

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (the ministry) reconsideration decision of May 10, 2012, which found that the appellant did not meet three of five statutory requirements of section 2 of the *Employment and Assistance for Persons With Disabilities Act* (EAPWDA) for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that in the opinion of a medical practitioner 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 help as defined in section 2(3)(b) of the EAPWDA.

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 information before the ministry at the time of reconsideration included the following:

- The appellant's application for designation as a PWD, signed by the appellant on February 2, 2012. The application included a physician report (PR) signed by the appellant's physician and dated February 1, 2011 (though the panel assumes the actual date was February 1, 2012), and an assessor report (AR) signed by a social worker and dated February 12, 2012.
- A letter from the ministry to the appellant, dated March 27, 2012 advising the appellant that he had been found ineligible for designation as a PWD.
- The appellant's Request for Reconsideration form signed by the appellant on April 10, 2012.
- A written submission from the appellant's advocate.

At the appeal hearing the appellant's advocate submitted three documents:

- The written submission previously submitted for the reconsideration decision. The advocate submitted this document to the appeal panel since only part of the submission had been reproduced in the appeal record.
- A typewritten note from the appellant's girlfriend describing manifestations of his impairment and the help that she provides for him.
- A 2-page printout from Wikipedia describing the postictal (i.e., "after the seizure") state, which is the altered state of consciousness that a person enters after experiencing a seizure. The document explained that following a seizure it is common to experience feelings of mental and physical exhaustion that can last a day or two. Patients' most common complaint is an inability to think clearly, specifically poor attention and concentration, poor short term memory, decreased verbal and interactive skills, and a variety of cognitive defects.

Both the girlfriend's note and the Wikipedia printout provide further detail on the impairment that was the subject of the reconsideration decision. The panel admitted them into evidence as written testimony in support of the records and information that were before the ministry at the time of reconsideration in accordance with s. 22(4)(b) of the *Employment and Assistance Act*. The ministry had no objection to admission of this evidence, but asked the panel to review the Wikipedia information "carefully" because of the inherent unreliability of the website's model which allows virtually anyone to edit the entry. The panel accepted the advocate's submission as argument and as information that had been before the ministry at the time of reconsideration.

In his PWD application the appellant explained that he has had epilepsy since early childhood. He is disoriented after a seizure and has difficulty communicating. Part B2 of the PWD application form provides more than a page to allow an applicant to answer the question "How does your disability affect your life and your ability to take care of yourself?" The appellant left part B2 blank.

In the PR the appellant's physician of 7 or 8 years (a prescribed professional) confirmed a diagnosis of medically resistant epilepsy. The physician noted that "Despite being on medication he still gets



convulsions which seriously influence not only daily life but ability to get and retain work." The appellant's anti-epileptic medication is sedating. In terms of functional skills the physician reported that the appellant can walk more than 4 blocks unaided on a flat surface, can climb more than 5 steps unaided, has no limitations in lifting, no limitations in remaining seated, and no difficulties with communication. The physician did report significant deficits with 4 out of 11 aspects of cognitive and emotional functioning: memory, emotional disturbance (e.g. depression, anxiety), motivation, and attention/sustained concentration. The physician noted that "This condition influences his usual activities which has led to multiple emotional and motivational problems." With respect to social functioning the physician noted "low self esteem". In the section of the form describing direct restrictions of DLA, the physician said that 2 of 8 DLA as defined in s. 2(1)(a) of the EAPWDR (meal preparation, and mobility inside and outside the home) are periodically restricted. The periodicity is further described as being "when he has a convulsion". One DLA (use of transportation) is continuously restricted, with the comment that "He is a danger to use any machinery and won't ever be allowed to drive." Social functioning is described as being restricted but there is no detail as to whether the restriction is continuous or periodic. In response to the question asking for specifics as to what assistance the appellant needs with DLA, the physician's one word response is illegible.

In the AR, the social worker (a prescribed professional) noted that this was her first contact with the appellant. She described his ability to communicate as "poor", noting that seizures make him unconscious for up to 8 hours and he can have up to 3 seizures per month. In terms of mobility the social worker said that the appellant requires continuous assistance from another person for walking outdoors and climbing stairs, and that he requires periodic assistance walking indoors, lifting, and carrying/holding. She noted he is limited to lifting 20 pounds. Section B4 of the AR form is to be completed for an applicant with an identified mental impairment or brain injury. The social worker completed section B4, saying that the appellant's impairment has a major impact on 7 out of 14 aspects of social functioning, a moderate impact on 4 aspects of social functioning, and no impact on 3 aspects. In her comments related to social functioning, the social worker said that the appellant sleeps for up to 8 hours after a seizure, that his seizures are "unpredictable so if he goes anywhere he is in danger", and that the appellant has "tried to leave his home naked and is unaware of it." In terms of DLA, the social worker described the appellant as being independent in most aspects of personal care (while noting he stays in bed on bad days), paying rent and bills, managing medications, transportation (getting in and out of a vehicle and using transit schedules, but avoids public transit whenever possible), and social functioning (noting with respect to "appropriate social decisions" that he needs to have someone around to keep him safe and that with respect to interacting with others "not when he is recovering from a seizure.") The social worker indicates the appellant has good functioning with respect to his immediate social network, and marginal functioning with respect his extended social network at least partly because of concern over safety because of the unpredictability of the seizures. With respect to basic housekeeping the social worker noted that the appellant needs periodic assistance with laundry and otherwise continuous assistance as "his girlfriend does this". The social worker indicated the appellant requires periodic assistance with shopping as "he does not do these things when he has a bad day." In section D of the AR which is to detail the assistance provided for an applicant, the social worker indicated that the appellant receives help from family and friends, no assistive devices are indicated, and no assistance is provided by assistance animals.

