

PART C – Decision under Appeal

The decision under appeal is the ministry's reconsideration decision dated February 13, 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 meets the age requirement, and has impairments that are, in the opinion of a medical practitioner, likely to continue for two years or more. The ministry was not, however, satisfied that in the opinion of a medical practitioner the appellant has a severe mental or physical impairment, or 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 found that it could not be determined that the appellant, in the opinion of a prescribed professional, requires help to perform DLAs.

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 did not attend the hearing before this panel. After confirming that the ministry had been notified of the hearing, the panel decided to proceed with the hearing in accordance with section 86(b) of the Employment and Assistance Regulation.

The evidence before the ministry at the time of the reconsideration decision included the following:

- The appellant's PWD application, including a Physician's Report (PR) and Assessor's Report (AR); and
- The appellant's Request for Reconsideration, including a four page submission from the appellant.

In his PWD application the appellant advised that he can't walk far because of a double fracture of his left ankle which is secured with two pins. He had a heart attack while in hospital and was diagnosed with blockages and was advised to have bypass surgery. The appellant declined surgery because he was caring for his sick wife. He subsequently developed lower back pain from the cast on his leg. He gets sweats and then cold and throws up. The appellant wrote that he cannot walk for more than two or three blocks without his ankle and leg throbbing. He has shortness of breath, and the heart pills and pain killers make him feel sick on some mornings, but he needs them for the pain.

Both the PR and AR were completed by the appellant's general practitioner (physician). In the PR the physician indicated that the appellant had been his patient for one year and he had seen the appellant two to ten times within the previous twelve months. He diagnosed the appellant with ischemic heart disease and chronic pain/arthritis. The physician indicated that the appellant suffers with significant cardiovascular problems including dilated cardiomyopathy, and that he suffers with chronic shortness of breath, lack of mobility, chronic pain, and significant osteoarthritis. In response to the question as to whether the appellant had been prescribed any medications or treatments that interfere with his DLAs, the physician indicated "yes" and commented that the appellant complains of disorientation and significant side effects from the medication. The anticipated duration of the medications was described as "permanent". While he reported the appellant does not require any prostheses or aids, the panel notes this information is inconsistent with the physician's evidence in the AR where he indicated the appellant uses a cane. With respect to functional skills the physician reported the appellant can walk 1 to 2 blocks unaided on a flat surface, can climb 5 stairs unaided, can lift 5 to 15 pounds, can remain seated without limitation, and has no difficulties with communication. The appellant also displays a significant deficit with 1 of 12 categories of cognitive and emotional function – emotional disturbance – with the physician commenting that the appellant presents with a low mood.

In the AR, the physician indicated no restriction or impact in 13 of 14 categories of cognitive and emotional functioning. He indicated a moderate impact 1 category – emotion, commenting that "severity and disability has resulted in ongoing depression and anxiety". The physician described the appellant's ability to communicate as good or satisfactory, and classed him as independent in all categories of personal care, paying rent and bills, and medications. Regarding mobility and physical ability, the physician indicated the appellant as being independent in walking indoors and outdoors, and needing periodic assistance with climbing stairs, lifting, and carrying/holding. With respect to basic housekeeping and laundry, the physician reported the appellant as requiring periodic assistance from another person due to fatigue and shortness of breath. With respect to shopping, the

appellant is shown as being independent in reading prices and labels, making appropriate choices, and carrying purchases home, but needing periodic assistance from another person for going to and from stores - due to chronic pain - and carrying purchases home. Regarding meals, the physician shows the appellant as requiring periodic assistance from another person in 3 of 4 categories due to difficulty with preparation and significant fatigue. Under transportation, the appellant is described as being independent in getting in and out of a vehicle, but needing periodic assistance from another person in using public transit and using transit schedules and arranging transportation.

