

## PART C – Decision under Appeal

The decision being appealed is the Ministry's January 14, 2012 reconsideration decision denying the Appellant Persons with Disabilities (PWD) designation. The Ministry determined that the Appellant did not meet all of the required criteria for PWD designation set out in EAPWDA section 2(2). Specifically the Ministry determined that the Appellant does not have a severe mental or physical impairment that in the opinion of a prescribed professional

- (i) directly and significantly restricts his ability to perform daily living activities either continuously or periodically for extended periods; and,
- (ii) as a result of those restrictions he requires help to perform those activities.

The Ministry did determine that the Appellant satisfied the other criteria, that: he has reached 18 years of age; and, in the opinion of a medical practitioner his impairment is likely to continue for at least 2 years.

## PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act (EAPWDA) Section 2(2) and 2(3).

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR) Section 2.

## PART E – Summary of Facts

For its reconsideration decision the Ministry had the following evidence:

1. Appellant's September 20, 2011 PWD application.
2. Physician's Report (PR) and Assessor's Report (AR) both completed on September 29, 2011 by the same physician who indicated he has known the Appellant since August 9, 2011 and had seen the Appellant 2-10 times in the 12 months preceding these reports.
3. Appellant's December 20, 2011 request for reconsideration together with a written submission from the Appellant's advocate.

In his PWD application the Appellant wrote that his physical and mental disabilities combined significantly restrict his daily living. He described his physical disabilities as degenerative conditions in his neck and back that cause severe pain most of the time. He wrote that he can reduce these episodes by just not doing anything (significantly limiting his activities). Also the pain is particularly bad in cold weather and damp conditions. He is impacted by severe pain and related mobility 50% of the time (one good day, one bad day). He also wrote that if he is engaged in physical activity he finds that for every hour he needs 20 minutes rest. The Appellant described having severe pain, burning sensations and cramps in his right foot on a daily basis, all permanent conditions.

The Appellant wrote that he had a near fatal car accident, fracturing his skull and requiring surgery. He was in a coma for 3 weeks which resulted in epileptic seizures. The Appellant stated that now he has no sense of smell, and experiences long term depression, mood swings, and motivation impacts which with his physical pain make daily living very, very challenging. He used to be very involved, volunteering and now is quite unproductive. The Appellant also wrote that his sleep is disturbed by pain and mood. He requires assistance with housework, laundry, walking, navigating stairs, standing and carrying things at least half the time or they're not done, or they take three times as long. The Appellant indicated that his depression is getting worse, probably from the long term pain and immobility combined with a brain injury, and depression is a daily interference of major proportions.

In the PR the doctor described the Appellant's diagnoses as neck degeneration, hepatitis C, Sudeck's dystrophy right foot, head injury, depression and back injury 1976 - degenerative. He described the severity of some of these conditions as follows:

- Neck pain – especially in cold weather, movement of right arm causes pain; April 2011 started in left arm as well; "separated shoulder left – never fixed"; can't use hands/arms for more than 45 minutes then has to stop activity. Difficult to sleep due to pain, gets depressed due to pain.
- Hepatitis C – recently diagnosed.
- Sudeck's dystrophy right foot – fractured leg right 1988 & 2002; severe cramping and pain in leg and foot, burning sensation, can't climb a ladder.
- Head injury – 1976 MVA – had seizures. Also fractured skull in 1969; was in coma for 3 weeks, loss of smell.

The doctor also indicated that the Appellant requires prostheses or aids for his impairment but provided no details.

Regarding the Appellant's physical function the doctor noted that the Appellant can walk 4+ blocks and climb 5+ stairs unaided, lift 5-15 lbs. and has no limitations with remaining seated. However, the doctor also added "can't do anything when has cramps and pain" for walking, climbing stairs and lifting. He also indicated that the Appellant has significant deficits with cognitive and emotional

functioning, and specifically with emotional disturbance and motivation. The doctor noted that the following daily living activities are periodically restricted due to the Appellant's impairments: basic housework, and mobility inside and outside the home. The doctor explained the periodic restrictions as "unable to use arms and leg when pain and cramping present." He also indicated that the following aspects of daily living activities are not restricted: personal self care, meal preparation, management of medications, daily shopping, use of transportation, management of finances and social functioning.

