

### PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development (the ministry) dated 13 July 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. 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 (DLAs) 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 the following:

1. The appellant's PWD Designation Application dated 05 March 2012. The application contained the appellant's Self Report (SR), written out for him, from his verbal description of the answers to the questions, by a person connected to a mental health organization. The application also included a Physician Report (PR) and an Assessor Report (AR) both completed by the appellant's psychiatrist dated 21 April 2012. The psychiatrist has been providing psychiatric care to him over the past year and has seen him 2-10 times in that period.
2. The appellant's Request for Reconsideration dated 14 June 2012, in which the appellant requests extra time because it took time to find an advocate and get further information. No further information was provided at reconsideration.

In the SR, the appellant states:

"I have multiple sclerosis and depression. I have a chronic headache that never goes away. I have a repetitive motion injury on my right elbow that causes me pain so I'm unable to grip/hold onto tools. The MS causes me to have a numbness on my left side and in my legs. I had been hospitalized twice for suicidal thoughts. My depression has been a problem for me since my mother died. I used to use drugs and alcohol, but have been clean for two years. I find I'm forgetful and now unable to work.

I am not sure where I would be without my dad. Maybe I would have to live in a home. He drives me to doctors, counselors and to the [mental health organization] clubhouse where I go and participate daily in their activities for the past year. My dad helps me to remember appointments and things I have to do.

I am unable to work because of pain - the chronic headaches - and I can no longer grasp and hang onto tools. When I bend over, the headaches worsen. I see a doctor to help me with pain management, but the headaches are still there. Because of the prescription drugs, I do feel tired a lot of the time.

I go to AA/drug rehab weekly at the [hospital]. I try to maintain a clean and healthy lifestyle by not hanging out with people who use drugs/alcohol. My depression has caused me to lose interest in my former job, in life, in my family, and in friendships and relationships. I have trouble sleeping and now take a sleeping pill to help me sleep. I try to think positive, but I still think about suicide, but not as much as I used to. I feel worthless and think about what I should have done with my son and wife.

I also have trouble writing. My concentration is poor. I feel frustrated and at times worthless, when I think about how I can no longer work."

In the PR, the psychiatrist diagnoses the appellant with recurrent depression, substance abuse (in remission), chronic migraine headaches and multiple sclerosis. Under health history he writes:

"[The appellant] is a 47-year-old male who has had a long history of depression. He was admitted to hospital under my psychiatric care approx. one year ago (April 2011) at which point he was experiencing depression and suicidal ideation in the context of a recent marital breakup, unemployment, and long-term substance abuse

[The appellant] was quite forthright with regard to his past history of substance abuse. He appeared to be genuinely motivated to pursue abstinence from street drugs in the future.

He has actually remained clean and sober over the past year. [The appellant] was having significant problems with headaches during his hospitalization one year ago and he was therefore referred to a neurologist [name]. He had an MRI scan which revealed that he has multiple sclerosis. [The appellant] has attempted to reenter the workforce over the past year. He had a brief start with a painting company in June/July 2011, but found that his energy level was very poor, he was unable to sustain his concentration, and he found that the work aggravated his headaches. As a result, he was laid off a short time later."

In answer to the question whether the appellant has been prescribed any medication and/or treatments that interfere with his ability to perform daily living activities, the psychiatrist answers Yes, listing a combination of psychotic drugs. The psychiatrist comments that the appellant will require long-term treatment with psychotics.

Under degree and course of impairment, the psychiatrist indicates that the appellant's impairment is likely to continue for two years or more, commenting that he has remained chronically depressed over the past year. His condition is further complicated by his chronic migraine headaches and his recently diagnosed MS.

Under functional skills, the psychiatrist reports that the appellant can walk unaided 4+ blocks, climb 5+ stairs, lift 15 to 35 pounds, and has no limitation in remaining seated. The psychiatrist reports the appellant has no difficulties with communication. As to significant deficits with cognitive and emotional function, the psychiatrist assesses significant deficits with respect to executive, memory, emotional disturbances, motivation, and attention or sustained concentration. With respect to DLA, the psychiatrist indicates that the appellant is not actively restricted in any DLA, except for mobility outside the home with the comment that he has limited physical tolerance, and indicates "unknown" with regard to the aspect of social functioning. He comments that the appellant has a very limited social life. He mainly has social contact with his family (his father and sister) and he attends AA meetings. Under additional comments he writes: "mild social impairment." As to assistance required with DLA, the psychiatrist notes that the appellant has lived with his father for the past year as he struggles with his low energy and depression, which would make independent living much more stressful and challenging.

In the AR, the psychiatrist notes that the appellant lives with family. Regarding mental or physical impairments that impact ability to manage DLA, the psychiatrist states that the appellant struggles with significant deficits which include low energy, poor concentration, fatigue, apathy, and headaches. As to ability to communicate, the psychiatrist assesses the appellant as good with regard to speaking and hearing, satisfactory for reading and poor for writing. Under mobility and physical ability the appellant is assessed as independent for walking indoors (poor endurance), walking out of doors climbing stairs, standing and lifting, with periodic assistance from another person required for carrying and holding, with the comment that he reports he is physically weaker than he was in the past.

