

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (ministry) reconsideration decision dated August 9, 2012 which found that the appellant did not meet three of the five statutory requirements of Section 2 of the Employment and Assistance for Persons with Disabilities Act for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that his impairment is likely to continue for at least 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 the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act (EAPWDA), Section 2
Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), Section 2

PART E – Summary of Facts

The evidence before the ministry at the time of the reconsideration decision consisted of:

- 1) Person With Disabilities (PWD) Application: applicant information dated May 7, 2012, physician report dated May 21, 2012, and assessor report dated May 19, 2012;
- 2) Letter dated June 27, 2012 from the ministry to the appellant denying his request for PWD designation and enclosing a copy of the original decision summary;
- 3) Letter dated July 19, 2012 from the appellant's physician 'To Whom It May Concern' stating in part that the physician confirms that the appellant suffers from a combination of medical conditions: peptic ulcer disease, alcoholism, chronic joint problems and malnutrition. At 5'3" and 94 lbs., the appellant is very underweight which puts him at an increasing risk of developing further health problems; he is often very fatigued and is thus restricted in daily living activities (DLA) that involve anything more than slight physical exertion; as indicated in the physician report of the PWD application, the appellant requires periodic assistance from another person when lifting, carrying and holding, he also requires help from other persons to do laundry, basic housekeeping, cooking, using transit and grocery shopping; his ability to independently perform these activities is directly and significantly restricted; the appellant relies on a stair railing to ascend one flight of stairs; without the help of friends and volunteers, it would take the appellant significantly longer to perform the activities that he requires help with, or they would not get performed at all; though the appellant can walk short distances and climb one flight of stairs unaided, it takes him significantly longer to do so, it takes approximately 10 to 15 minutes to walk one block and at least 5 minutes to ascend one flight of stairs/ 10 minutes on bad days and he may need to take breaks;
- 4) Personal Statement by the appellant faxed July 26, 2012; and,
- 5) Request for Reconsideration- Reasons prepared by an advocate on behalf of the appellant.

Prior to the hearing, the appellant provided a written submission; the ministry advised that it relies on its reconsideration summary. The panel reviewed the appellant's written submission, which did not include new evidence, and accepted it as argument.

In his Personal Statement, the appellant states that he cannot walk for long without getting tired, that he cannot walk for more than 10 minutes maximum or two blocks at the most without being extremely fatigued. The appellant states that he cannot walk up hills or stairs because it is too difficult and so he must try to avoid them. This, as well as lifting, leaves the appellant exhausted, that he sometimes has difficulty breathing and he has joint pain in his right ankle. For housekeeping, once a week he brings friends over to help because he cannot move furniture or do his dishes. On his worst days, the appellant cannot get out of bed. The appellant states that without the help of his friends he would be unable to properly do his daily chores such as housekeeping or dishes. The appellant states that he cannot stand for longer than 10 to 15 minutes and this interferes with his ability to prepare any food that would take longer than this time. When he is grocery shopping he cannot carry more than one bag so he often relies on his friends to help. The appellant states that he has to climb one flight of stairs to get to his apartment and he always has to rely on the stair railing to ascend the stairs. At least once a week his fatigue is so severe it prevents him from leaving his apartment and this is socially isolating for him. The appellant states he cannot wait for transit for a long time due to his difficulties standing and he must sit down when he is travelling. When walking outdoors, he has to take small steps and walks a lot slower, it takes him about 10 to 15 minutes to walk one block. It also takes him at least 5 minutes to ascend one flight of stairs. On a really bad day, he would need to take a break on the stairs and it would take him over 10 minutes. The appellant states that he relies on the help of his friends for housekeeping, doing dishes, laundry, grocery shopping, and things that require any sort of heavy lifting. If they were not around, he would not be able to do these things.

In the Request for Reconsideration, the advocate states that the appellant suffers from a host of chronic medical conditions: peptic ulcer disease, alcoholism, post traumatic arthropathy (chronic ankle pain from an injury) and malnutrition. The main symptoms that the appellant experiences are debilitating fatigue, weakness and lack of energy, as well as chronic pain. The appellant's laundry appliances are located on the third floor of his building and he lives on the first floor and there is no elevator in his building. This poses a problem for the

appellant and creates a situation in which he requires assistance.

