

PART C – DECISION UNDER APPEAL

The decision under appeal is the ministry's reconsideration decision dated December 23, 2011 which held that the appellant did not meet 3 of the 5 statutory requirements of section 2 of the Employment and Assistance for Persons with Disabilities Act and Section 2 of the Employment and Assistance for Persons with Disabilities Regulation 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 2 years. However, the ministry was not satisfied that the appellant has a severe physical or mental impairment or 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. The ministry also found that a prescribed professional has not confirmed that, as a result of direct and significant restrictions, the appellant requires help or supervision of another person 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 reconsideration consisted of:

- Request for Reconsideration dated 22 September 2011, with a Self Report (SR),
- Physician's report (PR) dated 06 June 2011,
- Assessor's report (AR) dated 08 June 2011,
- Medical Report Employability form dated 16 May 2011 (unreadable),
- Letter from the appellant's friend dated 03 June 2011,
- Letter from the appellant's step-daughter, undated,
- Update note dated May 2011, written by the appellant,
- Application for PWD designation dated 04 November 2010, with a SR dictated by the appellant and an
- Additional 4 page statement by the appellant,
- MyoVision WinScan98 Exam report dated 20 December 2010,
- Letter from Neurologist dated 02 December 2010 and
- A copy of medical terms and conditions.

In the Request for Reconsideration under SR, the appellant writes that he has had 2 cat scans because of severe headaches. He takes Demerol for chronic back pain which limits his mobility. He has high blood pressure and takes 3 different medications, twice a day and has disrupted sleep despite taking sleeping pills. He can't ride on buses because he doesn't want to be around people, he doesn't know. He depends on his car because of limited mobility. He could walk 1-2 blocks on a good day but not frequently and is constantly nauseous because of pain.

The PR was completed by the appellant's medical practitioner (MP) of 2 years who has seen the appellant 2-10 times in the past 2 months and diagnoses the appellant with cervicogenic headache, somatisation disorder and sciatica, with an onset date of 2009. The MP adds that the appellant "seems to have a plethora of symptoms without any hard evidence of specific diseases". Regarding the Health History of the appellant, under questions "Please indicate the severity of the medical conditions relevant to this person's impairment."; "How does the medical condition impair this person?" and "Test results and other reports or findings may be used here where appropriate."; the MP without making any comment indicates only "See patient's reported limitations". The MP responds N/A to: Has the applicant been prescribed any medication and/or treatments that interfere with his ability to perform DLA? The MP indicates that the appellant does not require any prosthesis or aids for his impairment. Regarding Degree and Course of Impairment, the MP indicates that the appellant's impairment is likely to continue for two years and with regard to an estimated duration of the impairment and remedial treatments that may resolve or minimize the impairment; the only explanation noted is "Seems to lack any motivation".

Regarding Functional Skills, the MP reports that; the applicant can walk 1 to 2 blocks unaided on a flat surface, he can climb 5+ steps unaided, he has no limitations for lifting and that he can remain seated for 2-3 hours. The PR notes that the only significant deficit with cognitive and emotional function is emotional disturbance with a comment that the appellant seems mildly depressed. Regarding DLA, in response to "Does the impairment directly restrict the person's ability to perform Daily Living Activities?" the MP responds no. The MP does not indicate that the appellant's Social Functioning is impacted or that he requires assistance from another person, equipment and/or an assistance animal.

The AR was completed by a social worker who has known the appellant for 1 day. It is noted that the appellant lives alone. The appellant's mental or physical impairments that impact his ability to manage DLA are listed as follows: chronic pain on right side of body (starting at head, all the way down to his foot), sciatica in lower back

and butt, chronic headaches and depression. The appellant's Ability to Communicate is reported as good for speaking, satisfactory for hearing and poor for reading and writing because of headaches and neck pain. A comment notes that reading and writing worsen the headaches and cause tension in the neck and shoulders whereas ringing in the ear causes difficulty to hear at times. Regarding Mobility and Physical Ability; it is reported that the appellant takes significantly longer than typical to walk indoors (30-120 minutes). He requires continuous assistance from another person while walking outdoors (1-2 blocks). He requires periodic assistance from another person for climbing stairs. Standing, lifting and carrying/holding are reported as unable. The AR states that the appellant's leg and back are so sore that he cannot get out of bed right away (takes 30 mins-2 hours, everyday). Headaches, leg and back pain limit physical mobility and stairs cause pain in legs as does standing in one spot (need to move around and to shift weight to reduce pain). The appellant is unable to lift/carry heavy objects due to pain in back, neck and shoulders.