With respect to cognitive and emotional functioning, the psychiatrist indicates a major impact on daily functioning for emotion, attention/concentration, executive, memory and motivation. A moderate impact is reported for other emotional or mental problems with a comment "very poor frustration tolerance." Minimal impact is assessed for impulse control, insight and judgment and other neuropsychological problems. No impact is assessed for bodily functions, consciousness, motor

activity, language or psychotic symptoms. The psychiatrist comments that, as previously stated, the appellant's inability to find and sustain employment is a result of chronic depression, chronic headaches and MS.

Under DLA, the appellant is assessed as independent for all aspects of personal care; requiring periodic assistance for basic housekeeping (with a comment that the appellant reports that he fatigues much more quickly since he developed MS); independent for all aspects of shopping except requiring periodic assistance for carrying purchases home; under meals, requiring periodic assistance for meal planning, food preparation and cooking; and independent for all aspects of paying rent and bills, medications and transportation. Under social functioning periodic support/supervision is required to be able to deal appropriately with unexpected demands, with the comment that the appellant depends on his father. The psychiatrist assesses good functioning with respect to how the appellant's mental impairment impacts his relationship with immediate social networks (his family) and marginal functioning with his extended social networks. With regard to help required the psychiatrist comments that the appellant does not require external supports beyond that provided by health professionals and his family. The appellant does not routinely use any assistive device or require the help of an assistance animal.

In his Notice of Appeal dated 31 July 2012, the appellant writes that since he was diagnosed with MS he has had increased deterioration of some of his body functions. He has begun losing feeling in his arms and legs – he now needs to wear a brace daily for his arm. He also is having to use a cane daily and is limiting some of his regular daily activities. He states that he doesn't think that it is understood that, yes, he can complete tasks such as something as simple as doing the dishes but it takes him anywhere from two – three days. He has found that he now has to bring someone in to help him as he cannot keep up maintaining his home. He goes on to write that some days he has such bad aches and pains that he has to force himself to get up and be motivated. The thought of not being able to move or seizing up terrifies him. When he has to ask for help his anxiety soars through the roof at the idea of losing his independence. He writes: "I have come a long way in my life to getting back on track from my addiction and having this diagnosis thrown at me has really changed my outlook on life and my future."

At the hearing, the appellant's advocate stated that she and others have observed a marked deterioration in the appellant's physical condition, due to his MS, since his PWD application was completed in April. He now uses a cane "24/7" and the Red Cross has visited him twice and provided him with an adjustable back chair, a raised toilet seat, a bed-assist, and a shower grab bar. A friend now visits him for an hour or so five days a week to tidy up his home and do other things around the house. His general practitioner (GP) would prefer him to use a walker. Those involved in his care are concerned over his safety in taking a shower when no one else is around. As a result of his deteriorating physical condition, the appellant's periods of depression are becoming more frequent. The appellant stated that his condition has reached the point where he can't stand anymore and that every day is in constant pain.

The advocate stated that, prior to reconsideration and because of the deterioration of his physical condition, she had arranged to have a new PR prepared by his GP and a new AR completed by an occupational therapist (OT). She stated that these documents were submitted prior to reconsideration, but noted they were not referred to in the reconsideration decision nor included in the appeal package. Unfortunately, she did not retain copies of these documents. The ministry

representative confirmed that he did not have these documents available to him.

The ministry stood by its position at reconsideration.

The panel finds that the new information provided by the appellant in his Notice of Appeal and by him and his advocate at the hearing concerning his medical condition is in support of the information and records that were before the ministry at the time of reconsideration, as this information clarified the extent of the deterioration of the appellant's physical condition as a result of his MS, as diagnosed in the PR. The panel therefore admits the new information as evidence pursuant to section 22(4) of the Employment and Assistance Act.

## 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 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*

In the reconsideration decision, the ministry reviewed the evidence set out in the PR and AR relating to the appellant's diagnosis of depression. The ministry noted that the psychiatrist had indicated significant deficits in cognitive and emotional functioning in the areas of executive, memory, emotional disturbance and attention and that the appellant has remained chronically depressed over the past year and this is complicated by his chronic migraine headaches and recently diagnosed MS. The ministry stated that as the appellant is able to independently manage the majority of his DLA with periodic assistance and requires periodic support and supervision with only one out of five social functions, evidence of a severe mental impairment has not been provided. Further he has good to marginal functioning with his immediate and external social networks. The ministry noted that the psychiatrist reports that he does "not require external supports beyond that provided by health professionals and his family." The ministry also noted that the psychiatrist reports that the appellant has "mild social impairment." The ministry stated that it would be reasonable to assume that evidence of a severe mental impairment would indicate more of the major social impairment. The ministry therefore found that there was not enough evidence to establish a severe mental impairment.

The position of the appellant is that his depression is so severe that he had to be hospitalized for it a year ago and to control it he needs to take a mix of powerful medications under the care of his psychiatrist. Moreover, it is the expert opinion of this specialist in psychiatry that as a result of his depression the appellant has significant deficits in 5 important areas of cognitive and emotional functioning, specifically executive, memory, emotional disturbance, attention and motivation with impacts on daily functioning assessed as major. This evidence should be sufficient to establish a severe mental impairment.