Regarding social functioning, the physician indicated the appellant needs periodic support or supervision in 5 of 5 categories, and that he is functioning marginally in his immediate social network and extended social networks. In the area of the AR where the prescribed professional is asked to describe the degree and duration of support/supervision required, the physician commented "significant stress and recent loss resulted in social isolation". In none of the categories or DLAs where periodic support/supervision is indicated has any information been provided regarding the degree, frequency or duration of support or supervision required. The physician indicated that help for DLAs is provided by friends, that the appellant uses a cane, and that no assistance is provided by assistance animals.

Finally in the AR, the physician wrote that "Patient suffers with significant heart disease and chronic pain, and he is unable to function in any normal capacity. I believe his disabilities to [be] permanent, and on-going and fully support his application."

In his submission with the Request for Reconsideration, the appellant stated that he double-fractured his ankle on October 30, 2010. He provided more detail with respect to his heart attacks and the circumstances in which he declined open heart surgery in November 2010, and stated he was prescribed several medications for his frequent chest pains. The appellant had the cast off in May 2011 but still had to use crutches for another 2 months. The cast increased the back pain that the appellant had been experiencing for years, and he frequently takes pain killers for his back and ankle. The appellant says that his ankle barely bends. He has to stop to rest every 50-100 steps. His ankle throbs and the pins in his ankle cause piercing pain. His wife, whom he had been caring for at home, passed away in August, 2011. The appellant advised that he could not keep up with rent or utilities and was evicted from his home.

At the hearing before this panel the appellant described the throbbing ache he experiences in his leg and the piercing pains from the pins in his ankle. He has trouble lifting anything because of his cane so he usually relies on the help of his son or mother for shopping. He is able to take the bus on his own - he travelled to this hearing by bus - but struggles with climbing on and off the bus, requiring the use of the hand rails. The appellant can walk outside with the use of his cane but has to stop frequently to relieve the pain and to catch his breath. He is on a wait list for heart bypass surgery. He has trouble with stairs because his ankle isn't flexible - if there is no hand rail he tends to use his hands on the stairs to steady himself. The appellant manages his medications on his own, but it is difficult to stand long enough to prepare meals so his mother, with whom the appellant lives, does most of the cooking and housework. The appellant helps as much as he is able - he said some days are better than others, and that the discomfort is up and down. The appellant said he cannot live on his own. Before living with his mother he lived with his wife until she passed away. With respect to social functioning, the appellant stated he does not get out much because of his difficulty with mobility.

When asked how long he had known his physician, the appellant advised that it was only since he'd broken his ankle. In response to a question as to whether he'd been present when his physician completed the PR and AR, the appellant advised that he had not been present – he had left the forms with the physician who completed and submitted them. When asked if he agreed with the physician's assessments of his abilities the appellant said "No, not totally." The appellant was asked whether he had been back to the physician to ask for another letter to clarify things – he responded that he had not been back because it is such an ordeal to get downtown and it can take 2 or 3 weeks lead time to book an appointment.

The panel assessed the appellant's evidence as being oral testimony in support of the information that was before the ministry at the time of its reconsideration decision, and admitted it in accordance with section 22(4) of the *Employment and Assistance Act*.

PART F – Reasons for Panel Decision

The issue on this appeal is whether the ministry's decision to deny the appellant designation as a PWD was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. In particular, was the ministry reasonable in determining that in the opinion of medical practitioner the appellant does not have a severe physical or mental impairment, and that in the opinion of a prescribed professional the appellant's impairments do not directly and significantly restrict him from performing DLAs either continuously or for extended periods, and that as a result of those restrictions the appellant does not require help to perform those activities?

The relevant legislative provisions are as follows:

EAPWDA section 2:

2 (1) In this section:

"assistive device" means 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;

"daily living activity" has the prescribed meaning;

"prescribed professional" has the prescribed meaning.

(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.

EAPWDR section 2(1):

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 appellant's position is that his physical impairment is severe, and that he is sufficiently restricted in his DLAs that he simply cannot live on his own, requiring the help of his mother, his son, and occasionally friends.

