

PART C – Decision under Appeal

The decision under appeal is the ministry's 21 January 2012 Reconsideration Decision denying the appellant person with disabilities (PWD) designation. The ministry determined that the appellant did not meet all of the required criteria for PWD designation set out in the Employment and Assistance for Persons with Disabilities Act, section 2(2). Specifically the ministry determined that the appellant does not have a severe mental or physical impairment that in the opinion of a prescribed professional

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

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

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 consisted of the following

- A Physician Report (PR) dated 20 September 2012 prepared by the appellant's general practitioner (GP), who has known him for 3 years and seen him 2 – 10 times in the previous year. The GP diagnoses the appellant with depression, right knee pain-chronic, and ETOH (alcohol) abuse. Under health history, the GP stated that the appellant has struggled with alcohol and stress and tension headache for more than 10 years. He has been intermittently depressed, at least since entering his practice. His right knee locks about 3 times per month, causing pain and weakness. He indicates that the appellant's impairment is lifelong, and he is taking trazadone to help with depression. With respect to physical functioning, the GP reports the appellant can walk 2 to 4 blocks unaided, climb 2 to 5 steps, lift 15 to 35 lbs and can remain seated for 1 to 2 hours. The GP reports no difficulties with communication. As to any significant deficits with cognitive and emotional function, the GP marks emotional disturbance and motivation, with the comment that his patient is depressed, with reduced motivation and ability to accomplish goals.

With regard to daily living activities (DLA), the GP marks yes in answer to the question "Does the impairment directly restrict the person's ability to perform DLA's?" The GP indicates that the appellant is not actively restricted for 9 out of the 10 DLA listed; the exception being social functioning, indicated as being restricted on a continuous basis. The GP comments that depression affects his ability to interact with people, pay attention and be motivated.

Under additional comments the GP states that he has not seen any significant improvements despite medication and physiotherapy

- An Assessor Report (AR) dated 14 October 2011 completed by a registered social worker (SW) who had seen the appellant, as a new client, 2-10 times and who indicates she relied on an office interview and the PR in preparing her report. She reports the appellant lives with a friend. She lists his mental or physical impairments as depression, knee, and seizures related to alcohol consumption. With respect to ability to communicate, she assesses him as satisfactory for speaking, reading and writing, and poor for hearing, commenting "only at times." As to mobility and physical functioning, she reports the appellant independent for walking indoors; and periodic assistance from another person required for walking outdoors, with the comment: "2 to 4 blocks and leg will give out. Knee locks." She reports continuous assistance is required for climbing stairs, with the comment: "avoids when possible." Periodic assistance is required for standing, with the comment "can't stand for long periods" and continuous assistance from another person is required for lifting and for carrying and holding, with the comment: "can only lift 5 to 10 pounds."

Under cognitive and emotional functioning, the SW assesses a major impact on daily functioning for bodily functions, consciousness, emotion, impulse control, attention/concentration, executive, memory, motivation and other emotional or mental problems. A moderate impact is reported for insight and judgment, motor activity, language, psychotic symptoms and other neuropsychological problems. The SW comments: 'very problematic sleeping – can only sleep for about one hour at a time. Cannot quit drinking and

marijuana. Talks to himself often. Got kicked out of school, kept failing – completed grade 9. Has assault charges and feels angry or hostile. He will stay in the room and smoke.”

With respect to DLA, the SW reports the appellant independent under all aspects of personal care, except for regulating diet, for which continuous assistance is required, and for basic housekeeping. Continuous assistance is required under all aspects of shopping with the exception of paying for purchases, for which he is assessed as independent. The SW comments that he avoids going out at all times – he is able to do the above physically but emotionally he has no willingness. The SW reports continuous assistance is required for all aspects of meal planning and paying rent and bills with the comment that rent is sent directly to his landlord. Continuous assistance is required for filling and refilling prescriptions, with the comment that he uses a delivery service and phones in; and periodic assistance is required for taking medications and for directed and safe handling and storage, with the comment that he forgets to take them lots of times. Periodic assistance is reported to be required for all aspects of transportation with the comment that getting in and out of vehicle is painful at times. The SW comments that the appellant “doesn't do any of the meal planning or cooking because it would be dangerous due to drinking and sometimes he just doesn't feel like it. Total loss of motivation.”

