

## PART C – Decision under Appeal

The decision under appeal is the Ministry's reconsideration decision dated December 13, 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 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 his daily living activities (DLAs) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods. The Ministry also found that as the Appellant is not significantly restricted in his ability to perform DLAs, it could not be determined that he requires the significant help or supervision of another person although a cane was used.

## 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 Ministry was not in attendance at the hearing. After confirming that the Ministry 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 Physician's Report (PR) completed by Dr V, who has seen the Appellant 2-10 times in the previous 12 months.

- Dr V diagnosed the Appellant with the following:
  - Osteoarthritis in both knees for 20 years
  - Blind in his left eye due to an accident 10 years ago
  - Depression for 15 years
  - Hammer toes for 10 years
  - Alcohol addiction with an unknown start date
- No medications or treatments interfered with the Appellant's ability to perform daily living activities, nor did the Appellant require prostheses or aids for his impairment.
- Dr V felt the Appellant's impairment would last for two or more years from the date of the report.

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

- Walk 4+ blocks unaided
- Climb 5+ steps
- Lift 15-35 lbs, and
- Remain seated for an unlimited period
- The Appellant had no difficulty communicating in English but had deficits in terms of:
  - Emotional disturbance
  - Motivation, and
  - Motor activity

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

- He had no difficulties communicating
- He required periodic assistance walking outdoors, climbing stairs, lifting, carrying and holding, but was independent walking indoors and standing.
- In terms of cognitive and emotional functioning, Dr V found impulse control and motor activity had a moderate impact on the Appellant's Daily Functioning, whereas the remaining 12 categories of cognitive/emotional functioning had minimal or no impact on Daily Functioning.
- Assessing the Appellant's DLAs, Dr V found him:
  - Independent in six of eight personal care activities, but requiring periodic assistance in bathing and transfers in/out of bed.

- Requiring periodic assistance with laundry and basic housekeeping
  - Independent in three of five elements of shopping, but requiring periodic assistance going to/from stores and carrying purchases home
  - Requiring periodic assistance in three of four elements of meal preparation (food preparation, cooking and food storage); independent only in planning
  - Independent in paying rent and bills
  - Independent with his medications, and
  - Requiring periodic assistance with transportation
- In terms of social functioning, the Appellant required periodic support/supervision with:
    - Making appropriate social decisions
    - Developing and maintaining relationships, and
    - Dealing appropriately with unexpected demands
  - He was independent in interacting with others and securing assistance from others
  - In terms of his immediate and extended social networks, the Appellant had marginal functioning.
  - Assistance was provided to the Appellant by family, friends, volunteers and community service agencies.
  - The Appellant required the use of a cane.
  - His alcohol use consisted of binge drinking every second weekend.

Dr V issued these reports on May 19, 2011. Subsequently, the Appellant, with the assistance of his advocate, sought clarification from Dr V. In a note dated December 7, 2011, Dr V answered the following questions:

- Q: In your opinion, do you agree that [the Appellant] has a severe physical or mental impairment?  
A: "Yes. Lost L eye in accident, still struggling with addiction – alcohol, osteoarthritis both knees"
- Q: In your opinion, do you agree that [the Appellant] is significantly restricted in his ability to perform daily living activities either continuously or periodically as a direct result of his impairment?  
A: "Yes"
- Q; Do you agree that as a result of those restrictions, that John requires help to perform those activities?  
A: "Yes"

In a separate letter to the Ministry, the Appellant's advocate summarized the original PR and AR, as well as Dr V's new evidence and argued that the Appellant met the legislative requirements for PWD status.

The Appellant also provided a self-report which summarized his diagnoses and described

- his pain when he walks and sits down
- that he must use a hand-rail to ascend stairs and experiences severe pain descending them , which takes twice as long as a normal person
- he has difficulty hearing
- his depression and PTSD cause him to lose attention and concentration
- dressing takes twice as long as does grooming and bathing as he gets lost and can't find what he's looking for

- his housekeeping is similarly affected
- he can ride a bike but worries about seeing properly in the absence of sight in his left eye
- he has difficulty shopping as he runs into people and drops items
- reading prices requires his glasses at all times
- he has left the stove on frequently and his esophageal disorder makes eating very painful
- he does not have skills for budgeting
- getting in and out of vehicles and chairs is difficult
- he has social isolation and feels depressed
- his disabilities interfere with his ability to sleep.

At the hearing, the Appellant and his advocate stated the following:

- they reviewed their written submission to the Ministry and highlighted why they felt he meets the legislative criteria.
- The Appellant stated he was in much pain every day and wants to be alone all the time. His depression, PTSD and anxiety resulted from being abused as a child
- He hoped that some of his difficulties will be addressed with upcoming surgery.

Under section 22(4)(b) of the Employment and Assistance Act, the Panel admitted this evidence as it is in support of information and records which were before the Ministry at the time of its decision.