In regards to Cognitive and Emotional Functioning, a major impact on daily functioning was reported under bodily functions, consciousness, motor activity and language. A moderate impact was noted under emotion, attention/concentration, memory and motivation. There was no impact rated under impulse control, insight and judgment, psychotic symptoms, other neuropsychological problems and other emotional or mental problems. Comments were added as follows: the appellant is bothered by small noises and lights that he claims causes pain in his body so he has all light blocked out of the room. He has difficulty sleeping due to pain, feels tired and fatigued all the time regardless of how much he has slept. He sleeps 10-12 hours a day. He experiences depression, poor concentration due to constant pain in head and body and claims he cannot think straight. He writes appointments down to ensure he remembers and forgets to take medicine. His low motivation/initiative is due to high pain levels. He has racing speech.

Five (5) of the first 15 aspects of DLA were indicated as the appellant independently manages. Under Personal Care; dressing, grooming, toileting and transfers on/off chair were noted as independently manages. Bathing, feeding self, regulates diet; transfers in/out of bed were rated as requiring continuous assistance from another person or unable. Under Basic Housekeeping; laundry and basic housekeeping were rated as requiring continuous assistance from another person or unable. Under Shopping; going to and from stores, making appropriate choices, paying for purchases and carrying purchases home are indicated to require continuous assistance from another person or unable. Noted was that the appellant was on social assistance. Reading prices and labels is indicated as independently managed. Additional comments are as follows: the appellant takes 30-120 minutes to get out of bed due to pain; he is unable to shower as standing for that period is too painful; he eats mostly microwaveable food and McDonalds and his daughter cleans his home as he is unable due to pain in back, neck and leg and headaches. He requires a vehicle to go to and from stores and will not go in a store if it is busy.

Regarding the following 13 aspects of DLA, it is indicated that 5 were independently managed. Under Meals; meal planning, food preparation and cooking are indicated to require continuous assistance from another person. The safe storage of food was independently managed. Under Pay Rent and Bills; the appellant was noted to require periodic assistance from another person for budgeting and pay rent and bills whereas banking was independently managed. Under Medications; the appellant was noted as independent for filling/refilling prescriptions and safe handling and storage however, he was rated as requiring continuous assistance from another person or unable for taking as directed. Under Transportation; it was indicated that the appellant independently manages getting in and out of a vehicle however requires continuous assistance from another person or unable when using public transit and using transit schedules and arranging transportation. Comments were added as follows: the appellant's daughter cooks for him as he is unable due to chronic pain; he forgets to pay his only 2 bills; he doesn't take public transportation as he would be too nervous around all the people and is unable to walk to a bus stop.

In regard to Social Functioning, the appellant was reported as requiring periodic support/supervision under the

following areas: appropriate social decisions because the appellant is home most of the time and agitated by a lot of noise or lights, able to develop and maintain relationships, interacts appropriately with others because he talks rapidly and under able to deal appropriately with unexpected demands. The appellant was noted to be independent under able to secure assistance from others. In response to how the mental impairment impacts the appellant's relationship with his immediate social network and his extended social network, the AR has noted marginal functioning in both areas. It is added that the appellant would not take a taxi as he would not like to be around the driver because he/she would be a stranger.

The AR makes note that assistance is provided by family and friends. The appellant receives help with meals, cooking and cleaning on a daily basis. He also receives help with forms. The assistance that would be necessary for the appellant is increased financial support and physiotherapy for neck pain. Additional information was provided as follows: the appellant takes 4 different blood pressure medications, sleeping pills, anti-anxiety medication and medication for high cholesterol and the appellant's pain in lower back causes nausea. He lives next door to his parents who check in on him daily. The assessor noticed that he experienced head pain while the AR was being conducted which caused his eyes to water.

The letter from the appellant's friend, who has known him for several years and worked with him in the past states that lately he has had to help him on several occasions doing heavy lifting (furniture), etc. and has had to give him rides to appointments.

The letter from the appellant's step-daughter states that the appellant was a very active man who was always doing things around the house, cooking, cleaning and yard work. However, lately he seems unable to do things because of his sore back and legs and bad headaches. She states that she helps him around the house with cooking, cleaning, etc.

A note dated May 2011 was written by the appellant as an update and states that lower back pain limits his ability to sit and after 10 minutes, it is painful. The pain goes down his right leg to his foot. His cooking is minimal because of pain. He avoids stairs because of back pain which is nauseating and results in fatigue so he has to lie down in the afternoon. When his back flares up, then his neck pain increases and he must lay down. He has tried taking oxycontin and gabapentin but they make him feel like a zombie.