Under social functioning the SW reports continuous support/supervision is required for all aspects, with comments in relation to appropriate social decisions that he is reckless and stays home and in regard to ability to develop and maintain relationships the comment is “fractured.” The SW reports very disruptive functioning with respect to the appellant's relationships both with his immediate social network and with extended social networks.

The SW reports that the appellant uses a brace for his right knee.

- A Self Report (SR) dated 08 August 2011 prepared by the appellant, in which he writes:

“My disabilities are asthma, depression, I have trouble sleeping every night, groin strain. I have trouble hearing, paying attention to things and people, my right knee is screwed up from when I jumped up and caught a football and when I landed my knee went right back, my back(lower) from being hit with a broken wooden crutch 18 years ago, and my overall health. Also the seizures I have from me being an alcoholic. There is also the tension headaches I get almost every day. [unreadable].. with a lot of stress. They affect my life and my ability to take care of myself by not getting to sleep I need, not wanting to do anything because of being tired almost every day. The tension headaches are so bad that they last for three or four days at a time. My seizures have been really bad. My groin has been screwed up the last couple of years, it's been hard for me to do any long distance walking, and any lifting. I've been getting really stressed a lot mainly due to my wife giving me stress. I've been having trouble dealing with everyday situations due to my overall health, my back is been screwed up the last 18 years due to the fact that I was almost paralyzed from being attacked by someone using a broken wooden crutch. About three years ago, I ended up with double pneumonia and was flown from [city] to [hospital] where I was at a 95% chance of dying.”

- The appellant's Request for Reconsideration dated 01 January 2012, in which he states:

"My reason for reconsideration is that it is hard for me to do a lot for myself because my roommate depends on only me to do all of his running around even though he has a bus pass and doesn't seem to understand that my knee is literally messed up also it is really hard to find employment when a person like me is screwed up mentally and physically.

"My depression has been with me since I was a child, from my mother turning her back on me when my parents were divorced and my father beating me when I was a child. My right knee buckles or locks up on me about three or four times a week. I am in constant pain every day plus I might be requiring surgery on this knee sometime in the near future. My headaches are so bad they last from six days to eight or nine days at a time. I have seizures from drinking and therefore it is hard for me to do anything since my seizures occur within 12 hours after my last drink. At night I can't fall asleep until 4 or 5 AM and will only sleep for 2 or 3 hours a day."

In his Notice of Appeal dated 31 January 2012, the appellant writes:

"Because I found out on January 30, 2012 but I will require surgery on my right knee (cartilage damage) when I went to physiotherapy that day!"

At the hearing, the appellant stated that his GP had set him up with a surgeon in another city. He said that dealing with his knee will take up time, so he will not be able to find a job. He said he could not understand why he was refused Person with Persistent Multiple Barriers to Employment (PPMB) status. He described a typical day as not being able to get to sleep at night, sleeping only for a couple of hours early in the morning, then getting up to go to walk to the store about 3 blocks away, then coming home to make a sandwich for breakfast, and then he was done for the day. He said he makes himself sandwiches for breakfast and lunch and because as he cannot cook he relies on his roommate to make supper. He said his leg was in always in pain and he had constant headaches. He referred to the many pills he took for his depression.

In answer to a question, the appellant stated that he had met the SW who prepared the AR only once, for about an hour.

The panel finds that the new information provided by the appellant is in support of the information and records that were before the ministry at the time of reconsideration. The information about the appellant's knee problem, his daily living routine and the number of times he met with the SW and length of the interview clarifies some aspects of the material covered in the PR and AR. The panel therefore admits the new information as evidence pursuant to section 22(4) of the Employment and Assistance Act.

The ministry stood by its position at reconsideration. The ministry noted that the PPMB denial was a separate issue, not for discussion at the hearing, but offered to discuss the matter with him at some mutually convenient time after the hearing. The ministry noted that employability is not a PWD criterion: the focus is on the ability to perform DLA. The ministry also noted that more information would have been helpful regarding the SW's comment: "Cannot quit drinking and marijuana."

PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry reasonably determined that the appellant is ineligible for PWD designation because he did not meet all the requirements in section 2(2) of the EAPWDA. Specifically the Ministry determined that the appellant does not have a severe mental or physical impairment that in the opinion of a prescribed professional

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

The Ministry did determine that he met the 2 other criteria in EAPWDA section 2(2) set out below.

