

PART C – Decision under Appeal

The decision under appeal is the ministry's reconsideration decision dated January 16, 2012 which found that the appellant did not meet three of the five 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 two years. However, the ministry was not satisfied that the evidence establishes that he has a severe physical or mental impairment. The ministry was also not satisfied 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. As the ministry found that the appellant is not significantly restricted with DLA, it could not be determined that he requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal 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 the time of the reconsideration decision consisted of:

- 1) Person With Disabilities (PWD) Application: applicant information dated September 29, 2011, physician report dated September 29, 2011, and assessor report dated September 29, 2011;
- 2) Letter from the ministry to the appellant dated November 4, 2011 denying person with disabilities designation and enclosing a copy of the decision summary;
- 3) Fax cover sheets from an advocate on behalf of the appellant to the ministry dated November 24 and December 7, 2011;
- 4) One page from the physician report of the PWD application completed and signed by the appellant's physician on January 9, 2012 which states in part that the appellant is periodically restricted in the areas of personal self care, meal preparation, basic housework, and daily shopping, and is not restricted in the areas of management of medications, mobility inside the home, mobility outside the home, use of transportation, management of finances and social functioning; the physician notes that "...patient states room-mate helps him with personal self care, meal preparation, management of medications, housework, shopping; he states he uses the bus for transportation"; the physician indicates he believes the appellant that he is in constant pain and without being present at his home to observe him, the physician believes he has trouble with DLA; the September 16, 2011 X-Ray of lumbar spine does show degenerative changes of lumbar spine and it does not surprise the physician that the appellant is in pain chronically; the physician believes the appellant needs periodic to continuous help from his room-mate; and,
- 5) Request for Reconsideration- Reasons.

At the hearing, the appellant provided several additional documents, namely:

- 1) Report of CT of appellant's lumbar spine dated August 21, 2000 which states in part that the appellant has a small spinal canal and the finding is spinal stenosis with associated disc protrusion at 4-5;
- 2) Operative Procedure Report dated January 15, 2001 which states that the appellant has a history of low back and right lower limb pain and that conservative treatment failed to help; examination revealed finding of L5 radiculopathy; CT scan showed L4-5 disc herniation superimposed and tight spinal stenosis; due to lack of improvement in conservative treatment, bilateral L4-5 discectomy and bilateral L5 foraminotomy and partial L4 laminectomies were recommended;
- 3) Questionnaire completed by the appellant's physician dated January 25, 2012 which states in part: in response to the question when the impact of his medical conditions on his daily functioning is considered does the appellant have a severe impairment, the physician has noted "...yes, severe pain in back since surgery in 2001...pain is not relieved by Tylenol #3, pain restricts flexibility and mobility and thus affects ability to do housework and sports activities.; the physician agrees that the appellant's health limitations significantly restrict his ability to perform a range of DLA on an ongoing basis and notes "...prolonged standing preparing meals, cooking, cutting activities at home and out shopping and using transit cause pain, because he has constant pain in most activities"; the physician agrees that the appellant needs significant help from other people and/or assistive devices and notes "...needs help with cooking, housework, shopping and transportation, uses cane and had support belt and needs bathroom grab bars;"
- 4) One page from the physician report of the PWD application completed and signed by the appellant's physician on January 25, 2012 which states in part that the appellant is continuously restricted in the areas of personal self care ("restricted range of motion"), meal preparation ("standing causes some pain too"), basic housework, daily shopping, mobility inside the home, mobility outside the home, use of transportation ("vehicle movement causes pain too"), with additional comments that "...excruciating chronic pain restricts most DLA ongoing", and in terms of assistance that "...cane, back support belt, significant ongoing help with meal preparation, housework, laundry, shopping, transportation (jarring motion of vehicles aggravates pain").