In the Application for PWD designation, the appellant describes his disability as follows: headaches, poor eyesight, occipital neuralgia, right eye waters, sciatica mainly in right leg, depression, arthritis in neck, high blood pressure, back problems on right side, chronic lower back pain, tinnitus in left ear, and chronic fatigue. He responds how the disability affects his life and his ability to take care of himself as follows: constant ringing in ear is debilitating, has very disrupted sleep, wakes up with severe headaches 2 or 3 times a week, takes baths as he can't stand long enough to take a shower, loud noises cause pain, stress amplifies pain, doesn't have stamina to make a full course meal, when incapacitated parents bring him food, can only get a few things at a time when shopping because of limited ability to stand and manage dealing with all the activity in the store, is very limited to sun exposure, has plywood on bedroom windows to make it dark, is socially isolated, doesn't have patience, gets frustrated easily because of chronic pain, has anxiety, has memory problems and gets headaches from trying to concentrate or to understand paperwork.

A 4- page statement provided by the appellant with the Application for PWD designation provides additional information as follows: the pain in his feet cause them to go numb, his sciatica pain has become worse in the past few months, he was recently in a car accident and his headaches have since become worse, his neck is very sore and it is hard for him to move it from side to side, he is undergoing physiotherapy as a result of the accident and he is to see a rheumatologist in November 2010. The appellant indicates that he can't walk very far or sit or stand very long as the pain gets unbearable.

A letter from a Neurologist to the MP reports that the appellant is in a similar situation now as he was last summer. The appellant is prone to back pain that may radiate down his right leg and he gets headaches which involve his right sub occipital and right frontal regions. The Neurologist writes that "The headache can be quite severe, bothering him when he is trying to sleep and interfering with him as he tries to rise from bed in the morning. During the day he can get shocky pain in this location. Sometimes he has to rest during the day to get control of these symptoms." The Neurologist adds that; cranial nerves remain normal, reflexes are symmetric, the appellant has no drift and tests of coordination are well performed. The Neurologist reports that this is a pesky problem that can last a long time however, it is unusual for cervicogenic headache to be a lifetime problem and usually there is spontaneous remission at some point.

At the hearing, the appellant's advocate submitted that the appellant's diagnosis of cervicogenic headaches, somatisation disorder and chronic back pain are severe impairments. As a result of these medical conditions the appellant has been prescribed a series of pain control medications. In terms of the PWD eligibility criteria, the advocate cited excerpts from the Supreme Court's decision in Hudson.

Additionally, the appellant's advocate provided the following evidence at the hearing:

1. A 1-page letter dated 20 October 2011 from the appellant to the ministry which indicates that the appellant is submitting a MyoVision WinScan98 Exam report dated 20 December 2010. The appellant writes that he is having difficulty relating to his physician and when he attended the MP's office with his advocate to obtain more information, the MP advised that he did not want to deal with this matter anymore and asked both parties to immediately leave. The letter reports that the MP has referred the appellant to a Rheumatologist for November 24, 2011 and that the appellant finds his chronic pain very disabling.
2. A Medical Report Employability form dated 16 May 2011 which is certified by the appellant's MP and reports that his primary medical condition is Chronic Low Back Pain and the secondary medical condition is Chronic Headaches (cervicogenic). In response to how the MP describes the overall medical condition, it is indicated as moderate. The prognosis is indicated as more than 2 years and medical condition(s) are not episodic in nature and are reported to occur "daily" and recur "daily". The nature of restrictions specific to these medical conditions is reported as "Too much pain with any exertion".
3. A color coded MyoVision WinScan98 Exam report dated 20 December 2010 indicates which areas/levels of the nervous system are being adversely affected by Vertebral Subluxations and provide qualitative and quantitative data to assist the Chiropractor. "By interfering with the communication between the brain and the rest of the body, a Vertebral Subluxation leads to improper electrical impulses which can lead to poor health". The highly affected area is indicated to be at the bottom of the spine and a medium-high area is indicated to be at the top of the neck.
4. A copy of the appellant's personal medication history from his pharmacy provides a list of medications prescribed for the appellant from December 8, 2010 through October 3, 2011. Included are; Demoral, Tylenol #3, Oxycontin, Apo-Ibuprofen and Co-gabapentin, along with 15 others.

The appellant also gave oral testimony that when he saw his physician in order to have the PR completed, it was done without any questions asked and the physician commented that he didn't have time for this and he complained that he had a waiting room full of other patients. Also, when the appellant and his advocate returned to obtain additional information, they were asked to leave the physician's office and once again the physician indicated he did not have time. The appellant has since seen the same physician 4-5 times however, has not yet received the results from the Rheumatologist.