In the AR the doctor indicated that the Appellant required periodic assistance with the following aspects of mobility and physical ability: walking indoors and outdoors, climbing stairs, lifting, and carrying and holding. He indicated all of these activities take significantly longer and he wrote that the Appellant can't stand for long – has to move. For impacts to the Appellant's cognitive and emotional functioning the doctor indicated: no impacts to bodily function, consciousness, impulse control, insight and judgment, motor activity, language, psychotic symptoms, other neuropsychological problems, or to other emotional or mental problems; minimal impact to executive and to memory; and, moderate impact to emotion, to attention/concentration and to motivation. As for assistance with daily living activities, the doctor indicated that the Appellant is independent in all aspects of personal care, meals, paying rent and bills, medications and using transit. The Appellant is also independent in all aspects of shopping except for carrying purchases home for which he requires periodic assistance and takes significantly longer. Also the Appellant requires periodic assistance and takes significantly longer with basic housekeeping and with laundry "2-3 times longer". The doctor indicated that the Appellant is independent in all aspects of social functioning except for being able to deal appropriately with unexpected demands. He also has good functioning in his immediate and extended social networks. The doctor noted that the Appellant gets help from friends, but also indicated no use of assistive devices or assistance from assistance animals.

In the submission for the reconsideration, the advocate reviewed the Appellant's medical conditions and impairments as described by the Appellant. She also pointed out the resulting restrictions on the Appellant's mobility and daily living activities as reported by the doctor in the PR and in the AR. She reviewed the Ministry's initial determination on the Appellant's eligibility for PWD designation and cited various sections of the *Hudson* decision to support the Appellant's reconsideration arguments.

At the hearing, the Appellant described the same medical conditions and symptoms he wrote about in his PWD application and which the doctor also reported. He said his right leg regularly swells to twice its size and he gets very bad cramps in his leg, preventing him from moving. Because of nerve damage, deterioration and arthritis in his neck and shoulders he sometimes can't touch his back or raise his arms past his waist and he experiences excruciating pain, like an electric charge running through his arms and neck. The pain is often triggered and intensifies when it's damp or cold. The Appellant also said that he still experiences effects from surgery after a car accident several years ago. His memory lapses are getting worse and he is on medication for his mood disorder which he described as scary with suicidal thoughts. He said his conditions also affect his socialization. He can go 2-4 days without talking to anyone, feeling very isolated, not wanting his children to see him when he is physically and mentally impaired. He also said he doesn't take as much pride in his home which he used to keep presentable. The Appellant described his back problems and how he started to rely on his upper body for strength which he thinks contributed to the problems he now has. He said if his back goes out he is on the floor or bed ridden and he also has trouble getting in and out of

a car. In the last 2-3 years his back has really progressed downhill.

The Appellant said that in September will be undergoing treatment with a new drug therapy for what he described as stage 3 liver disease. The Appellant submitted a letter dated February 16, 2012 from a registered nurse from a hepatitis/liver service indicating that the Appellant has been recommended for treatment consisting of a year of chemotherapy to treat his liver disease. They expect that while on this treatment he will have numerous side effects, including profound fatigue and anemia, mood and sleep disruption, and working through this treatment would be extremely difficult for the Appellant. They hope to start treatment in the next 6 months.

The Appellant submitted this letter as evidence about the severity of his liver disease and as evidence in support of information that was already before the Ministry. The Ministry did not object to the admissibility of this letter, but pointed out that because the therapy had not yet started it was not able to assess the impacts, and also this evidence did not address the PWD criteria.

The Panel finds that both the Appellant's oral testimony and the information in the February 16, 2012 letter relate to information about the Appellant's medical conditions and their severity which the Ministry had when it made its reconsideration decision. Therefore the Panel admits the oral testimony and the letter as being in support of the evidence that was before the Ministry at the time of reconsideration pursuant to section 22(4) of the Employment and Assistance Act (EAA).

At the hearing the Appellant's advocate submitted written argument which she also read. In that submission the Appellant acknowledged that his physician did not provide some of the information the Ministry requires on PWD applications. The advocate argued, however, that when looking at the application as a whole there is sufficient information to determine that the Appellant met the PWD criteria. For example, the advocate cited the Appellant's report that he needs assistance half of the time for the activities the physician indicated were restricted. The advocate also submitted that the Ministry failed to adequately consider the Appellant's self-report in his PWD application about how severely he is affected by physical and mental impairments. She cited the *Hudson* decision as setting the precedent that the Ministry must consider the Appellant's information when making its decision.

The Panel finds that the written and oral submissions by the Appellant's advocate are in the form of written and oral argument and accepts them as such.