In the Request for Reconsideration the appellant wrote that his seizures incapacitate him for at least 8 hours and that he gets 2-3 seizures a month or more depending on his stress level. He needs daily



assistance with managing daily living as he can't be under too much stress. He can't drive or use any electrical equipment because of the risk of injury. His seizures are mainly nocturnal. His partner has to supervise him as he is not aware of what he is doing after a seizure.

At the hearing the appellant's advocate acknowledged that she understands that employability is not a factor for consideration in assessing an applicant for PWD designation, but she noted that some aspects of employability are transferable and can be considered, such as the appellant's inability to use sharp objects or to drive. She said that the appellant left part B2 of the PWD application form blank because he didn't understand what was being asked of him and he didn't ask for help. The appellant testified that he has 3 to 4 seizures a month, depending on how much sleep and how much stress he has. Sometimes he doesn't feel safe going out the door. In response to a question from the panel the appellant said that he gets no warning of a seizure. Most of his seizures occur at night...he has not had a daytime seizure for "a long time". He doesn't know how long a seizure lasts – he says the doctor has told him it can be 2 to 20 minutes – but that he generally is unconscious or sleeps for up to 8 hours after a seizure. He has been told he sometimes has 2 seizures in one night. His girlfriend takes care of him during the seizures and always calls an ambulance to take him to the hospital after a seizure. He is never hospitalized for any length of time. After a seizure he is incapacitated. It drains him of all energy. The appellant said he can exhibit unusual behaviour after a seizure, describing how his ex-wife once stopped him from sleepwalking naked out in the hallway of his apartment building. The post-seizure effects generally last for about a day.

In response to questions from the panel the appellant said that he has not had a daytime seizure for about 10 years. He generally doesn't know he's had a seizure except he loses control of his bladder. His girlfriend makes sure he doesn't hit his head during a seizure, and she calls the hospital after every seizure. If his girlfriend is away the appellant has a friend stay over. He was last in hospital after a seizure a month ago. The hospital checked his heart and took a blood sample, then released him at 1:00 or 2:00 am and he walked or staggered approximately 20 blocks home. The appellant's girlfriend does not drive, and the appellant lost his driver's license 2 years ago. The appellant said he does not like to take public transit in case he has a seizure and hurts someone and he generally walks wherever he wants to go, but he has asked the ministry to supply him with a bus pass. In response to the question as to what is a "bad day" as referenced in the AR, and how often they occur, the appellant said that a bad day is when he can't read labels well for shopping and can't tell a good buy from a bad buy, or when he can't read or watch TV. In response to a question on the restriction of lifting noted by the social worker in the AR, the appellant said that he assumed it was because he could injure himself if he had a seizure when lifting and that heavier objects would pose more of a risk of injury.

Asked to describe the significant help or supervision he receives for meal preparation and cooking, the appellant said that he only needs help when recovering from a seizure. His girlfriend won't let him near the stove when he is in the recovery period. When fully recovered he enjoys cooking. He can do laundry on normal days but his girlfriend is afraid he might swallow soap on recovery days. Asked about help or supervision with respect to personal finances, the appellant said he makes sure his bills and rent are paid. With respect to shopping, he "muddles through" when his girlfriend is away. She is currently away for 6 weeks and he has a friend staying with him for the entire period.

The panel finds that the appellant's oral testimony provides further detail with respect to the information and records that were before the minister at the time of reconsideration, and accepts it as



evidence in accordance with section 22(4) of the *Employment and Assistance Act*.

In her note the appellant's girlfriend explained that she lives with the appellant and that both on a daily basis and during his recovery from seizures she prevents the appellant from harming himself during seizures until the ambulance arrives, cleans up after him and makes sure he bathes, makes sure he rests for at least 8 hours after a seizure since he gets drained out and disoriented, cooks for him, grocery shops for him, and cleans the house. She wrote that she has seen the appellant have two seizures in one night, though the physician has him on strong medication.

The ministry relied on its reconsideration decision.

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## 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 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 DLA either continuously or for extended periods, and that as a result of those restrictions the appellant does not require help to perform DLA?

The relevant legislation is as follows:

### EAPWDA:

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.