With respect to a severe mental impairment, the only evidence in the PR is an indication of a significant deficit with respect to 1 of 12 categories of cognitive and emotional function – emotional disturbance (e.g. depression.) There is no supporting evidence other than the statement that the appellant "does present with a low mood". The physician did not diagnose a mental impairment in the PR. In the AR, the section dealing with Social Functioning has been completed and indicates that the appellant requires periodic support or supervision because of significant stress and recent loss. The instructions for that section provide that it should only be completed if the appellant has an identified mental impairment. The ministry determined that the evidence was not indicative of a severe mental impairment. The appellant's evidence was that he doesn't socialize much simply because it is physically too difficult to get out of the house. The panel finds that the ministry's determination on severe mental impairment was reasonably supported by the evidence.

With respect to a severe physical impairment, the ministry considered the functional limitations reported in the PR where the physician indicated the appellant can walk 1 to 2 blocks, climb 5 or more stairs, lift 5 to 15 pounds and has no limitation to remaining seated. The ministry also considered the evidence that the appellant requires periodic assistance with some functions and is independent with others. It noted that the physician had indicated in narrative that there is mobility impairment but dismissed this statement as not being supported by the functional information, and accordingly came to the conclusion that the appellant's physical impairment is moderate rather than severe. The ministry does not seem to have given much weight to the observations of the physician that the appellant suffers from "significant cardio-vascular problems", "significant osteoarthritis", "significant heart disease", and that "he is unable to function in any normal capacity." The ministry also does not appear to have considered the physician's evidence - supported by the appellant's

evidence - that the appellant's mobility is accomplished with the use of a cane and is accompanied by chronic pain and shortness of breath. The ministry gave the appellant's evidence little weight because it says "Although a medical condition may be severe, this does not establish that your daily functioning is severely impaired or that your daily living activities are directly and significantly restricted." On balance, the evidence of the appellant and the physician are consistent with each other on the issue of impairment and are indicative of a severe physical impairment. The panel finds that the ministry's conclusion that the appellant does not have a severe physical impairment is unreasonable as it is not reasonably supported by the evidence.

With respect to the criterion as to whether, in the opinion of a prescribed professional, the appellant's severe physical impairment directly and significantly restricts daily living activities continuously or for extended periods, the ministry considered that the physician had reported the appellant as being independent in 19 of 28 "daily activities". The ministry also noted that while the physician had reported that the appellant requires periodic assistance with laundry, basic housekeeping, going to and from stores, carrying purchases home, meal planning, food preparation, cooking, using public transit and using transit schedules, the duration and frequency of the appellant's restrictions are undefined. Similarly, the ministry noted that any restrictions to the five Social Functioning activities are not supported with evidence as to the degree of support/supervision required or the duration of support. Given that the majority of restrictions are described by the physician as "periodic", that the appellant described his limitations as being "up and down" with "some days better than others", and that the physician has provided little or no information on which the frequency or duration of restrictions can be determined, the panel finds that the ministry's decision that in the opinion of a prescribed professional the appellant does not experience direct and significant restrictions in his ability to perform DLAs either continuously or periodically for extended periods was reasonable.

Regarding the criterion that in the opinion of a prescribed professional, as a result of those restrictions the appellant requires help as described in the legislation, the ministry determined that since it had not been established that DLAs are directly and significantly restricted it could not be determined that the appellant requires significant help. There is evidence that the appellant uses an assistive device (a cane) for mobility, and that he requires periodic assistance with some DLAs. As well, the appellant argues that he is unable to perform most of his DLAs without assistance. However, since direct and significant restrictions caused by a severe impairment are a prerequisite to needing "help" as defined in the legislation, and such restrictions have not been determined, the panel finds the ministry's decision on this issue to be reasonable.

Accordingly, the panel finds that the ministry's decision to deny the appellant designation as a PWD was reasonably supported by the evidence and confirms the ministry's decision.