The panel admitted the appellant's oral testimony as well as the above listed 4 documents as evidence under section 22(4) of the Employment and Assistance Act as they were found to be directly in support of the information and records before the ministry at reconsideration. The panel noted that items 2 and 3 although they were included in the appeal record were not readable and items 1 and 4 which were shown to be faxed to the ministry with the other documents, previously listed as evidence before the ministry at the time of reconsideration, were not included in the appeal record for unknown reason(s).

The ministry did not object to the admission of the new evidence.

No additional evidence was provided by the ministry at the hearing.

PART F – REASONS FOR PANEL DECISION

The issue under appeal is whether the ministry reasonably concluded that the appellant is not eligible for designation as a PWD because he does not have a severe physical or mental impairment that in the opinion of a prescribed professional (PP), directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods, necessitating help or supervision of another person to perform DLA. The ministry found that he met the age requirement and that his impairment was likely to continue for at least two years.

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 applicant 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. Section 2(2)(b) (i) requires that the impairment, in the opinion of a prescribed professional, directly and significantly restricts the person's ability to perform daily living activities (DLA) either continuously or periodically for extended periods. Section 2(2)(b)(ii) states that as a result of those restrictions the person must require help to perform DLA. Section 2(3)(b) of the EAPWDA states that a person requires help in relation to a DLA if 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 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.

Regarding the existence of a severe physical impairment, the appellant's position is that the MP has diagnosed him with cervicogenic headache and sciatica which result in chronic pain. The appellant argues that his DLA are significantly restricted by pain, limited mobility and medication. The PR reports that the appellant "seems to have a plethora of symptoms without any hard evidence of specific diseases". The MP responds N/A to: Has the applicant been prescribed any medication and/or treatments that interfere with his ability to perform DLA? Regarding Functional Skills, the MP reports that the applicant can walk 1 to 2 blocks unaided on a flat surface, he can climb 5+ steps unaided, he has no limitations for lifting and he can remain seated for 2-3 hours.

The AR reports under Mobility and Physical Ability that the appellant takes significantly longer than typical to walk indoors (30-120 minutes). Further indicated is that he requires continuous assistance from another person while walking outdoors (1-2 blocks) and he requires periodic assistance from another person for climbing stairs. Standing, lifting and carrying/holding are reported as the appellant is unable. The AR indicates that the appellant's leg and back are so sore that he cannot get out of bed right away (takes 30 mins-2 hours, everyday). The appellant's headaches, leg and back pain limit physical mobility and stairs cause pain in his legs as does standing in one spot. The AR reports that the appellant is unable to lift/carry heavy objects due to pain in back, neck and shoulders.

The ministry's position is that the assessor, who had only met the appellant one day during an office visit, may have overstated the appellant's functional abilities when compared to the appellant's MP, who has known the appellant for two years and has seen the appellant 2-10 times in the last past year and does not indicate a severe physical impairment.

Upon reviewing the PR respecting Functional Skills as well as the AR report under Mobility and Physical Ability; the panel finds that this evidence is not consistent. The MP, approximately 3 weeks before completing the PR, completed the medical report employability form and noted that the appellant's medical conditions are moderate, not episodic in nature and occur daily and recur daily. Also he reports that the nature of restrictions specific to these medical conditions is, "Too much pain with any exertion". The panel finds that this information does in fact support the information in the AR. The PR written in June specifies that there is no hard evidence to confirm specific diseases which result in the limitations to the appellant's physical functioning and in response to indicate the severity of the medical conditions relevant to this person's impairment; the MP writes "See patient's reported limitations". Additionally, the Neurologist writes that the cervogenic headaches can be quite severe. The appellant's evidence is that his symptoms have become worse with time, requiring the need for more pain control medication. The panel is troubled that the MP does not provide sufficient details to clarify the physical limitations of the appellant; regardless the panel finds that by taking into consideration all the descriptions of the impacts and restrictions to the appellant's physical functioning that the ministry did not reasonably determine that a severe physical impairment was not established under section 2(2) of the EAPWDA.

Regarding the existence of a severe mental impairment, the ministry's position is that there is no evidence provided by the MP to confirm any mental impairment diagnosis. The PR does diagnose the appellant with somatisation which is listed under mental disorders by its diagnostic code however, notes that the only significant deficit with cognitive and emotional function is emotional disturbance with a comment that the appellant seems mildly depressed. The AR however indicates that in terms of Cognitive and Emotional Functioning, a major impact on daily functioning was reported under bodily functions, consciousness, motor activity and language and a moderate impact was noted under emotion, attention/concentration, memory and motivation. These impacts are further explained in the AR as follows: the appellant is bothered by small noises and lights that he claims causes pain in his body, he has difficulty sleeping due to pain, feels tired and fatigued all the time regardless of how much he has slept which is between 10-12 hours a day, he experiences depression and poor concentration due to constant pain in head and body. He has low motivation/initiative due to high pain levels and he has racing speech.