The following section of the EAPWDA applies to this appeal:

2 (2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person has a severe mental or physical impairment that

- (a) in the opinion of a medical practitioner is likely to continue for at least 2 years, and
- (b) in the opinion of a prescribed professional
 - (i) directly and significantly restricts the person's ability to perform daily living activities either
 - (A) continuously, or
 - (B) periodically for extended periods, and
 - (ii) as a result of those restrictions, the person requires help to perform those activities.
- (3) For the purposes of subsection (2),
 - (a) a person who has a severe mental impairment includes a person with a mental disorder, and
 - (b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires
 - (i) an assistive device,
 - (ii) the significant help or supervision of another person, or
 - (iii) the services of an assistance animal.

The following section of the EAPWDR applies to this appeal:

- 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 ministry determined that the appellant met the 18 years of age criterion and that his impairment, in the opinion of a medical practitioner is likely to continue for at least 2 years.

Evidentiary issues

In its introduction to the decision, the ministry raised an evidentiary issue as follows:

"This application is problematic as Section 3 [the AR] was completed by [name], a social worker, who met you once to complete the assessor section and used your self report and Section 2 [the PR] as sources of information. As stipulated on page 13 of the PWD application, Section 3 is intended to be completed by a prescribed professional with a history of contact and recent experience with the applicant, and the information is to be based on knowledge of the applicant, observations, clinical data and experience (see page 13). For this reason, precedent will be given to information from [the GP] as he has known you for three years and has access to medical investigations and is the treating medical practitioner."

The evidence from the appellant is that he met the SW only once (not 2-10 times as indicated by the SW) and for only about an hour.

The panel notes that the PWD Application form is not included in the Forms Regulation under the EAPWDA, and therefore has no formal legislative basis. Nevertheless, the panel considers the direction in the AR referenced above by the ministry to be fair notice of what the ministry expects of a prescribed professional in terms of knowledge of the applicant. Further, the panel considers it reasonable for the ministry to expect that "the opinion of a prescribed professional," as reflected in entries on the form, be based not only on his/her professional expertise but also "the history of contact and recent experience with the applicant, and the information is to be based on knowledge of the applicant, observations, clinical data and experience." The panel therefore finds the ministry reasonably gave precedent to the information from the GP, who has known the appellant for 3 years and is his treating physician, in reaching its decision.

Severity of Impairment

With respect to whether the appellant has a severe physical impairment, the ministry noted that the GP indicates that the appellant is able to walk 2 to 4 blocks and to climb 2 to 5 steps unaided, to lift 15 to 35 pounds and to sit for 1 to 2 hours. The ministry noted that the SW reported that periodic help is needed to walk outdoors (2 to 4, blocks and leg will give out, knee locks) and to stand (can't stand for long periods of time). Continuous help is reported to climb stairs (avoids when possible), and to lift/carry/hold (can only lift 5 to 10 pounds). The appellant uses a right knee brace. The ministry concluded that the functional skills limitations are not significantly restricted and are more in keeping with a moderate degree of impairment. Thus the Minister is not satisfied that the information provided is evidence of a severe physical impairment.

The position of the appellant is that he has a bad right knee that causes him much pain and locks up frequently. He has been referred to a surgeon. He has suffered from the condition for many years.

The evidence is that the appellant can walk 2 to 4 blocks and climb 2 to 5 stairs, though with pain and using a knee brace. At the hearing he stated he routinely walks about 3 blocks to the store and back, after which he is "done for the day." However, it is unclear whether being "done for the day" is mental or physical outcome. The GP and SW both report that the knee locks, (according to the GP about 3

times per month, and according to the appellant 3 to 4 times per week) but there is no evidence regarding for how long the knee is locked when this happens. Further, there is no evidence as to the medical nature of his knee problem, except the appellant's testimony that it stemmed from an old football injury. Moreover, since surgery is being considered, there is no evidence of the likely long term prognosis and whether the condition might be remedied after recovery from surgery. Accordingly, the panel finds that the ministry reasonably determined that the information provided did not establish a severe physical impairment.

As to whether the appellant has a severe mental impairment, the ministry notes that the GP reports two deficits to cognitive and emotional functioning i.e. emotional disturbance and motivation, described as "patient is depressed, reduced motivation and energy and ability to accomplish goals". There are no reported difficulties with communication. Continuous restrictions to social functioning are described as "depression affects ability to interact with people, pay attention and be motivated". The ministry notes that the SW reports moderate and major impacts on daily functioning. She describes "very problematic sleeping – can only sleep for about one hour at a time. Cannot quit drinking and marijuana. Talks to himself often. Got kicked out of school, kept failing, completed grade 8. Has assault charges and [when] feels angry or hostile he will stay in room and smoke." The position of the ministry is that as the SW met the appellant for the first time to complete the AR and has no recent psychiatric assessment to base her opinion on, and as a narrative from the GP is not supportive of a severe mental health condition that severely limits the appellant's ability to function either continuously or periodically for extended periods, the Minister is not satisfied that the information provided is evidence of a severe mental impairment.

