APPEAL

PART C – Decision under Appeal

The decision under appeal is the Reconsideration Decision of the Ministry of Social Development dated 01 June 2012 denying the appellant designation as a person with disabilities (PWD). 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) and (3). Specifically the ministry determined that the information provided did not establish that the appellant has a severe mental or physical impairment that in the opinion of a prescribed professional

(i) directly and significantly restricts the person's ability to perform daily living activities either continuously or periodically for extended periods; and,

(ii) as a result of those restrictions, the person 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:

1. The appellant's PWD Designation Application, dated 09 February 2012. The Application included the following: a) the appellant's Self Report (SR): b) a Physician Report (PR) dated 27 February 2012, prepared by the appellant's General Practitioner (GP) who has known the appellant for 3 years and seen him 2 – 10 times in the past year; and an Assessor Report (AR) dated 24 February 2012 completed by the appellant's Chiropractic Doctor (DC), who has known the appellant for 21 months. (See below)
2. A Medical Imaging Report dated 25 April 2012 reporting on a CT exam done at a Health Authority Hospital. (See below)
3. A letter from the appellant's GP dated 10 May 2012, (see below) to which is attached a revised page of the PR, filling out the table left blank in the original PR relating to restrictions to daily living activities (DLAs).

In the PR, the GP diagnoses the appellant with Hepatitis C (with onset 2010), depression (onset 2011) and spondylolysis of the lumbar spine (onset 1992). Under Health History, the GP states that the appellant requires anti-viral therapy for his Hepatitis C; his work requires extensive travel and he would be unable to comply with the anti-viral protocol and schedule if he developed adverse side effects - management away from home and his regular doctor would impact him; he requires regular analgesics/Motrin for his musculoskeletal symptoms; and clinical depression as a consequence of his health issues - may need further assessment and management. The GP reports that the appellant's medications/treatments interfere with his ability to perform DLAs, commenting that many of his patients develop nausea/emesis from the anti-virals. The GP notes that the anticipated duration of the treatment is six months from the initial treatment. The GP indicates that the appellant's impairment is likely to continue for 2 years or more, commenting that his musculoskeletal problem is chronic, while his Hepatitis C response to treatment is unknown as is his depression.

With respect to functional skills, the GP reports that the appellant is able to walk 4+ blocks unaided, climb 5+ stairs, and has no limitations to lifting or remaining seated. No difficulties with communications are reported. As to significant deficits with cognitive or emotional function, the GP indicates "considerable anxiety and depression." In his original version of the PR, the GP indicates that the appellant's impairment does not directly restrict his ability to perform DLAs. In the revised section on DLAs, the GP indicates the appellant is restricted on a periodic basis with respect to personal self care, meal preparation, basic housework, daily shopping, mobility inside the home and social functioning, the latter with a comment that the appellant may tend to isolate as a consequence of his depression.

In the AR, the DC notes that the appellant lives alone. Under impairments, he lists Hepatitis C, clinical depression as a consequence of the Hepatitis C, and post-traumatic lumbar-sacral sprain/strain with associated spondylolysis and myositis. All aspects of communications are assessed as good, except reading, rated as satisfactory. In terms of mobility and physical ability, the DC assesses the appellant independent for walking indoors, walking outdoors, climbing stairs and lifting and standing, and requiring periodic assistance for lifting and carrying and holding. Under cognitive and emotional functioning, the DC assesses the appellant's mental impairment as having a major impact on bodily functions (sleep disturbance), emotion (depression) and motivation, and a minimal impact on executive and memory functions, with no impact shown for all other aspects. As to DLAs, the DC assesses the appellant requiring periodic assistance for 4 aspects of personal care

(dressing, grooming, bathing and toileting) with a comment that he has considerable difficulty when experiencing back problems – he lives alone. The appellant is assessed as independent in all aspects of basic housekeeping, shopping, meals, and paying rent and bills, medications. Under transportation, he is assessed as requiring periodic assistance getting in/out of a vehicle, with a comment that this is with the exacerbation of back problems. No assessment is provided as to the support/supervision required relating to social functioning. With respect to assistive devices, the DC indicates that the appellant uses a T.E.N.S. (transcutaneous electrical nerve stimulation) unit for back pain management. Under additional comments, the DC states that he will be prescribing several nutritional supplements to reduce inflammation and support liver function.

