

PART C – Decision under Appeal

The decision under the appeal is the ministry's Reconsideration decision dated January 10, 2012, which denied the appellant's request for Persons with Disabilities (PWD) designation. The ministry determined 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 - EAPWDA* for designation as a PWD. The ministry determined that the appellant met the age requirement and that his impairment is likely to continue for 2 years or more. However, the ministry determined that:

- the information before the Ministry at reconsideration did not establish that the Appellant has a severe physical and/or mental impairment which in the opinion of a prescribed professional directly and significantly restricts her ability to perform daily living activities (DLAs) either continuously or periodically for extended periods of time and,
- The information did not establish that to perform DLAs, the Appellant requires an assistive device, the significant help of another person or the services of an assistance animal.

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 the reconsideration decision included:

- Persons with Disabilities Designation application dated September 20, 2011;
- Assessor Report completed by the appellant's psychiatrist, on September 20, 2011;
- Physician Report completed by the same psychiatrist on September 20, 2011;
- Persons with Disabilities Designation decision dated November 14, 2011;
- Request for reconsideration dated December 12, 2011;
- A letter from the appellant's physician, Dr. W. a consultant in Physical Medicine and Rehabilitation dated December 20, 2011.

At the hearing, the appellant provided two letters from two physicians, Dr. D and Dr. T. dated September 12, 2011 and January 24, 2012. The ministry reviewed the letters stating that the letters did not contain any new information. The ministry did not object to admitting the letters as evidence. The panel admitted the letters pursuant to Section 22(4) (b) of the *Employment and Assistance Act (EAA)* as evidence in support of the information and records before the ministry at reconsideration.

One of the letters is from the appellant's orthopaedic surgeon, Dr. T. Dr. T. stated that the appellant has a stiff shoulder and he has referred the appellant for radiographs of his left shoulder, as well as MRI scan. Dr. T. stated that he has postponed the appellant's right shoulder surgery due to the left shoulder's pain.

The second letter dated September 12, 2011 is from an internal and respiratory physician, Dr. D. who diagnosed the appellant with a moderately severe Obstructive Sleep Apnea (OSA). Dr. D. recommended the appellant to keep his trunk elevated when he sleeps.

The appellant in the application for the PWD designation stated that he has generalized anxiety, panic and obsessive compulsive disorders (OCD). The appellant further stated that he has Spondylitis in several discs in his back, Osteochondromatosis and Chondromalacia Patella in his right knee and Labrum tear in his right hip. The appellant stated that it is very difficult for him to sit or stand and he is using a cane for walking; therefore he cannot perform his duties as a teacher. The appellant further stated that he has moderate to severe sleep apnea and as a result he is very tired. The appellant reported that he has tendinitis in his left shoulder and he is scheduled for Arthroscopy operation.

The appellant in the request for reconsideration stated that the letter from the physician, Dr. W. combined with the Assessor and Physician reports indicate that he has severe impairments, both physically and mentally. The impairments are longstanding and significantly restrict his ability to perform a number of DLAs, including; walking, housework, meal preparation, shopping, and social functioning on an ongoing basis.

The appellant's psychiatrist, who has known him for almost one year and has seen the appellant 11 times or more, completed the Physician Report. The psychiatrist reported the appellant's medical diagnoses as:

- Mood disorders – major depression;
- Anxiety disorders – GAD, OCD and Panic Attack;
- Degenerative disc disease – shoulder, knee, lumbar spine, hips and right thumb;
- Digestive disorders – severe gastroesophageal reflux;
- Sleep apnea – Severe Obstructive sleep apnea.

The psychiatrist in the Physician Report stated that all of the appellant's diagnosed conditions are severe and the appellant is unable to walk, work, sit or stand for any length of time. The psychiatrist reported the appellant's height as 6 ft. 1 in. and weight 237 lbs. The psychiatrist further listed the medications the appellant has been prescribed and reported the anticipated duration of the medications/treatment as indefinite and that the medical conditions will likely continue for two years and more. The psychiatrist, in the Physician Report indicated that the appellant is able to walk unaided less than 1 block, can climb unaided over 5 steps and can

remain seated less than 1 hour. The psychiatrist answered unknown to the appellant's limitation in lifting.