The advocate also submitted 2 pages from a public health internet site about complex regional pain syndrome. The Panel finds that the document has no specific information related to the Appellant who was not diagnosed with this syndrome. Therefore it is not in support of information that the Ministry had and the Panel does not admit it into evidence pursuant to section 22(4) of the EAA.

At the hearing the Ministry reviewed the reports from the physician and noted it had considered the Appellant's own descriptions of his impairments. However, the Ministry submitted that the information provided, especially from the doctor, did not address the issue of severity. Also the doctor did not explain if the restrictions to daily living activities were continuous or if periodic whether the restrictions were for extended periods as required by the legislation. The Ministry acknowledged what the Appellant is going through but it was not satisfied that the information provided was enough to meet the PWD legislative criteria.

## PART F – Reasons for Panel Decision

The issue in this appeal is whether the Ministry reasonably determined that the Appellant is ineligible for PWD designation because he did not meet all the requirements in section 2(2) of the EAPWDA, and specifically that: he does not have a severe mental or physical impairment that in the opinion of a prescribed professional directly and significantly restricts his ability to perform daily living activities either continuously or periodically for extended periods; and, that in the opinion of a prescribed professional, as a result of the restrictions, he does not require significant help to perform those activities. The Ministry determined that he met the 2 other criteria in EAPWDA section 2(2) as set out below.

The eligibility criteria for PWD designation are set out in the following sections of the EAPWDA:

2(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

- (a) in the opinion of a medical practitioner is likely to continue for at least 2 years, and
- (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.

The "daily living activities" referred to in EAPWDA section 2(2)(b) are defined in the following sections of the EAPWDR

2 (1) For the purposes of the Act and this regulation, "daily living activities",

- (a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities: (i) prepare own meals; (ii) manage personal finances; (iii) shop for personal needs; (iv) use public or personal transportation facilities; (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, and
- (b) in relation to a person who has a severe mental impairment, includes the following activities: (i) make decisions about personal activities, care or finances; (ii) relate to, communicate or interact with others effectively.

The Panel will consider each party's position regarding the reasonableness of the Ministry's reconsideration decision under the applicable PWD criteria at issue in this appeal.

### *Severe Impairments*

In its reconsideration decision the Ministry reviewed the doctor's evidence regarding the Appellant's physical functioning and noted that the doctor did not describe the frequency of the cramps and pain. The Ministry also noted that the doctor reported that periodic help is needed to walk indoors/outdoors, climb stairs, and to lift, carry and hold; however, the doctor did not explain the frequency or the duration of the help needed, and the use of assistive devices was not indicated. Therefore the Ministry determined that the Appellant's skill limitations were not significantly restricted and he is able to function to a moderate degree with episodes of limitations not well described. It also reviewed the

advocate's submissions about the severity of the Appellant's pain; however, the Ministry found that the doctor did not describe the same degree of severity or any remedial measures being taken for the pain. The Ministry determined that the information provided did not demonstrate either a severe impairment or significant restriction in the Appellant's ability to perform daily living activities.

The Appellant's position is that the Ministry must consider the Appellant's self-report as well as the physician's description of his physical conditions, and taken together they establish that he has a severe physical impairment. The Appellant described how he is in severe pain 50% of the time, has to reduce the severe pain by just doing nothing, and for every hour of physical activity he needs 20 minutes rest. The Appellant also listed the daily living activities impacted by his physical impairments. Also the physician reported periodic restrictions to mobility and that periodic help needed with several daily living activities requiring physical mobility.

The Appellant described how his daily life is impacted by severe neck, back and arm pain, how his mobility is impacted 50% of the time and how he regularly experiences severe pain, burning sensations and cramps in his right leg and foot. The doctor described the Appellant as having neck pain especially in cold weather, pain in the right arm caused by movement, being unable to use his hands and arms for more than 45 minutes, having difficulty sleeping due to pain, and experiencing severe cramping, pain and burning sensations in his right leg and foot. The doctor also indicated that the Appellant can't do anything, such as walking, climbing stairs and lifting when he has cramps and pain; however, the doctor did not describe how often the Appellant experiences the pain and cramps. For the daily living activities noted as being periodically restricted by the Appellant's impairments (basic housework, and mobility inside and outside the home) the doctor added "unable to use arms and legs when pain and cramping present", but the doctor did not describe the duration or extent of such restrictions. The Panel finds that, based on the Appellant's descriptions of his physical impairments and of the restrictions on his daily life together with the doctor's reports of the Appellant's physical functioning and mobility, the Ministry reasonably determined that the Appellant does not have a severe physical impairment.