The ministry did not object to the admissibility of these documents. The panel reviewed the documents and admitted them as being a further description of the appellant's diagnosed impairments and being in support of the information and records before the ministry on its reconsideration, pursuant to Section 22(4) of the Employment and Assistance Act.

The appellant stated that he has had problems with his back for 10 years and he has been trying not to be on disability, but he is losing energy and balance. The appellant stated that after he had the first surgery on his back, he did not feel better and his doctor has recommended another surgery. The appellant stated that he could not go through with another surgery because after the first one anytime he is walking or sitting, he gets a feeling like an electric shock going through his body and he does not know where it comes from. The appellant stated that sometimes it is like his body is burning and he sweats even in cold weather and sometimes he pees his pants. The appellant stated that sometimes the pain is so bad that it makes him say things that he does not mean to say. The appellant stated that his doctor gives him Tylenol #3 and he takes 2-3 every 4 to 6 hours but it does not work. The appellant stated that when these electric shocks occur, all he can do is close his eyes and pray. The appellant stated that he sleeps a maximum of 4 to 6 hours per night because he has nightmares about the surgery and his back. The appellant stated that the shock will radiate to his head and throughout his body, and the only thing that helps is when he meditates and tries to kill his feelings. The appellant stated that he wears his back belt for a couple of hours after he eats a meal since he experiences an upset stomach. The appellant stated that he uses an umbrella as his cane and that he carries it with him when he is walking outside. The appellant explained that he feels these terrible pains about 4 to 6 times each day. The appellant stated that his doctor has recommended a medication called Nabilone, or Cesamet, but he needs to have it approved by the ministry, and his doctor has told him it is potentially addictive. The appellant stated that he had an X-Ray done on his back in September 2011 and that it shows his back has gotten tighter, but that report is at his doctor's office and he did not bring a copy to the hearing.

The appellant stated that he has been treated by the physician who completed the PWD application for over 20 years. The appellant explained that when the PWD application was completed in September 2011, he left the forms with his doctor to complete. The appellant stated that the additional page dated January 9, 2012 was also completed by the doctor after the page had been provided to him. The appellant stated that after the ministry denied his application, he went in to talk to his doctor and they agreed that the appellant needs help through the ministry.

The physician who completed the physician report has confirmed that the appellant has been his patient for many years and that he has seen the appellant 2 to 10 times in the past 12 months. In the physician report, the physician confirms a diagnosis of back pain, degenerative disc disease ("many years"), facet joint disease (and some scoliosis). The physician adds comments that "...severe pain prevents work." The physician report indicates that the appellant has not been prescribed medication that may interfere with his ability to perform DLA, and he does not require an aid for his impairment. The physician reports that the appellant can walk less than 1 block unaided on a flat surface, he can climb 2 to 5 stairs unaided, he cannot lift any weight, and can remain seated less than 1 hour. The physician reports that the appellant has no difficulties with communication. The physician also indicates that there are no significant deficits with cognitive and emotional function.

The physician has also completed the assessor report and indicates that the appellant is independent with walking indoors and walking outdoors, as well as with climbing stairs and standing, with lifting and carrying and holding, and no further notes are provided. The physician indicates that the appellant is independent with all tasks of personal care including dressing, grooming, bathing, toileting, feeding self, regulating diet, transfers in/out of bed and transfers on/off chair. The physician reports that the appellant is independent with doing laundry and basic housekeeping. The physician indicates that the appellant is independent with all of the tasks of shopping, including going to and from stores, reading prices and labels, making appropriate choices, paying for purchases, and carrying purchases home, with no further comments provided. Further, the physician reports that the appellant is independent with all of the tasks of managing meals, including meal planning, food preparation, cooking and safe storage of food. The physician indicates that the appellant is independent with all tasks of paying rent and bills (including banking and budgeting), managing medications (filling/refilling prescriptions, taking as directed and safe handling and storage) and transportation (getting in and out of a vehicle, using public transit, and using transit schedules and arranging transportation). In the assessor report,

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the physician has not completed the section applicable to an applicant with an identified mental impairment or brain injury, which details impacts to daily cognitive and emotional functioning, and has noted "N/A", or not applicable. The physician has also noted "N/A" and has not completed the section which details impacts to social functioning, which applies for an applicant with an identified mental impairment, including brain injury. The physician makes an additional note that the appellant uses a cane for support and a back belt for back support.

PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry reasonably concluded that the appellant is not eligible for designation as a person with disabilities (PWD) as he does not have a severe mental or physical impairment and that his daily living activities (DLA) are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods and that, as a result of those restrictions, it could not be determined that the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

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 person 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. The impairment must also, in the opinion of a prescribed professional, directly and significantly restrict the person's ability to perform DLA either continuously or periodically for extended periods, as set out in Section 2(2)(b)(i). As a result of those restrictions, the person must require help to perform DLA, pursuant to Section 2(2)(b)(ii). Section 2(3)(b) sets out that a person requires help in relation to DLA if, in order to perform it, 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: prepare own meals, manage personal finances, shop for personal needs, use public or personal transportation facilities, perform housework to maintain the person's place of residence in acceptable sanitary condition, move about indoors and outdoors, perform personal hygiene and self care, and manage personal medication. In relation to a person who has a severe mental impairment, there are two additional activities, namely: making decisions about personal activities, care or finances, and relating to, communicating or interacting with others effectively.

The ministry argues that the evidence does not show that the appellant has a severe physical impairment. The ministry points to the physician report, where it is indicated that the appellant is able to walk less than 1 block unaided, to climb 2 to 5 steps unaided, can do no lifting, and can remain seated for less than an hour, and argues that although there are limitations indicated to the appellant's physical functioning, the physician has also assessed all areas of the appellant's mobility and physical ability as independent (walking indoors and outdoors, climbing stairs, lifting and carrying and holding). The ministry argues that the physician indicates in one part of the PWD application that the appellant uses a cane for support and a back belt for back support but not in any other part of the application, and it remains unclear as to the frequency and degree to which the appellant uses assistive devices. The appellant argues that the evidence establishes that he suffers from a severe physical impairment as a result of back pain, degenerative disc disease, facet joint disease and some scoliosis, and that he has had these conditions for 10 years. The appellant argues that the surgery and Tylenol #3 are not helping with the pain and that he suffers excruciating pain 4 to 6 times each day. The appellant argues that he uses a back belt for a couple of hours after each meal and that he carries an umbrella with him when he walks outside, for support.

The panel finds that the evidence of a medical practitioner confirms a diagnosis of back pain, degenerative disc disease ("many years"), facet joint disease (and some scoliosis). The physician report indicates that the appellant can walk less than 1 block unaided on a flat surface, he can climb 2 to 5 stairs unaided, he cannot lift any weight, and can remain seated less than 1 hour. Although the physician indicates in the physician report that the appellant does not require an aid for his impairment, in the assessor report the physician indicates that the appellant uses a cane for support and a back belt for back support. Also in the assessor report, the physician indicates that the appellant is independent with walking indoors, with walking outdoors, with climbing stairs, and with lifting and carrying and holding. Further, in the additional page dated January 9, 2012,

the physician indicates that the appellant is not restricted with mobility inside the home nor with mobility outside the home, but includes a handwritten comment that he believes the appellant is in constant pain. The Questionnaire completed by the physician dated January 25, 2011 includes many handwritten comments which the panel finds helpful to provide specific information in light of some of the inconsistencies between the assessor and physician reports. In response to the question of whether the appellant has a severe impairment, the physician has noted "...yes, severe pain in back since surgery in 2001...pain is not relieved by Tylenol #3, pain restricts flexibility and mobility and thus affects ability to do housework and sports activities." The appellant has described episodes of excruciating pain ("like an electric shock") that are debilitating and occur 4 to 6 times each day and that he sometimes becomes incontinent as a result of the pain. The panel finds that the evidence demonstrates that the appellant is limited in his functional skills, has undergone surgery in an effort to correct his condition and takes Tylenol #3's every 4 to 6 hours but this does not relieve the pain. Therefore, the panel finds that the ministry's determination that the evidence does not establish a severe physical impairment, was unreasonable.