The psychiatrist further reported that the appellant has the following significant deficits with cognitive and emotional function:

- Executive (planning, organizing, sequencing, calculations, and judgment);
- Emotional disturbance (depression, anxiety);
- Motivation (loss of initiative or interest);
- Impulse control;
- Motor activity;
- Attention or sustained concentration.

The appellant's psychiatrist also completed the Assessor Report. The psychiatrist reported that the appellant uses assistive device, a cane, in order to walk indoors, walk outdoors, climb stairs and standing. The psychiatrist also reported that it takes significantly longer for the appellant to lift, carry and hold due to pain.

Under the cognitive and emotional functioning, the psychiatrist reported that the following mental impairment restricts the appellant's functioning:

- Memory, minimal impact;
- Impulse control, moderate impact;
- Attention/concentration such as distractible, unable to maintain concentration, moderate impact;
- Executive such as planning, organizing, moderate impact;
- Motivation, moderate impact;
- Bodily function such as sleep disturbance, major impact;
- Emotion, major impact;
- Motor activity such as ritualistic or repetitive actions, major impact.

The psychiatrist reported that the appellant is independent in all Daily Living Activities (DLAs); however, the psychiatrist stated that the appellant requires continuous assistance from another person in going to and from the store and in carrying groceries home.

The psychiatrist in the Social Functioning section reported that the appellant requires periodic support/supervision in the following areas:

- Appropriate social decision;
- Able to develop and maintain relationships;
- Interact appropriately with others;
- Able to deal appropriately with unexpected demands;
- Able to secure assistance from others.

The psychiatrist further reported that the appellant is shy, has no friends, and has obsessive compulsive disorder (OCD), being teased by others. The psychiatrist stated that the appellant has marginal functioning in regards to relationship with his family, friends and extended social networks. The psychiatrist reported that the appellant is living with his 87 years old father who supervises him. The appellant uses a cane routinely to help compensate for his impairment.

The appellant's physician, Dr. W., a consultant in Physical Medicine and Rehabilitation, in a letter dated December 20, 2011 to the appellant's advocate made the following observations:

- The physician could only comment about some of the physical problems of the appellant;
- The physician stated that the appellant claims to have neck, bilateral shoulder pain, low back pain, right hip pain, and right knee pain.
- The physician had limited contact with the appellant; however, he believed that the appellant has right

shoulder pain right hip pain, and knee pain problems.

- The physician found that the combination of all these pains together could produce severe physical impairment;
- The physician reported that the appellant's shoulder pain would limit his use of the right upper limb movement and his hip and knee pain limit his ability to walk;
- The physician stated that the appellant's back pain limits his standing to a few minutes and his sitting tolerance;
- The physician further reported that the pain limits the appellant's ability to cook a meal or clean a house;
- The physician stated that the appellant's level of activity is significantly restricted because he cannot walk far or very fast secondary to the knee, hip, and low back pain and his ability to perform his DLAs would be restricted by his various pains."

At the appeal hearing the appellant's representative provided a written submission. He stated that the appellant is diagnosed with major depressive illness, GAD, OCD, panic attacks, degenerative Disc Disease, severe gastroesophageal reflux and severe obstructive sleep apnea. The appellant uses a cane for walking, climbing stairs, and standing. The appellant requires supervision and support in all aspects of social functioning and decision making and he relies on his father for this supervision.

The appellant stated that he has a medical report from his physical medicine and rehabilitation physician indicating that he has Labrum Tear in his hip but this report is not included in the appeal package. The appellant further stated that he thought his psychiatrist forwarded all his reports to the ministry; however, the appellant stated that as this report indicated that he was independent in performing all his DLAs, the psychiatrist did not send that report to the ministry.