The position of the appellant is that he suffers from depression and constant headaches, that he is an alcoholic and has seizures after drinking, that he cannot stop drinking that he cannot get proper sleep, and that he lacks motivation to do much with his day.

The evidence in the PR is that the appellant is diagnosed with depression and ETOH abuse, with the physician reporting that the appellant has struggled with alcohol and stress and tension headache for more than 10 years. The GP reports that he has been intermittently depressed since entering his practice. However, in the Health history section of the PR, where the physician is asked to describe the severity of the medical condition, the panel notes that no description of the severity of these conditions is provided, including the length, frequency and severity of his intermittent bouts of depression, nor any insight into whether there is any inter-relationship between the depression and the ETOH abuse. In the AR, the SW assesses moderate or major impacts on daily functioning for all aspects of cognitive and emotional functioning. However, no examples or details how these impacts manifest in daily function, except for reference to sleeping difficulties, that he has had assault charges (no details as to how long ago) and that he feels angry or hostile. Considering this assessment was made during a single one hour interview, and without any other sources such as a psychiatric assessment, the panel finds the ministry was reasonable in not attaching any weight to this assessment. Further, as the ministry commented at the hearing, no information is provided as to why the appellant "cannot quit drinking or marijuana." The panel therefore finds that the ministry reasonably determined that the information provided does not establish a severe mental impairment.

Whether DLA are directly and significantly restricted

With respect to whether the information provided establishes the impairment directly and significantly

restricts DLA either continuously or periodically for extended periods, the ministry notes that a severe impairment has not been established. Further, the ministry notes that the GP reports no restrictions 9 of 10 DLA. Continuous restrictions to social functioning are described as "depression affects ability to interact with people, pay attention and be motivated". The ministry also notes that the SW reports a number of activities that require periodic or continuous assistance from another person including social functioning. The position of the ministry is that this level of restriction in the appellant's ability to perform DLA is not corroborated by information from the GP, who is known him longer and has access to medical investigations. As the GP reports that the majority of DLA are performed independently, the information from the appellant's prescribed professionals do not establish that impairment significantly restricts DLA, either continuously or periodically for extended periods.

The position of the appellant is that the PR reports continuous restrictions to social functioning, as his depression affects his ability to interact with people, pay attention and be motivated. Further, the AR reports continuous assistance required for many DLA, including shopping, meals, and paying rent and bills, periodic assistance for taking medications and transportation and continuous support and supervision for all aspects of social functioning.

The evidence shows the GP reporting the appellant independent in all DLA except social functioning – daily decision-making; interacting and communicating with others. The panel notes this restriction is reported to be continuous, while the appellant's depression is reported as intermittent. The SW has assessed the appellant as requiring support or supervision with respect to all aspects of social functioning without providing a description of the degree and duration of support/supervision required. Given the evidentiary issues discussed above associated with the AR, and since no severe mental or physical impairment has been established, the panel finds the ministry reasonably determined that this criterion had not been met.

Whether help is required with DLA

As to whether the information provided establishes that to perform the directly significantly restricted DLA the appellant requires an assistive device, the significant help of another person or the services of an assistance animal, the position of the ministry is that as it had not been established that DLA are significantly restricted, it cannot be determined that significant help is required from another person. The ministry does note that a knee brace is used.

The panel notes that the only references in the evidence to help required to perform DLA's is with respect to the knee brace and to having medications delivered and the appellant's evidence that he lets his roommate cook dinner, either because the appellant can't cook or that it is too dangerous for him to do so because of his drinking. The panel finds that as the information provided has not described a significant need for help and as a severe impairment which directly and significantly restricts the appellant's ability to perform DLA has not been established, the ministry reasonably determined that it cannot be determined that significant help is required.

Therefore the panel finds that the ministry decision that the appellant is ineligible for PWD designation because he did not meet all the requirements in section 2(2) of the EAPWDA is reasonably supported by the evidence and is a reasonable application of the legislation in the circumstances of the appellant. The panel thus confirms the ministry decision.