In light of the psychiatrist's assessment of a "mild social impairment," the panel considers it reasonable that the ministry would expect more evidence in other areas of the appellant's mental functioning in order to substantiate a severe mental impairment. The psychiatrist has identified major impacts in several areas of cognitive and emotional functioning. However, the narrative does not include any analysis, or even examples, as to how these impacts manifest in daily functioning. For example, for executive functioning, no description is provided as to how the appellant's mental impairment affects his planning, organizing, sequencing, abstract thinking, problem-solving or calculations. Without such a description or examples, the panel finds that the ministry reasonably determined that the information provided did not establish a severe mental impairment.

*Severity of physical impairment*

In the reconsideration decision, the ministry reviewed the functional skills (walk 5+ blocks, etc) reported by the psychiatrist. The ministry also noted that the psychiatrist assessed that the appellant can independently manage the majority of his mobility and physical functions, though periodic assistance with carrying and holding is reported, as he is "physically weaker than he was in the past." While acknowledging that the appellant may experience limitations as a result of his medical conditions, the ministry concluded that the information provided does not establish a severe physical impairment.

The position of the appellant is that it is clear his physical condition has deteriorated so much that the assessments made by psychiatrist are no longer applicable. The appellant, through his advocate,

attempted to bring forward up to date information at the time of reconsideration, but this information was not received nor was it added to the appellant's file.

The panel notes that the determination of the severity of impairment is at the discretion of the minister, taking into account all the evidence, including that of the appellant. However, the starting point must be medical evidence, with the legislation requiring that a medical practitioner identify the impairment and confirm that impairment will continue for at least two years. In the appellant's situation, documented information from a medical practitioner on his physical impairment as it has deteriorated over the past several months is not available. Given that the only medical evidence available is that contained in the PR and AR completed by the psychiatrist, and considering the lack of functional skill limitations reported in that PR and AR, the panel finds that the ministry reasonably determined that the information provided did not establish a severe physical impairment.

*Whether DLA are significantly restricted*

As to whether the information provided establishes that, in the opinion of a prescribed professional, the impairment directly and significantly restricts DLA either continuously or periodically for extended periods, the ministry noted that the psychiatrist indicates that the appellant is not restricted in his ability to manage the majority of his DLA. The ministry noted that he is restricted in his ability to manage mobility outside the home due to limited tolerance. The psychiatrist also indicates that his ability to manage social functioning is unknown although the psychiatrist comments that the appellant has a "mild social impairment." The ministry noted that as the appellant's assessor, the psychiatrist indicates that he can independently manage the majority of his DLA, with periodic assistance required with basic housework, meals and carrying purchases home, though the frequency and duration of this assistance has not been confirmed. The ministry concludes that overall, there is not enough evidence to establish that the appellant's impairment significantly restricts his ability to manage his DLA.

The position of the appellant is that the new AR prepared by an OT, would show that, as a result of his deteriorating physical condition, his ability to manage DLA is now significantly restricted. This is demonstrated by the need for someone to come to his home almost daily to help him with housekeeping and other chores. His mobility difficulties, requiring him to use a cane, arm brace and handicap devices, further restrict his ability to manage DLA.

The panel notes that this criterion requires the evidence to be "in the opinion of a prescribed professional." Therefore the panel must rely on the PR and AR before the ministry at reconsideration. With respect to the DLA relating to a person with a mental impairment i.e. make decisions about personal activities, care or finances; and relate to, communicate or interact with others effectively, the panel notes that the only information provided with respect to the first is that the appellant depends on his father to help him deal appropriately with unexpected demands, and with regard to the second that with extended social networks his social functioning is assessed as marginal and the psychiatrist notes a "mild social impairment." In the panel's view, assessing the totality of the evidence and the appellant's overall ability to function as reported in the PR and AR, it is difficult to assess the psychiatrist's opinion as confirming that these restrictions are "significant." The panel therefore finds that the ministry reasonably determined that this legislative criterion had not been met.



*Whether help to perform DLA is required*

In the reconsideration decision, the ministry noted that the psychiatrist has indicated that the appellant does not require any prostheses or aids and that he does not routinely use an assistive device to compensate for his impairments. As it had not been established that DLA are significantly restricted, the ministry concludes that it cannot be determined that significant help is required from other persons and that the appellant does not require the services of an assistance animal.

The position of the appellant is that, as a result of his deteriorating physical condition, he now uses a cane and probably should use a walker instead. In addition he now requires the help on almost daily basis of a friend to come in and do housekeeping and other chores.

The panel notes that the legislation requires that in the opinion of a prescribed professional the need for help must arise from direct and significant restrictions in the ability to perform DLA that are either continuous or periodic for extended periods. The panel finds that the ministry reasonably determined that since 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*

Having reviewed and considered all of the evidence and the relevant legislation, the panel finds that the ministry's decision that the appellant was not eligible for PWD designation was reasonably supported by the evidence and therefore confirms the ministry's decision.