

## PART C – Decision under Appeal

The decision under appeal is the ministry's reconsideration decision dated February 9, 2012 which held that the appellant did not meet 3 of the 5 statutory requirements of section 2 of the Employment and Assistance for Persons with Disabilities Act for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that his impairment is likely to continue for at least 2 years. However, the ministry was not satisfied that the appellant has a severe physical or mental impairment or that 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 was also not satisfied that as a result of those restrictions, in the opinion of a prescribed professional, the appellant requires help 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 reconsideration was a PWD application comprised of a Self-report (SR), a Physician Report (PR), and an Assessor Report (AR), and the Request for Reconsideration.

In the PR, completed on December 2, 2011 by a general practitioner who has seen the appellant 3 times, the appellant is diagnosed with alcohol abuse (26 yrs) and secondary liver problems, heart attack (2 years), motor vehicle accident (MVA) with concussion and fracture at C2-C5 (24 yrs), and peripheral neuropathy. The appellant is reported to have chronic pain and neuropathy from alcohol/MVA and sometimes needs to walk with a cane. Alcohol use has resulted in liver and brain damage. The physician notes that liver enzymes are improving from treatment with the possibility of liver recovery after quitting alcohol use. The appellant has not been prescribed medication and/or treatment that interfere with his ability to perform DLA. The degree and course of impairment is described as "Permanent slow progressive condition." With respect to functional skills, the appellant can walk 4+ blocks unaided on a flat surface, climb 5+ steps unaided, lift 15 to 35 lbs, and can remain seated for 1 to 2 hours. No difficulties with communication or significant deficits with cognitive and emotional function are reported. The physician reports that the appellant's impairment does not directly restrict his ability to perform DLA but then notes periodic restrictions with mobility inside and outside the home stating that the appellant has good and bad days. On bad days the appellant cannot walk or lift. The need for a cane to walk sometimes is confirmed.

In the AR, completed by a social worker who serves as the appellant's addictions therapist and has had regular sessions with the appellant for over 4 months, the general practitioner's diagnoses are confirmed with the assessor also indicating that the appellant has a history of diagnosis and treatment for Parkinson's disease and that the appellant's alcohol dependence is in early full remission. The appellant is reported to have a good ability to communicate respecting speaking, reading, and writing with his ability to hear reported as satisfactory/poor due to bilateral high frequency hearing loss (tinnitus). With respect to mobility and physical ability, the appellant uses assistive devices for walking indoors, walking outdoors, standing, lifting and carrying on difficult days. On good days, the appellant can walk more than 2 miles; however, when Ropinirole is not effective he can be almost incapacitated completely by axis1 issues. A major impact on daily functioning is reported for 1 aspect of cognitive and emotional functioning, impulse control related only to alcohol, with a moderate to major impact reported for motor activity, a moderate impact reported for bodily functions which is identified as sleep disturbance (3-4 hours per night – unrested), and a minimal impact reported for emotion and executive function. No impact is reported for the remaining 9 listed aspects. With respect to DLA, with the exception of using an assistive device for 1 aspect of shopping, going to and from stores which also takes the appellant significantly longer than typical, and using an assistive device for 2 of 3 aspects of transportation, getting in and out of a vehicle and using public transit, the appellant independently manage all aspects of personal care, basic housekeeping, meals, paying rent and bills, medications, and social functioning as well as the remaining 4 aspects of shopping and 1 aspect of transportation. The appellant's capacity is impacted by chronic pain and axis 1 issues and he has fallen due to lack of sensation in lower right leg combined with Parkinson's symptoms. Good functioning with immediate and extended social networks is reported. The appellant will require support from other people for the anticipated future due to alcohol addiction and requires the use of a cane.

In the SR, the appellant describes his disabling conditions as mild to severe tremors, paralysis and loss of sensation to the lower right leg due to alcoholism, anxiety due to alcoholism, the onset of arthritis, degenerative disc disease resulting from MVA injury to his neck at the C2-C5 level, loss of sensation in his lower left leg due to injury, bilateral high frequency hearing loss, and chronic pain due to numerous fractures over the years. The appellant reports that medication gives some relief and stabilizes his tremors but has side effects including nausea and mental and physical fatigue throughout the day. The appellant reports that he is prone to falling without warning, is unable to bear full weight for extended periods of time and that there are

times he requires the use of a cane.

In the Request for Reconsideration, the appellant confirms information provided in the PR and AR respecting his physical impairment and adds that due to a MVA causing damage to cervical vertebrae C3, C4, C5 which impacts peripheral nerves he has bilateral impairment of arm function which affects him daily including with lifting. With respect to his alcoholism, the appellant writes that alcoholism has been defined as a disease of the mind by medical professionals including the American Medical Society and is a non-curable life threatening disease which, however manageable, requires daily supervision with relapse highly probable without long term, ongoing daily supervision.

At the hearing, the ministry stated that the appellant's request for PWD designation was denied because there is no medical verification of how often the appellant has bad days in order to establish a severe impairment and significant restrictions with DLA. The ministry also clarified that PWD designation criteria are not about an applicant's ability to work.