The ministry argues that the evidence does not show that the appellant has a severe mental impairment. The ministry argues that the physician has not provided a mental diagnosis. The ministry points out that the physician has indicated that the appellant does not have a significant deficit with cognitive and emotional functioning and has noted "N/A" with regard to the impacts of cognitive and emotional function on daily functioning. The appellant argues that the evidence establishes that he suffers from a severe mental impairment as a result of stress. The appellant argues that he does not sleep well partially as a result of nightmares about his back surgery and he is stressed from worry and having to cope with ongoing pain.

The panel finds that the evidence of a medical practitioner does not confirm a diagnosis of a mental disorder. The physician reports that the appellant has no difficulties with communication. The physician also indicates that there are no significant deficits with cognitive and emotional function. In the assessor report, the physician has not completed the section applicable to an applicant with an identified mental impairment or brain injury, which details impacts to daily cognitive and emotional functioning, and has noted "N/A", or not applicable. The physician has also noted "N/A" and has not completed the section which details impacts to social functioning, which applies for an applicant with an identified mental impairment, including brain injury. In the additional page dated January 9, 2012, the physician confirms that the appellant is not restricted in the area of social functioning. Therefore, the panel finds that the ministry's decision, which concluded that the evidence does not establish a severe mental impairment, was reasonable.

The ministry argues that the evidence does not establish 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 points out that the physician indicates in the assessor report that the appellant is independent in his ability to manage all areas of DLA including personal care, basic housekeeping, shopping, meals, paying rent and bills, medications, and transportation. The ministry argues that the additional page completed by the physician on January 9, 2012 indicates that the appellant is restricted in his ability to do personal self care, meal preparation, basic housework, and daily shopping, but the physician does not provide additional information to explain the frequency, the degree, or the duration of the assistance that the appellant requires and the need for assistance remains unclear. The appellant argues that the evidence of the physician in the additional pages dated January 9 and January 25, 2012, along with the Questionnaire dated January 25, 2012, establishes that he requires continuous assistance with many DLA.

The panel finds that the legislation requires that the opinion of a prescribed professional confirms that the appellant's ability to perform DLA is directly and significantly restricted either continuously or periodically for extended periods. In terms of preparing his own meals, the physician has indicated in the assessor report that the appellant is independent with all tasks, including meal planning, food preparation, cooking and safe storage of food. In the January 9, 2012 page, the physician indicates that the appellant is periodically restricted in meal preparation and notes that the appellant states that his room-mate helps him with meal preparation. In the January 25, 2012 page, the physician has indicated that the appellant is continuously

restricted in the area of meal preparation, but the panel finds that there is no explanation for the change in the assessment made by the same physician two weeks previously. In the Questionnaire dated January 25, 2012, the physician agrees that the appellant's health limitations significantly restrict his ability to perform a range of DLA on an ongoing basis and notes "...prolonged standing preparing meals, cooking, cutting activities at home." For managing personal finances, the physician indicates in the assessor report that the appellant is independent with all tasks of banking, budgeting and paying rent and bills. In both the January 9 and January 25, 2012 additional pages, the physician indicates that the appellant is not restricted in the area of management of finances. In terms of shopping for his personal needs, the physician indicates in the assessor report that the appellant is independent with all of the tasks of shopping, including going to and from stores, reading prices and labels, making appropriate choices, paying for purchases, and carrying purchases home. In the January 9, 2012 page, the physician indicates that the appellant is periodically restricted in the area of daily shopping and notes that the appellant states his room-mate helps him with shopping. Although the January 25, 2012 page indicates an assessment that the appellant is continuously restricted in the area of daily shopping, the panel finds that there is no explanation provided for the change in assessment and places less weight on this evidence. In the Questionnaire, the physician notes that the appellant is restricted and needs help with shopping as a result of constant pain, with no further detail or narrative provided.