With respect to the Appellant's mental impairment the Ministry reviewed the doctor's reports of several deficits to cognitive and emotional functioning without comments and his reports of minimal to moderate impacts on daily functioning. The Ministry noted there was no narrative to support a severe mental health condition or brain injury and it determined that the information provided was not evidence of a severe mental impairment.

The Appellant submitted that his self report about his depression, his memory problems and mood changes combined with the physician's reports of significant deficits to emotion and motivation establish that he has a severe mental impairment. The Appellant also argued that the multiplicity of his conditions and the total impacts of his physical and mental impairments must be given fair and reasonable consideration.

The Panel finds that the Appellant described his depression as getting worse, and when his mood swings and motivation impacts are combined with his physical pain, it makes daily living very, very challenging for him. The doctor diagnosed the Appellant with depression, but provided no details about the severity or impacts of that condition. The doctor also indicated moderate impacts to emotion, attention/concentration and motivation, and minimal impact to executive and memory, but

again provided no details about the severity of these conditions, whether these impacts are episodic or continuous, and whether these conditions affect any aspects of daily living other than one aspect of social functioning. Therefore, the Panel finds that based on the evidence the Ministry reasonably determined that the Appellant does not have a severe mental impairment.

#### *Restrictions to Daily Living Activities*

The Ministry reviewed the doctor's reports of periodic restrictions to basic housekeeping and mobility inside and outside the home, and found that there was no information about the frequency or duration of severe symptoms that would restrict these activities. The Ministry wrote that no restrictions were reported to 7 out of 10 daily living activities including social functioning and the doctor also reported many activities are performed independently (23 out of 28). For the activities for which periodic help is needed the Ministry found that there was no information about how much longer these activities take, or the frequency or duration of periodic help needed. The Ministry determined that as the majority of daily living activities are performed independently or require little help from others, the information from the prescribed professional did not establish that impairment significantly restricts daily living activities either continuously or periodically for extended periods.

The Appellant acknowledged that the doctor did not fill in parts of the PR and AR about the extent and duration of the restrictions on his daily living activities. However, the Appellant argued that his evidence about the significant restrictions that he experiences in his daily life must be considered together with the doctor's reports. All of that evidence indicates that his mobility is restricted 50% of the time, he suffers severe pain during cold and wet weather which means for extended periods of time, and he requires assistance half of the time with housework, laundry, walking, navigating stairs, standing and carrying things.

The Panel notes that in the PR the prescribed professional, the doctor in this case, reported periodic restrictions to basic housekeeping, and mobility inside and outside the home when the Appellant is unable to use his arms and leg due to pain and cramping. However, the doctor provided no information about the duration or extent of these periodic restrictions. Also in the AR, the doctor reported that the Appellant needs periodic assistance with or takes significantly longer with basic housekeeping, aspects of shopping, transportation and social functioning, but the doctor provided no other information such as the extent of the help needed, whether help was need for extended periods or any other details about these restrictions. Therefore the Panel finds that the Ministry reasonably determined that the Appellant did not meet the requirements in section 2(2)(b)(i) of the EAPWDA; that is, that the Appellant's impairments do not significantly restrict his ability to perform daily living activities either continuously or periodically for extended periods.

#### *Assistance with Daily Living Activities*

Because the Ministry concluded that the Appellant's daily living activities are not significantly restricted, it therefore determined that the Appellant did not require significant help or supervision from another person. It also determined that no assistive devices are routinely used to help compensate for impairment.

The Appellant's position is that the doctor's reports should be considered together with the information he provided. The doctor indicated in the AR that the Appellant receives help from friends and the Appellant wrote that he requires assistance at least half the time or else housework, laundry,

walking, navigating stairs, standing and carrying things are not done or take three times as long.

The Panel finds that the physician reported that the Appellant needs a prostheses or aid for his impairment but provided no details. Also, although the physician indicated that the Appellant requires periodic assistance with the daily living activities noted in the preceding section, the physician provided no details about the type of assistance needed, or the duration or extent of assistance needed. The physician only indicated that the Appellant receives help from friends. Therefore the Panel finds that the Ministry reasonably determined that the Appellant did not meet the requirements of section 2(2)(b)(ii) of the EAPWDA.

The Panel finds, based on the whole of the evidence, that the Ministry's reconsideration decision was reasonably supported by the evidence and was a reasonable application of the applicable enactments in the Appellant's circumstances. Therefore, the Panel confirms that decision.