The appellant stated that he has seen the rehabilitation specialist 5 times since September 2011. The appellant further stated that he has rituals in completing his DLAs, such as cooking and housework. It takes him much longer to complete his chores. He has had anxiety for all of his life continuously. The appellant said that the medications are helping him with this medical condition. The appellant further stated that he has had panic attacks since childhood and medications have help him with this condition as well. The appellant said that his hip pain is the main problem affecting his mental conditions. The appellant further submitted that he had a car accident in 1997 and as a result his thumb and foot were broken. The appellant said that without the orthopedic seat, he is not able to sit down. He further stated that his father keeps him on track and does washing dishes and carrying groceries upstairs. However, he is an old man and the appellant cannot expect his father to assist and support him. The appellant said that he was overseas teaching when he had severe back pain. As a result of his medical conditions, he was hospitalized and lost his job. He came back to Canada a year and a half ago.

The ministry submitted that the evidence does not provide sufficient information on the severity of the appellant's medical and mental conditions nor provide sufficient information regarding the appellant's restrictions in performing his DLAs due to his medical conditions. The ministry further submitted that the ministry does not have any information about the Labrum Tear in the hip and based on all evidence available at the time, the ministry's decision was reasonable.

The appellant's representative points to the inconsistencies in the physician reports such as the appellant has no limitation walking or standing in one section and that the appellant need devices to be able to walk or stand in another section of the report.

The panel finds that the appellant is suffering from the following mental and physical conditions:

- mood disorders, major depression, anxiety disorders, GAD, OCD, sleep apnea and panic attack;
- The appellant is in pain due to degenerative disc disease in his shoulder, knee, lumbar spine, hips and

right thumb;

- The appellant has gastroesophageal reflux;

The physician, who completed both the Physician Report and the Assessor Report has provided contradictory reports and assessments in the following areas:

- The appellant's physical and mental impairment directly and significantly restricts the appellant's ability to perform daily living activities either continuously, or periodically;
- The appellant's requires significant help or supervision of another person in relation to DLA.

PART F – Reasons for Panel Decision

The issue on appeal is whether the ministry reasonably concluded that the appellant is not eligible for designation as a Person with Disabilities (PWD). The decision stated that the appellant did not meet 3 of the 5 statutory requirements of Section 2 of the *EAPWDA* for designation as a person with disabilities. The ministry determined that the appellant met the age requirement and that his impairment is likely to continue for 2 years. The ministry however determined that,

- the information before the Ministry at reconsideration did not establish that the Appellant has a severe physical and/or mental impairment which in the opinion of a prescribed professional directly and significantly restricts her ability to perform daily living activities (DLAs) either continuously or periodically for extended periods of time and,
- The information did not establish that to perform DLAs, the Appellant requires an assistive device, the significant help of another person or the services of an assistance animal.

Pursuant to Section 2 of the *EAPWDA*, 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.
- (4) The minister may rescind a designation under subsection (2).

Section 2 of the *EAPWDR* states, (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.

(2) For the purposes of the Act, "**prescribed professional**" means a person who is authorized under an enactment to practice the profession of

- (a) medical practitioner,
- (b) registered psychologist,
- (c) registered nurse or registered psychiatric nurse,
- (d) occupational therapist,

- (e) physical therapist,
- (f) social worker,
- (g) chiropractor, or
- (h) nurse practitioner

The ministry's position is that based on the available information the ministry is not satisfied that the appellant has a severe mental and/or physical impairment and there are no evidence provided to establish the appellant's impairment directly and significantly restricts his ability to perform the DLAs.

The appellant submitted that based on all available information, he has severe mental and physical impairments that restrict his activities. The appellant argued that he is not able to perform a number of DLAs, confirmed by his physician and his psychiatrist. Therefore, he meets all he eligibility requirements for the PWD designation.

The evidence before the panel with respect to the Appellant's physical impairment is:

- The appellant's physicians are prescribed professional pursuant to the *EAPWDR*, s.2 (2) (a);
- In the Physician Report the appellant's psychiatrist reported that the appellant's impairment will continue for two years or more;
- The appellant is diagnosed with, GAD, OCD, degenerative disc disease in his shoulder, knee, lumbar spine, hips and right thumb;
- The appellant is suffering from severe gastroesophageal reflux and severe destructive sleep apnea.