In his SR, the appellant writes that he has two major disabilities. First, he has chronic lower back pain as well as a calcium growth between the L4-5 vertebrae, which are compressed at the front of the spine as well. This causes daily pain problems. He also has Hepatitis C, and presently he is waiting to start the treatment for it in the next month or so. He is on the waiting list to do this and therefore unable to work. His work entails extensive traveling and lifting. He is experiencing extreme fatigue due to his Hepatitis C.

He goes on to write that he finds that with his back medication, he is able to do most daily activities with moderate pain but there are still times that with the medication he finds himself a couple of times a month unable to move around easily or not at all, and has to stay in bed to recuperate. He was diagnosed 10 years ago by the Canadian Back Institute for his back problems and in the last 10 years they have been getting worse. He usually has to use a T.E.N.S. machine to help with the muscle spasm 3 to 4 times a week. All this is affecting him more and more mentally and physically and makes everyday life and chores harder and harder to do. Worse for him is the Hepatitis C that he is stressed over. He is mentally exhausted thinking of the side effects that will be involved. He has had to change his diet and the fatigue now affects him daily. Due to all of this he is experiencing insomnia and getting very little sleep even though his doctor has prescribed him Diazepam for it. He has lost the spark for life that he would like to have.

The Medical Imaging Report sets out this conclusion: "Longstanding spondylolysis of L5. Grade 2 anterior spondylolisthesis of L5 on S1. Marked disk degeneration with degenerative arthritis at the L5-S1 disk."

In his letter of 10 May 2012, the GP writes to clarify some points regarding the appellant's health. He refers to the diagnosis of grade 2 spondylolisthesis L5/S1 and states that surgery may be a consideration and that the appellant will be referred to an orthopedic surgeon to determine if he is a surgical candidate. With regard to DLAs, the GP writes that the appellant reports difficulties in the area of personal self care, meal preparation, basic housework, daily shopping, and mobility both inside and outside the home of the periodic nature. As the GP has previously indicated the appellant tends to isolate as a consequence of his chronic pain in his depression.

In his Notice of Appeal dated 19 June 2012, the appellant writes that he is in constant pain and has trouble with daily activities and believes that his doctors' information is not coming across as to how bad a shape his body is in.

At the hearing the appellant submitted a letter dated 08 July 2012 from his tenant/roommate. She writes that over the past year and a half she has noticed a huge change especially in the appellant's

pain level and the limitations it causes. She states that the pain she sees him go through even just mowing the lawn or chopping wood or just getting up and being able to do anything physically is now a day-to-day chore mentally and physically.

The appellant made the following points in his presentation and in answer to questions:

- With respect to his Hepatitis C, he stated that 4 nodes had recently been discovered on his liver. Awaiting test results as to whether these were cancerous caused him much anxiety. He is awaiting acceptance into a trial program for anti-viral therapy. This treatment promises better results than the other treatment approaches, but his viral count has to stabilize before he is accepted. There is no cure for this disease, and no guarantee that treatment will be successful, and even if it goes into remission, that the disease witl not return. He stated that his GP was in disbelief that the diagnosis of Hepatitis C was in itself not sufficient to justify PWD designation.
- With respect to his back conditions, the appellant noted that the grade 2 anterior spondylolisthesis of L5 on S1 was a new diagnosis submitted by his GP at reconsideration – essentially his L5/S1 discs are a half inch out of alignment, exposing the nerves. He stated that he is in constant pain in his hip, but he has a high pain tolerance and tries to keep active, even mowing the lawn, trying to keep his muscles loose. But his condition has progressed to where at least once a week he is immobilized by piercing, stabbing pain when he can do nothing, for at least a day and sometimes for as long as 4 days. Because of the spondylolisthesis, he has not seen his DC for the past 3 months, as his GP advised that with this condition back manipulation was not a good idea. His back pain contributes to a lack of sleep – even with his sleeping medication, he gets only 2-4 hours of sleep a night.
- He also clarified that he has been referred to a neurosurgeon, not an orthopedic surgeon as the GP stated in his letter. He recognizes that there are no guarantees with the surgery for his back – it is risky, and the outcome could mean less mobility.
- The appellant clarified that, contrary to what the DC indicated in the AR, he does not live alone, but the above mentioned tenant/roommate lives in his house and when he is immobilized will bring things to him.
- As to his mental condition, he stated that he suffered bouts of huge depression, causing insomnia and a lack of motivation.