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### *Severe Mental Impairment*

The appellant's position, as expressed by his advocate, is that the physician has confirmed significant deficits with cognitive and emotional functioning. The fact that he didn't complete part B2 of the PWD application form is an indication that he simply didn't understand what was required. She said the social worker confirmed the appellant's ability to communicate is poor, and she pointed out that the social worker confirmed major impacts on 7 out of 14 cognitive and emotional functions. The Wikipedia excerpt supports the notion that a person's mental abilities are significantly affected during the post-seizure period.

The ministry's position is that the reconsideration decision was reasonable. The ministry pointed to inconsistencies between the PR and the AR, noting that the reconsideration decision gave more weight to the physician's evidence since the physician had known the appellant for 7 or 8 years and could refer to the appellant's medical history while the social worker had only met the appellant once.

The PR indicates no problems with communication, while the AR says the ability to communicate is poor – though suggesting this is during the period when the appellant is unconscious/asleep following seizures. With respect to cognitive and emotional functioning the PR refers to "multiple emotional and motivational problems." The AR also notes significant impacts to cognitive and emotional functioning, but the comments relate primarily to the time during or immediately after a seizure. Similarly, with respect to social functioning, the PR indicates low self-esteem but the AR indicates that the 2 out of 5 aspects of social functioning in which the appellant is not independent occur during or after seizures in part because he "needs to have someone around to keep him safe."

Taken as a whole, the evidence indicates that the primary mental impacts occur during the "post-

seizure" period. The concerns about safety expressed in the AR in relation to social functioning appear to be overstated since on the appellant's evidence he has not had a daytime seizure in approximately 10 years. There are two DLA that relate specifically to a mental impairment rather than a physical impairment – "make decisions about personal activities, care or finances" and "relate to, communicate or interact with others effectively". The evidence indicates that the appellant primarily makes his own decisions about personal activities, care and finance, and that he generally communicates and interacts with others effectively except during post-seizure periods which usually occur only 2 to 4 times a month and which generally last about a day.

Given the evidence of the periodic nature and relatively short duration of the post-seizure mental impacts, the panel finds that the ministry reasonably concluded that the appellant does not have a severe mental impairment.

### *Severe Physical Impairment*

The appellant's position is that his seizures influence his DLA. The advocate said that poor balance is a side effect of seizures which correlates with the AR's indication that the appellant has trouble with stairs and avoids walking outdoors because of the risk of seizure and injury.

In its reconsideration decision, the ministry relied primarily on the PR showing no limitations to physical functioning in concluding that the appellant does not have a severe physical impairment. At the hearing the ministry said that the appellant's description of the effects of his impairment is "scary", but maintained that the ministry's conclusion on this point was reasonable.

The evidence indicates that the appellant's physical functioning is generally good. The PR shows no functional limitations, and on the appellant's evidence he recently was released from hospital immediately after a seizure and managed to walk approximately 20 blocks to his home at night. The appellant also stated that he generally walks wherever he wants to go. The panel has concluded that the AR's references to limitations in stair climbing and walking indoors must refer specifically to the post-seizure interval.

On their own these physical limitations, occurring primarily during the post-seizure period 2 to 4 days a month, could not be said to constitute a severe impairment. However, the appellant's medical condition – which is resistant to medical treatment - puts him at risk of personal injury during his seizures, for which he has no prior warning sign, necessitates ongoing accompaniment and sedating medications, and also precludes him from driving or engaging in other activities such as operating machinery that could put him or others at risk. Given these circumstances, the panel finds that the ministry's conclusion that the appellant does not have a severe physical impairment is not reasonable.

### *Direct and Significant Restrictions*

The appellant's position is that most of the appellant's DLA are directly and significantly restricted periodically for extended periods of time, since the recovery time after a seizure is long. The advocate also referred to the AR's confirmation of a major impact on 7 out of 14 cognitive and



emotional functions.

The ministry's position, as expressed in the reconsideration decision, is that since the majority of DLA are performed independently or require little help from others except after a seizure which occurs 2 or 3 times a month, the evidence of the prescribed professionals did not establish that the appellant's impairment significantly restricts his DLA either continuously or for extended periods.

The PR indicates that such restrictions as the appellant does have in DLA relate to the post-seizure period. The exceptions are social functioning – for which no time period is indicated – and transportation – which is shown as continuously restricted because of the appellant's inability to drive. In the AR, the indicated restrictions are also primarily expressed as being in relation to the post-seizure period. This is consistent with the appellant's evidence that shows that between seizures, he can and does perform DLA such as housework and meal preparation that are periodically restricted during the post-seizure periods. Given that the appellant can perform most DLA, being restricted only during post-seizure periods 2 to 4 times a month for a relatively limited duration, it would be difficult to interpret the evidence as showing that in the physician's or social worker's opinions the appellant is significantly restricted in DLAs. Accordingly, the panel finds that the ministry reasonably determined that, in the opinion of a prescribed professional, the appellant's ability to perform DLAs is not directly and significantly restricted either continuously or periodically for extended periods.

#### *Help in Relation to DLA*

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. Therefore, the panel finds that since 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.

#### *Conclusion*

The panel finds that the ministry's decision declaring that the appellant ineligible for PWD designation was reasonably supported by the evidence and confirms the decision.