## PART F – Reasons for Panel Decision

This is a review of the Ministry's reconsideration decision dated December 13, 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 for designation as a person with disabilities (PWD). The Panel must determine whether the Ministry's decision was reasonably supported by the evidence, or a reasonable application of the applicable enactment in the circumstances of the person appealing the decision.

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 (DLAs) either continuously or periodically for extended periods. Section 2(2)(b)(ii) states that as a result of those restrictions, in the opinion of the prescribed professional, the person must require help to perform DLAs. 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 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."

The Appellant's advocate argues that the Ministry placed insufficient weight on the Appellant's evidence and did not explain why it was not considered. They argue that the Appellant's self-report and Dr V's evidence support a conclusion that the Appellant "is mentally and physically impaired to such a degree that his ability to function independently is severely restricted," thereby meeting the legislative requirements.

The Ministry did not attend the hearing to make additional arguments. In its decision, the Ministry argued that there was not evidence from Dr V on the severity of the medical issues facing the Appellant or how his functionality was impaired. Nor was there evidence from a prescribed practitioner that the Appellant's impairment significantly restricts daily living activities either continuously or periodically for extended periods.

There is no dispute that the Appellant is over 18 years old or that his impairment is likely to last for at least two years.

The Act requires the physical or mental impairment to be severe. Evidence of severity can be drawn from the Appellant's ability to perform DLAs as well as medical evidence of the impairment itself.

The Ministry did not find the Appellant's condition severe stating "Dr V does not provide any information on the severity of the medical conditions or how they impair your functionality. He provides pain management and support for your drinking problem." The Appellant argues that Dr V's subsequent letter and his self-report provide evidence of sufficient severity. The Panel finds that the Appellant's argument is not substantiated by the evidence. Despite the multiple conditions faced by the Appellant, he is able to:

- Walk 4+ blocks unaided
- Climb 5+ steps
- Lift 15-35 lbs, and
- Remain seated for an unlimited period

Dr V found deficits in terms of:

- Emotional Disturbance
- Motivation, and
- Motor activity

The Appellant described his limitations in terms of pain and mental condition but he remains functional with his condition, albeit at a reduced level. Dr V indicated only a moderate impact on daily functioning with Impulse Control and Motor Activity. Motivation, e.g. lack of initiative; loss of interest had only a minimal impact on the Appellant's daily functioning.

In terms of Dr V's subsequent letter, to which he answered "Yes" and listed the Appellant's diagnoses to the question of "In your opinion, do you agree that [the Appellant] has a severe physical or mental impairment?" The Panel has difficulty ascribing more weight to this evidence in light of the detailed report provided by Dr V previously. There is no indication as to why his opinion was different at this juncture, in terms of a changed condition of the Appellant or other reason. The Panel gives more weight to the earlier, more detailed evidence. In summary, the Panel finds the Ministry was reasonable in not assessing a severe impairment.

The next test is whether, in the opinion of a prescribed professional, the impairments directly and significantly restrict DLAs continuously or periodically for extended periods. For a person to qualify for PWD status, s/he must have direct and significant restrictions in at least two DLA categories either continuously or periodically for extended periods. The Ministry argued that his DLAs were not restricted in a way that met the legislative criteria.

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

As a prescribed professional assessing the Appellant, Dr V found that the Appellant needs periodic assistance with:

- four of six elements of mobility and physical ability
- basic housekeeping
- three of four elements of meal preparation,
- transportation,
- making appropriate social decisions,
- developing and maintaining relationships, and
- dealing appropriately with unexpected demands.

However, he was independent in:

- communication
- six of eight elements of personal care
- three of five elements of shopping
- paying rent and bills
- medications
- interacting and seeking help from others

The Ministry found that “the information from your prescribed professional does not establish that *impairment significantly restricts* daily living activities either continuously or *periodically for extended periods*. (italics in original.)

The Appellant argues that the Ministry did not place sufficient weight on Dr V's findings in his original report and his subsequent letter. Quoting this letter:

Q: In your opinion, do you agree that [the Appellant] is significantly restricted in his ability to perform daily living activities either continuously or periodically as a direct result of his impairment?

A: “Yes”

The Panel finds that the evidence does not support the Appellant's position. We place more weight on the detailed evidence in the original AR which indicates that although periodic assistance is required, there is no evidence from a prescribed professional that it is for an extended period. The Ministry was reasonable in this finding.

The final test is contained in section 2(2)(b)(ii) of the Act, which states that as a result of those restrictions, in the opinion of the prescribed professional, the person must require help to perform DLAs. Section 2(3)(b) of the EAPWDA expands upon this section, stating 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. The Ministry also reasonably concluded that this could not be determined given that his DLAs were not found to be significantly restricted.

Accordingly the Panel finds that the reconsideration decision was reasonably supported by the evidence and the decision is confirmed.