

## PART C – Decision under Appeal

The decision under appeal is the Ministry's reconsideration decision dated December 31, 2011 which refused disability assistance, holding 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 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 did not accept a severe mental or physical impairment, nor that his daily living activities (DLAs) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods and that he needs help from another person or an assistive device. The DLAs are set out in the Employment and Assistance for Persons with Disabilities Regulation, section 2.

## 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 Appellant was not in attendance at the hearing. After confirming that the Appellant was properly notified, the hearing proceeded pursuant to Section 86(b) of the Employment and Assistance Regulation.

The evidence before the ministry at the time of the Reconsideration Decision included:

A self report, in which the Appellant describes the following:

- He has two types of epilepsy, sleep apnea and limited movement of his right wrist
- His epilepsy is petit and grandmal, which he considers severe and permanent
- He must take his medication at night because it causes sleepiness, poor concentration, memory and learning difficulties.
- He must use a CPAP machine because of his apnea
- His right wrist injury requires a permanent resting splint
- He is obese and suffered a minor heart attack.

In terms of its effect on him, he states:

- He tires easily
- He has memory loss
- If he forgets his medications he'll have a seizure
- His right hand injury makes working difficult, as he cannot lift more than 20 lbs
- He cannot get his driver's licence and has difficulties walking distances.

A Physician's Report (PR) was completed by Dr C, neurologist, who has seen the Appellant 2-10 times in the previous 12 months and has attended him for 2 ½ years.

- Dr C diagnosed the Appellant with the following:
  - Tonic/clonic and complex partial seizures, since 1978
  - Sleep apnea with high apnea/hypopnoea index = 50.7, since 2000
  - Panic attacks and non-epileptic behavioural event, December 2010
  - Obesity with a BMI of 56.6 and increasing, since 1995
  - Pain and limited range of movement in right wrist from trauma and surgery for bone grafting/tendon repair, since 2006
- Dr C noted a history of seizures uncontrolled on high dosages of anti-convulsants. The seizures were weekly or monthly and unpredictable. Major mental health stressors were noted including panic attacks and non-epileptic behavioural events. His weight gain has hindered his functional capacity and worsened his sleep apnea.
- Dr C opined that the Appellant was unable to take his anti-convulsants in the morning, due to the drowsiness they cause. This interferes with his ability to perform DLAs and his epilepsy is difficult to control. He has a lifelong requirement for his medications. He requires a splint for his right wrist to prevent further damage.
- Dr C felt the Appellant's impairment would last for two or more years from the date of the report, however that weight loss would improve sleep apnea with possible better control of epilepsy.

In terms of functional skills, Dr C found that the Appellant could:

- Walk 1-2 blocks unaided
- Climb 5+ steps
- Lift 5-15 lbs, and
- Remain seated for 1-2 hours.
  
- The Appellant had no difficulty communicating in English but had significant deficits in terms of:
  - Emotional disturbance
  - Attention or sustained concentration
  - He noted drowsiness due to anticonvulsants; anxiety and panic attacks. And that the Appellant was unable to do DLAs on days he has seizures.
  
- Dr C noted periodic restrictions in all DLAs on days the Appellant suffers seizures.

Acting as the Assessor, Dr C noted the following about the Appellant in the Assessor's Report (AR):

- He lives with family, friends or a caregiver.
- He is independent with his:
  - Ability to communicate
  - Mobility and physical ability.
  - Personal care (with the exception of his overeating/obesity)
  - Basic housekeeping
  - Shopping
  - Meals
  - Paying rent and bills
  - Medications
  - Transportation, and
  - Social functioning
  
- In terms of cognitive and emotional functioning, Dr C found the following had a moderate impact on the Appellant's daily functioning:
  - Emotion
  - Memory
  
- The remaining 12 categories had a minimal or no impact although Dr C noted poor memory due to his multiple medical problems and medication side effects.
  
- The Appellant requires a breathing device for assistance.
  
- A diagnostic report from August 2007 diagnosed the Appellant with sleep apnea and recommended a CPAP device.
  
- In a letter dated November 24, 2009, Dr C discussed the Appellant's epilepsy and the recommended medications, as well as the need to reduce panic attacks.
  