At the hearing, the appellant stated that although he has good and bad days, the numbness and tingling in his right leg occurs all the time and that the times when his leg gives out resulting in falls is unpredictable. The last fall occurred when he was not using his cane and resulted in a broken nose. He stated that walking is difficult after 4 to 5 blocks, he uses a cane 3-4 times a week, and cannot work. He stated that he lives in second stage recovery housing in a unit downstairs where, with others in recovery, meals and housekeeping are shared. The appellant stated that he cannot drive and has days when his errands are done by other people. The appellant reported having a 30 year history of injuries including a MVA which has limited his ability to use his arms. The appellant stated that he has been taking Ropinirole for approximately 2 years but does not always take the prescribed dosage due to its cost. Due to alcoholism he has not been prescribed narcotics, the cost of which would be covered by the ministry, and instead for treatment of his chronic pain takes handfuls of over-the-counter Tylenol 1, the cost of which is not covered by the ministry and which is bad for the appellant's liver. The appellant confirmed that his liver, which had reached the life-threatening stage, is mending, giving him a second chance. The appellant stressed that he is "in recovery" respecting his alcoholism adding that he has a history of alcohol related chronic insomnia. The appellant expressed his frustration with the process of seeking PWD designation adding that it was difficult for him to get a doctor and that he has done everything he can and has been forthcoming throughout the process.

At the hearing, the appellant's friend stated that he has known the appellant over one year and sees the appellant almost every day. He stated that the appellant is a proud, smart man who is committed to maintaining his alcoholism recovery. The friend stated that he is aware of the appellant's physical ailments and believes that the appellant cannot go back to work physically. The appellant's friend stated that he assists the appellant by taking him for a meal and paying for some of the appellant's medication but that the appellant has not requested that he perform or assist with DLA.

The oral testimony of the appellant and his friend was determined to be further description of the appellant's evidence before the ministry at reconsideration and was therefore admitted pursuant to s. 22(4) of the Employment and Assistance Act as being in support of the information and records before the ministry at reconsideration.

## PART F – Reasons for Panel Decision

The issue under appeal is whether the ministry reasonably concluded that the appellant has not met the all of the eligibility criteria for designation as a PWD because it was not satisfied that the appellant had a severe physical or mental impairment that, in the opinion of a prescribed professional, directly and significantly restricts his ability to perform DLA either continuously or periodically for extended periods resulting in the need for help to perform DLA. The ministry determined that the age requirement had been met and that the appellant has an impairment that will last for 2 years.

The criteria for being designated as a person with disabilities (PWD) are set out in s. 2 of the EAPWDA and s. 2 of the EAPWDR which are set out below.

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.

(4) The minister may rescind a designation under subsection (2).

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.

(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.

With respect to the existence of a severe physical impairment, the appellant's position is that the physician's information respecting permanent, untreatable nerve damage to his right leg, muscle loss in his left leg, significant chronic pain, unpredictable loss of function due to his leg giving out, and significant cervical damage impacting the peripheral nerves resulting in bilateral impairment of arm function establishes a severe physical impairment. The appellant argues that the ministry has unreasonably focused on the singularity of the impairment to the appellant's legs rather than the collective whole.

The ministry's position is that the physical functional skill limitations described are more in keeping with a moderate degree of impairment. The ministry relies on the physical functional skills reported by the appellant's physician and the assessor's evidence that the appellant requires an assistive device on difficult days, with no description of the frequency of difficult days, and that on a good day the appellant can walk 2 miles.

With respect to the appellant's physical impairment, the panel finds that a medical practitioner has diagnosed the appellant with liver problems secondary to alcoholism, heart attack, motor vehicle accident (MVA) with concussion and fracture at C2-C5, and peripheral neuropathy. Additional narrative is that the appellant has chronic pain, his liver enzymes are improving with treatment, he has good and bad days, and requires a cane to walk sometimes. On bad days, the appellant is reported as unable to walk or lift. The panel finds that the physician's evidence establishes that the appellant is able to walk 4+ blocks unaided, climb 5+ steps unaided, lift between 15 to 35 lbs and remain seated 1 to 2 hours except on bad days when his physical functioning is significantly reduced. Similarly, the panel finds that the assessor's evidence is that on good days the appellant can walk more than 2 miles but that on difficult days, when his medication is not effective, the appellant requires the use of an assistive device (cane) and can be almost incapacitated completely. The appellant's evidence confirms that he has good and bad days, that he is able to walk 4 to 5 blocks, and that his liver

function has improved. The appellant clarifies that he requires a cane 3 – 4 times a week though he cannot predict when his legs will give out. The panel finds that the above evidence establishes that the appellant has bad days on which he is significantly physically incapacitated but that, the ministry has reasonably determined that in the absence of confirmation as to how often the appellant has bad days and in view of the physical functional skills reported in terms of the distances the appellant can walk on good days and his ability to lift and remain seated, a severe physical impairment was not established under section 2(2) of the EAPWDA.