Given the diagnosis of somatisation disorder, the physician doesn't provide any additional indication of a mental impairment or brain injury. With consideration for the appellant's oral testimony which corresponds to the evidence in the AR relating to his chronic pain and poor sleeping ability; the panel acknowledges as reported in the PR that the appellant is mildly depressed. However, the panel finds that the prescribed professional (PP) has not confirmed that a severe mental impairment exists and therefore, the panel finds that the ministry reasonably determined that a severe mental impairment has not been established under section 2(2) of the EAPWDA.

Regarding the degree of restriction that the appellant's impairment has on his ability to perform DLA, the appellant's position is that his medical condition severely limits his ability to manage daily living activities. Regarding DLA, in response to "Does the impairment directly restrict the person's ability to perform Daily Living Activities?" the MP responds no. The AR provides that the appellant is independent in his ability to perform DLA in 5 of the first 15 aspects. Under Personal Care, dressing, grooming, toileting and transfers on/off chair were noted under independent. Bathing, feeding self, regulates diet; transfers in/out of bed were rated as requiring continuous assistance from another person or unable. Under Basic Housekeeping, laundry and basic housekeeping were rated as requiring continuous assistance from another person or unable. Under Shopping, going to and from stores, making appropriate choices, paying for purchases and carrying purchases home are indicated to require continuous assistance from another person or unable. Reading prices and labels is indicated as independently manages. Regarding the following 13 aspects of DLA, it is indicated that 5 were independently managed. Under Meals, meal planning, food preparation and cooking are indicated to require

continuous assistance from another person. The safe storage of food was independently managed. Under Pay Rent and Bills, the appellant was noted to require periodic assistance from another person for budgeting and pay rent and bills whereas banking was independently managed. Under Medications, the appellant was noted as independent for filling/refilling prescriptions and safe handling and storage however he was rated as requiring continuous assistance from another person or unable for taking as directed. Under Transportation, it was indicated that the appellant independently manages getting in and out of a vehicle however, he requires continuous assistance from another person or unable when using public transit and using transit schedules and arranging transportation.

The ministry's position is that the information does not establish that in the opinion of a PP the impairment directly and significantly restricts DLA continuously or periodically for extended periods.

The panel notes that the legislation requires that a PP be of the opinion that an applicant's DLA are directly and significantly restricted either continuously or periodically for extended periods. Additionally, the panel notes that the PR and the AR are contradictory in their determinations. The panel finds that the evidence consisting of the appellant's diagnosed medical condition, prescribed pain medication and functional limitations, along with the AR has established that the appellant requires assistance in 18/28 aspects of DLA. 16 aspects of DLA require continuous assistance from another person or unable, whereas, 2 DLA aspects require periodic assistance from another person. Therefore, the panel finds that the ministry unreasonably determined that, in the opinion of a prescribed professional, a direct and significant restriction in the appellant's ability to perform DLA either continuously or periodically for extended periods was not established under 2(2)(b)(i) of the EAPWDA.

Regarding the need for help with DLA, the AR indicates that the assistance that would be necessary for the appellant is increased financial support and physiotherapy for neck pain. The AR has also indicated that 2 aspects of DLA under Shopping specifically; making appropriate choices and paying for purchases require continuous assistance from another person or unable because the appellant is on social assistance. The appellant's daughter has written that her dad had been an active man around the yard and house but now due to his pain and headaches requires her help to perform cooking, cleaning and other DLA. The appellant's friend who had previously worked with the appellant writes that he on several occasions has to help him with heavy lifting, etc. as well as to give him rides to appointments. The appellant has testified that his parents have to regularly check in on him and that he is unable to cook, shop, and perform other DLA because of chronic pain.

The panel notes that in the legislation; help in relation to perform DLA refers to assistance required by the appellant of an assistance device, the significant help of another person or the services of an assistance animal. However, the panel also finds that, as a direct and significant restriction with DLA has been established and as a PP has indicated the need for significant help or supervision of another person to perform 16/28 aspects of DLA, that the ministry unreasonably determined that a direct and significant restriction with DLA has not been established under Section 2(2)(b)(ii) of the EAPWDA.

In applying the legislation to the facts of the case, the panel finds that the ministry's decision is not reasonably supported by the evidence and thus rescinds the reconsideration decision.