- On January 11, 2011, Dr C issued another letter which discussed an emotional shock received by the Appellant in December 2010. This resulted in mental stress unrelated to his epilepsy. His medication level was not adjusted. Dr C noted two seizures occurring in the space of the previous four months.

## PART F – Reasons for Panel Decision

The issue before the Panel is whether the Ministry's reconsideration decision dated December 31, 2011 to refuse disability assistance was reasonably supported by the evidence, or a reasonable application of the applicable enactment in the circumstances of the person appealing the decision.

Pursuant to section 2 of the EAPWDA, 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 did not accept a severe mental impairment, nor that his daily living activities (DLAs) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods and that he needs help from another person or an assistive device. The DLAs are set out in the Employment and Assistance for Persons with Disabilities Regulation, section 2.

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 did not accept a severe physical or mental impairment, nor that his daily living activities (DLAs) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods and that he needs help from another person or an assistive device.

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:

- (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
  - (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.
- (3) For the purposes of subsection (2),
  - (a) a person who has a severe mental impairment includes a person with a mental disorder, and
  - (b) 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 DLAs 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 facilities,
- 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.

An "assistive device" is defined in the EAPWDA as "a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform."

In his appeal documents, the Appellant argues that he has panic attacks and anxiety, in addition to his epilepsy and that he should be awarded PWD status.

The Ministry restated the position it took in its reconsideration decision.

In the decision, the Ministry found that the Appellant is over 18 years old and that his impairment is likely to last for at least two years. It did not accept the severity of his impairment.

Nor did the Ministry accept that the Appellant's impairment directly and significantly restricts the Appellant's abilities to perform DLAs either continuously or for extended periods and that he required help from another person or assistive device as a result of these restrictions.

The Appellant suffers from epilepsy and anxiety/panic attacks, as well as sleep apnea and obesity. If he takes his anti-convulsive medication in the daytime, it makes him drowsy and unable to function, rendering him more prone to epileptic seizures.

Despite the Appellant's difficulties, the Panel does not find the Ministry's position with respect to severity unreasonable. Apart from his periodic seizures and attacks he is independent with his DLAs and functional in most physical and emotional regards, with the exception of a moderate impact on his emotions and memory.

The DLAs set out in the Regulations are as follows:

Section 2(1)(a)

- (i) prepare own meals
- (ii) manage personal finances
- (iii) shop for personal needs
- (iv) use public or personal transportation
- (v) perform housework to maintain the person's place of residence in acceptable sanitary condition
- (vi) move about indoors and outdoors
- (vii) perform personal hygiene and self care
- (viii) manage personal medication

b) in relation to a person who has a severe mental impairment, includes the following activities:

- Make decisions about personal activities, care or finances
- Relate to, communicate or interact with others effectively

The Ministry argues that the information before it did not demonstrate a severe mental or physical impairment which directly and significantly restricted the Appellant's ability to perform DLAs either continuously or periodically for extended periods.

The Appellant argues that the Ministry did not place sufficient weight on Dr C's findings in his original report and his own reports of his condition. The Panel notes that the legislation requires evidence regarding DLA restrictions to be provided by a prescribed professional. As well, a person must be restricted in at least two DLAs to qualify for PWD status.

Examining the evidence in totality, the Panel cannot find that the Ministry was unreasonable in its conclusions with respect to DLA restrictions. In the PR, Dr C opined that the Appellant needed periodic assistance with all of his DLAs on days he has seizures. In the AR, however, Dr C found he was independent in all DLAs, with the exception of a tendency to overeat, causing obesity, and the impact on his emotions and memory from his condition. As well, his medication causes drowsiness. The overall picture that emerges is that the Appellant can function independently in performing his DLAs, except when affected by his medication and seizures or anxiety/panic attacks.

This is not a continuous restriction. It is periodic, but there is no evidence from a prescribed professional that it is for extended periods. While the recurrence cannot be predicted, Dr C's January 2011 letter noted two seizures in the previous four months. The Ministry reasonably concluded that the restrictions were not for an extended period.

While the Ministry noted the use of the CPAP machine, as it did not find that DLAs were significantly restricted, it could not determine whether significant help is required from another person. This is also a reasonable conclusion given the above findings.

Accordingly the Panel finds that the reconsideration decision to refuse the Appellant's disability assistance was reasonably supported by the evidence and the decision is confirmed.