With respect to a severe mental impairment, the appellant's position is that he has a severe mental impairment due to longstanding alcoholism which is a severe life-threatening disease of the mind which restricts all aspects of daily living, is not curable, and requires ongoing daily supervision.

The ministry's position is that a severe mental impairment has not been established as the appellant's physician reported no significant deficits with cognitive and emotional functioning, the assessor reported a major impact on daily functioning in only 1 area of cognitive and emotional functioning which the ministry notes is not supported by the physician's evidence, and the appellant independently manages social functioning and the majority of DLA.

The panel finds that a medical practitioner has diagnosed the appellant with long standing alcohol abuse, noted as causing brain damage but not resulting in any significant deficits with cognitive and emotional functioning. The assessor reports a major impact on 1 of 14 listed aspects of daily cognitive and emotional functioning, impulse control solely related to alcohol use, as well as a moderate to major impact on motor activity and a moderate impact on bodily functions related to sleep disturbance (insomnia). Neither the physician nor the assessor reports any impact on DLA due to the appellant's mental impairment. In view of this evidence, the panel finds the ministry reasonable in determining that the impact reported to cognitive and emotional functioning and the appellant's ability to independently manage social functioning, decision-making and the majority of other DLA do not establish a severe mental impairment under section 2(2) of the EAPWDA.

Regarding the degree of restriction with DLA, the appellant's position is that chronic pain, nerve damage, unpredictable tremors, impaired arm and leg function, together with alcoholism significantly restrict his ability to perform DLA.

The ministry's position is that the evidence of the prescribed professionals, the physician and assessor, is that the appellant has bad or "difficult days" when he requires a cane for walking sometimes and that presumably a cane is the assistive device reported by the assessor as being required for going to and from stores, getting in and out of a vehicle, and using public transportation. However, in the absence of a description by the prescribed professionals as to how many days a week or month would be considered bad days and given the evidence of both the physician and the assessor that the appellant independently manages the majority of DLA independently, including social functioning, it has not been established that the appellant's impairment significantly restricts his ability to perform DLA continuously or periodically for extended periods. The ministry also argues that the assessor's narrative respecting incapacitation and DLA restrictions due to Axis I issues and Parkinson's Disease is not supported by a medical practitioner's diagnosis of those medical conditions.

The legislation requires that the minister be satisfied that, as a result of a severe physical or mental impairment, a person be directly restricted in the ability to perform DLA and that the restriction must be "significant" and either continuous or periodic for extended periods. Additionally, the legislation requires that the minister be satisfied that the requisite degree of restriction be in the opinion of a prescribed professional.

The panel finds that the appellant's general practitioner, a prescribed professional, reports that the appellant is continuously restricted in his ability to perform 1 DLA, moving about indoors and outdoors, noting that he uses a cane to walk sometimes and that on bad days the appellant cannot walk or lift. Otherwise, the appellant is

reported as able to walk 4+ blocks, climb 5+ steps, and lift 15-35 lbs. The physician reports no restrictions with any of the other DLA. Similarly, the assessor, a social worker who is also a prescribed professional, reports the need for an assistive device, on "difficult days" and that on good days the appellant can walk more than 2 miles. Additionally, the assessor reports the need for an assistive device, presumably a cane, with going to and from stores, getting in and out of a vehicle, and using public transit. The remaining 30 listed aspects of DLA are reported as managed independently. The panel finds that in the absence of information from either prescribed professional respecting how often the appellant has bad or difficult days in order to establish that the associated restrictions are for extended periods and as the appellant is otherwise reported by both prescribed professionals as independently managing the vast majority of aspects of DLA, the panel finds the ministry was reasonable in not being satisfied that in the opinion of a prescribed professional the appellant is directly and significantly restricted in his ability to perform DLA either continuously or periodically for extended periods under 2(2)(b)(i) of the EAPWDA.

Regarding the need for help with DLA, the appellant argues that as a result of his severe physical impairment which limits his mobility he requires assistance with DLA. The appellant further contends that due to his mental impairment, alcoholism, he requires daily supervision to help prevent relapse. The ministry argues that it has not been established that DLA are significantly restricted and therefore, it cannot be determined that significant help is required from other persons.

Regarding the need for help with DLA, the legislation requires that the need for assistance must arise from direct and significant restrictions in the ability to perform DLA that are either continuous or periodic for extended periods in the opinion of a prescribed professional. The evidence of the appellant's physician, a prescribed professional, is that the appellant requires a cane to walk sometimes, but the physician does not indicate what is meant by sometimes. The physician does not report the need for assistance with DLA from another person. The assessor, also a prescribed professional, reports that all DLA are managed without the assistance of another person and that the appellant requires the use of a cane with mobility on difficult days and with 3 of 33 listed aspects of DLA. The assessor also reports that the appellant requires support for anticipated future relapses but does not report the need for assistance from another person with DLA. Based on the above evidence and as the ministry reasonably determined that the requisite degree of restriction with DLA was not established, the panel finds that the ministry reasonably determined that as it has not been established that DLA are directly and significantly restricted, it cannot be determined that help is required under section 2(2)(b)(ii) of the EAPWDA.

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