The ministry stood by its position at reconsideration.

The panel finds that the appellant's testimony at the hearing and his tenant/roommate's letter are in support of the information and records that were before the ministry at the time of reconsideration, clarifying the progress and impact of the appellant's medical conditions reported by his GP and DC. The panel therefore admits this new information as evidence pursuant to section 22(4) of the Employment and Assistance Act.

APPEAL

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 information provided did not establish that the appellant has a severe mental or physical impairment that in the opinion of a prescribed professional

(i) directly and significantly restricts her ability to perform daily living activities either continuously or periodically for extended periods; and,

(ii) as a result of those restrictions she 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.

Severity of mental impairment

With respect to whether the information provided establishes a severe mental impairment, the ministry in its Reconsideration Decision reviewed the evidence in the PR and the AR. It noted the GP indicated that the appellant has a significant deficit in cognitive and emotional functioning in the area of emotional disturbance. The DC reported that the appellant's impairments have no impact on the majority of his cognitive and emotional function, indicating that his impairment does have a major impact in the area of bodily functions (sleep disturbances) and emotion (depression and motivation). The ministry notes however that no comments are included to explain why the DC indicates this level of impact. Further, the DC does not indicate that there is an impact on the ability to manage social functioning or an impact on the ability to manage immediate or extended social networks. The ministry therefore concluded that there was not enough evidence to establish a severe mental impairment.

The position of the appellant is that, as a consequence of his Hepatitis C and his back conditions, he suffers bouts of severe depression and anxiety, not knowing how his treatments will turn out and not being able to work or take part in recreational activities like golf, and this has a significant impact on his daily functioning, including his ability to get enough sleep and a tendency to isolate himself.

The evidence is that the GP has diagnosed the appellant with depression, indicating that is at the level of clinical depression, with the DC identifying the impacts as being in the areas of sleep disturbances and motivation. However, the panel finds that it is difficult to ascertain to what extent the appellant's insomnia results from the physical pain arising from his back conditions rather than his anxiety over his physical conditions. As no impact on the ability to manage social functioning, including social decisions, or any impact on the ability to manage immediate or extended social networks has been reported, the panel finds that the ministry reasonably determined a severe mental impairment had not been established.

Severity of physical impairment

As to whether a severe physical impairment had been established, the ministry's decision reviewed the evidence in the PR and AR, including the diagnosis of grade 2 spondylolisthesis of L5/ S1, that the appellant is being referred to a surgeon for his back condition, that he requires regular analgesics for his musculoskeletal systems and that he will require anti-viral therapy for his Hepatitis C. The ministry noted the PR assessment of the appellant's functional skills (can walk 4+ blocks, etc). The DC indicates that he can independently manage the majority of his mobility and physical functions. While the DC indicates that he requires periodic assistance with lifting and carrying and holding however, the ministry notes that no narrative is included that would describe the frequency and duration of this periodic assistance. Further the DC does not indicate that he requires an assistive device or that it takes him significantly longer to manage these mobility and physical functions. The ministry acknowledges that the appellant experiences limitations as a result of his medical conditions but finds that there is not enough evidence to establish a severe physical impairment.

The position of the appellant is that the diagnosis of Hepatitis C is in itself sufficient to establish a severe physical impairment as well as eligibility for PWD designation. Further, the ministry did not take into account the impact of his recent diagnosis grade 2 spondylolisthesis of L5/ S1, submitted

before reconsideration. This, together with his frequent periods of immobility and the need for risky back surgery, all establish a severe physical impairment.