For use of public or personal transportation facilities, the physician indicates in the assessor report that the appellant is independent with all tasks, including getting in and out of a vehicle, using public transit, and using transit schedules and arranging transportation. In the January 9, 2012 page, the physician indicates that the appellant is not restricted in the use of transportation and notes that he appellant states that he uses the bus for transportation. In the January 25, 2012 page, the physician indicates that the appellant is continuously restricted with use of transportation with a note that "...vehicle movement causes pain too", however the panel finds that this does not explain the change in the physician's assessment. In the Questionnaire, the physician notes that "using transit causes pain" and that he needs help with transportation, with no further detail or narrative provided. With respect to performing housework to maintain the appellant's place of residence in an acceptable sanitary condition, in the assessor report the physician has indicated that the appellant is independent with doing laundry and basic housework. In the January 9, 2012 page, the physician has indicated that the appellant is periodically restricted with basic housework and notes that the appellant states that his room-mate helps him with housework. The panel places little weight on the January 25, 2012 page that assesses the appellant as continuously restricted with basic housework where there is no explanation or narrative to explain this change in the physician's assessment over a two-week period. In the Questionnaire, the physician reports that the appellant needs help with housework, with no further detail provided as to duration or frequency of the assistance required or provided.

For moving about indoors and outdoors, the physician has indicated in the assessor report that the appellant is independent and the physician confirms in the January 9, 2012 page that the appellant is not restricted in these areas. The appellant has stated that he uses an umbrella like a cane for support when he is outside and that he uses his belt only for a couple hours after he eats a meal. Regarding performing personal hygiene and self care, the physician indicates in the assessor report that the appellant is independent with all tasks of personal care, including dressing, grooming, bathing, toileting, feeding self, regulating diet, transfers in/out of bed and transfers on/off a chair. In the page dated January 9, 2012, the physician indicates that the appellant is periodically restricted with personal self care and notes that the appellant states that his room-mate "...helps him with personal self care" with no further detail or explanation. With respect to managing his personal medications, the physician again indicates in the assessor report that the appellant is independent with all tasks including filling/refilling prescriptions, taking as directed and safe handling and storage. In both the January 9 and January 25, 2012 pages, the physician confirms that the appellant is not restricted with management of medication.

Looking at the consistent evidence of the physician, the panel finds that the prescribed professional has confirmed that the appellant is periodically restricted in personal care, meal preparation, basic housework and daily shopping. However, the panel finds that there is not sufficient information provided by the physician

regarding the duration or frequency of the help needed in these DLA to establish that the appellant requires periodic assistance for extended periods of time. Therefore, the panel finds that the ministry's determination that the evidence of a prescribed professional does not establish a direct and significant restriction on the appellant's ability to perform DLA either continuously or periodically for extended periods, as required by Section 2(2)(b)(i) of the EAPWDA, was reasonable.

In determining whether the ministry reasonably concluded that the appellant does not require the significant help or supervision of another person or the use of an assistive device, the panel relies on the information from the physician and the appellant that he lives with a room-mate and that assistance is also provided by his room-mate, and he uses an umbrella like a cane, as an assistive device. As it has not been established that DLA are significantly restricted, the panel finds that the ministry's conclusion that the requirement for significant help or supervision of another person, an assistive device, or the services of an assistance animal to perform DLA, under Section 2(2)(b)(ii) of the EAPWDA, has not been met was reasonable.

Overall, the panel finds that the ministry's reconsideration decision was reasonably supported by the evidence and confirms the decision pursuant to Section 24(2)(a) of the Employment and Assistance Act.