately, the panel must articulate reasons that illustrate its decision making process was justifiable, transparent and intelligible.