The panel does not accept the proposition that a diagnosis of Hepatitis C is itself sufficient to establish a severe physical impairment. While recognizing that Hepatitis C is a serious disease with life-threatening or life-shortening implications, the panel considers it reasonable that the ministry would expect, as the basis for determining a severe impairment, a detailed description of how and to what extent the disease currently manifests in the applicant's daily functioning. The panel finds the evidence instead relates to some mental, not physical, impacts or to prospective impacts in terms of the possible side effects of anti-viral therapy. In terms of the appellant's back conditions, the evidence is more substantive. Considering the appellant's evidence that his condition has progressed to where his pain leaves him immobile on average one day a week for at least one day and sometimes up to 4 days as a consequence of the diagnosed grade 2 spondylolisthesis of L5/ S1 and his other back issues, and that his GP considers this condition and the resulting pain serious enough to refer the appellant for surgery, the panel finds that the ministry was not reasonable in determining that the information did not establish a severe physical impairment.

Whether the impairment directly significantly restricts DLAs

With respect to whether the information provided establishes that in the opinion of a prescribed professional the appellant's impairment directly and significantly restricts his ability to perform DLAs, either continuously or periodically for extended periods, the ministry notes in its decision that the GP in the original PWD decision does not indicate that the appellant is restricted in his ability to manage any DLAs. The ministry notes that in a subsequent letter the GP states that the appellant requires periodic assistance with the majority of his DLAs does not explain why or what is changed since the original application. The ministry also refers to the AR where the DC indicates that the appellant can independently manage the majority of his DLAs though indicating that periodic assistance is required with some aspects of personal care and as he finds this considerably difficult when experiencing back pain. The ministry notes that the DC indicates that he can manage independently many of his DLAs that include a significant level of physical functional ability – laundry, basic housekeeping and cooking. The ministry further notes that the DC has not provided additional comments that would include a description of the type and amount of assistance required and has not identified any safety issues. The ministry therefore concluded that from the evidence provided by the GP and the DC that the appellant at the present time can independently manage the majority of his DLAs. Therefore the ministry did not have enough evidence to establish that this criterion had been met.

The position of the appellant is that his GP has confirmed that he has difficulties in the majority of physically demanding DLAs, as listed in his letter, and therefore this demonstrates that he meets this criterion.

The evidence shows that the appellant's severe physical impairment has a direct impact on his ability to perform many DLAs requiring physical effort during periods when he is immobilized by pain. However, there is no detailed description provided by a prescribed professional – from either his GP or DC - as to how significant these restrictions might be, or how often and for how long these restrictions occur. In the absence of such a description, the panel finds the ministry reasonably concluded that the information provided did not establish that this criterion had been met.

Help required

In its decision the ministry noted that the GP had indicated that the appellant does not require any prostheses or aids for his impairment and the DC had indicated the appellant's routine use of a T.E.N.S. unit for back pain. The position of the ministry is that as it has not been established that DLAs are significantly restricted (the criterion discussed above), it cannot be established that the significant help of another person is required. And as the appellant does not require the services of an assistance animal, the requirements of EAPWDA section 2(2)(b)(ii) have not been met.

The position of the appellant is that, during his frequent periods of immobility, he requires the help of his tenant/roommate, such as her bringing things to him when he cannot get up to get them himself..

The evidence of the appellant is that he benefits from some help from his tenant/roommate during his periods of immobility. The panel notes that the DC reports the use by the appellant of a T.E.N.S unit, but the panel considers such a unit a therapeutic device, and not an assistive device as defined in the legislation. The legislation requires that the need and extent of help required must be identified – be "in the opinion of" - a prescribed professional. The need for such help has not been identified by either of the appellant's prescribed professionals, neither his GP nor DC. The panel therefore finds that, as it had not been established that DLAs are significantly restricted, and as there is no description by a prescribed professional of any help required, the ministry reasonably concluded that this criterion had not been met.

Accordingly, the panel finds that the ministry determination that the information provided did not establish that the appellant met all the criteria for PWD designation was reasonably supported by the evidence. Therefore the panel confirms the ministry's decision.