Based on the evidence available regarding the appellant's physical impairment, the panel finds that the ministry's decision determining that the information does not establish a severe physical impairment is reasonable. The panel finds that the compelling evidence on the severity of the appellant's physical condition is from the physician. Dr. W. in the letter dated December 20, 2011. The physician concluded that the combination of the appellant's pain issues could produce severe physical impairment. The physician further stated that the appellant's impairment could limit the appellant's ability to use his right upper arm movement and would limit his ability to walk. Further, the panel notes as did the ministry at the reconsideration that the physician instead of making a diagnosis, speaks in terms of "could" and "would", and appears to be reflecting the appellant's claims rather than making a professional diagnosis based on the appellant's claim and examination.

Respecting the appellant's mental impairment, the evidence before the panel is:

- The appellant is diagnosed with mood disorder and major depression;
- The appellant is also diagnosed with panic attack, severe Obstructive sleep apnea;
- As a result of the appellant's mental conditions, he has deficits in impulse control, attention, concentration, motivation, bodily functioning such as major sleep disturbance.

Based on the evidence before the ministry at reconsideration decision, the panel finds the ministry's decision concluding that there was no evidence to establish a severe mental impairment is not reasonable. The ministry did not adequately consider the psychiatrist report indicating that all of the appellant's conditions are severe, and that the appellant has major depressive illness, and severe sleep apnea. Furthermore, the psychiatrist, in the Assessor Report stated that the appellant's mental impairment has major impact on his bodily functioning such as sleep disturbance emotion such as depression and his motor activity, such as ritualistic or repetitive actions.

With respect to the Appellant's DLA restrictions, the evidence before the panel is:

- The psychiatrist reported that the appellant uses assistive device, a cane, in order to walk indoors, walk outdoors, climb stairs and standing;
- The psychiatrist also reported that it takes significantly longer for the appellant to lift, carry and hold due

to pain;

- The psychiatrist concluded that the appellant is independent in performing DLAs; however, the psychiatrist stated that the appellant requires assistance from another person in order to do shopping and carrying groceries home;
- The psychiatrist stated that the appellant can independently manage the majority of his DLAs.
- The psychiatrist reported that the appellant's various chronic pain problems make it much slower for him to perform many activities around the house.

The panel finds that the ministry's decision concluding that the appellant's impairment does not directly and significantly restrict his ability to perform the DLA's is reasonable. The panel notes that the psychiatrist in the Assessor Report stated that the appellant is independent in performing his DLAs and that the appellant's impairment does not directly restrict his ability to perform personal self-care, basic housework, and transfer, (in and out of bed and on/off of chair). The psychiatrist further reported that appellant is independent in meal planning, food preparation, cooking, banking, budgeting, taking his medication as directed and using public transit.

The panel finds that based on information provided by the psychiatrist and Dr. W., the ministry's determination that the appellant's impairment does not directly and significantly restrict her ability to perform DLAs for extended periods is reasonable.

With respect to the Appellant's requirement for help to perform DLA's, the evidence before that panel is:

- The appellant is living with his 87 years old father;
- The appellant does not have friends or other family members assisting him in DLA's. He has a brother who is busy with his family and his employment, but who the appellant says can and does sometimes help with the carrying of heavy loads of shopping;
- The appellant uses a cane routinely to help compensate for his impairment;
- The appellant uses an orthotic seat cushion to assist him with sitting;
- The physician indicated that the appellant is able to walk unaided less than 1 block and that the appellant can climb unaided over 5 steps and can remain seated less than 1 hour.

Based on the evidence available the panel finds that the ministry's decision that the appellant does not require significant help or supervision of another person to perform his DLA's is reasonable. The panel accepts the information provided by the appellant's physician and the appellant at the hearing indicating that the appellant lives with his 87 years old father who assists him with carrying the grocery upstairs and that the appellant has a brother who sometimes helps him carrying of heavy loads of shopping. Furthermore, the panel finds that the appellant requires assistance in going to and from stores and carrying groceries home. However, the panel finds that the appellant does not require significant help with daily living activities.

Accordingly the panel finds that the ministry's reconsideration decision was reasonably supported by the evidence and confirms the decision.