The physician who completed the physician report indicates the appellant has been his patient for 3 years and that he has seen the appellant 11 or more times in the past 12 months. In the physician report, the physician confirms a diagnosis of peptic ulcer disease, chronic alcoholism, post traumatic arthropathy, and malnutrition, all chronic. In describing the severity of the medical condition relevant to the appellant's impairment, the physician notes that for the peptic ulcer and arthropathy the appellant has chronic pain and an operation in 2006 for hematemesis (vomiting of blood), for the chronic alcoholism he has 4/4 on the CAGE (questionnaire for alcohol problems) and psychotherapy/cognitive-behavioural therapy, and the malnutrition is secondary to the alcoholism. The physician indicates that the appellant has not been prescribed medications or treatments that interfere with his ability to perform DLA and he does not require an aid for his impairment. The physician reports that the appellant can walk 1 to 2 blocks unaided on a flat surface, that he can climb one flight of stairs unaided, that he can lift 5 to 15 lbs. and can remain seated for 1 to 2 hours. The physician does not indicate whether there are any difficulties with communication. The physician reports that there are no significant deficits with cognitive and emotional function. The physician's additional comments include "...ADL's, IADL's independent; person with persistent multiple barriers."

The physician also prepared the assessor report and indicates that the appellant has a good to satisfactory ability to communicate in all areas. The physician indicates that the appellant is independent with walking indoors and walking outdoors, climbing stairs and standing, while taking significantly longer than typical with walking outdoors and climbing stairs. The physician indicates the appellant requires periodic assistance from another person with lifting and carrying and holding, with no further explanation provided. The physician indicates that the appellant is independent with all tasks of personal care including dressing, grooming, bathing, toileting, feeding self, regulating diet, and with transfers in/out of bed and transfers on/off chair, with no other explanation or description provided. The physician reports that the appellant requires periodic assistance from another person with doing laundry and with basic housekeeping, with no further comments. The physician indicates that the appellant is independent with two tasks of shopping, including going to and from stores and paying for purchases, while requiring periodic assistance with reading prices and labels, making appropriate choices and carrying purchases home. The physician reports that the appellant is independent with one of the tasks of managing meals, being safe storage of food, but requires periodic assistance from another person with meal planning, food preparation, and cooking, with no further explanation or description provided. The physician indicates that the appellant is independent with all tasks of paying rent and bills including banking and budgeting. The physician also indicates that the appellant is independent with managing medications (filling/refilling prescriptions, taking as directed and safe handling and storage), and with using public transit and requires periodic assistance with using transit schedules and arranging transportation, with no further comments provided. The physician did not complete the sections of the report designed for an applicant with an identified mental impairment or brain injury, including details of impacts to cognitive and emotional functioning and social functioning.

PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry reasonably concluded that the appellant is not eligible for designation as a person with disabilities (PWD) as he does not have a severe mental or physical impairment and that his daily living activities (DLA) are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods and that, as a result of those restrictions, it could not be determined that the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

The criteria for being designated as a person with disabilities (PWD) are set out in Section 2 of the EAPWDA as follows:

Persons with disabilities

2 (1) In this section:

"**assistive device**" means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform;

"**daily living activity**" has the prescribed meaning;

"**prescribed professional**" has the prescribed meaning.

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

(a) in the opinion of a medical practitioner is likely to continue for at least 2 years, and

(b) in the opinion of a prescribed professional

(i) directly and significantly restricts the person's ability to perform daily living activities either

(A) continuously, or

(B) periodically for extended periods, and

(ii) as a result of those restrictions, the person requires help to perform those activities.

(3) For the purposes of subsection (2),

(a) a person who has a severe mental impairment includes a person with a mental disorder, and

(b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires

(i) an assistive device,

(ii) the significant help or supervision of another person, or

(iii) the services of an assistance animal.

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

Section 2(1)(a) of the EAPWDR defines DLA for a person who has a severe physical or mental impairment as follows:

Definitions for Act

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 physical impairment:

The ministry argues that the evidence does not show that the appellant has a severe physical impairment. The ministry points out that in terms of physical functioning, the physician indicates that the appellant is able to walk 1 to 2 blocks unaided, can climb one flight of stairs unaided, and can lift 5 to 15 lbs. and remain seated for 1 to 2 hours. The ministry argues that the physician states that the appellant is independent with ADL and IADL. The ministry argues that the physician also indicates that the appellant takes significantly longer walking outdoors and climbing stairs and that he needs periodic assistance with lifting and carrying and holding. The ministry argues that the functional skills limitations described by the physician are more in keeping with a moderate degree of impairment.

The appellant argues, through his advocate, that severe physical impairment is demonstrated by the appellant's dependence on friends for help, that the appellant periodically relies on the help of friends to do laundry, basic housekeeping, cooking, and to use transit and to go grocery shopping. The advocate points out that the physician provided an additional statement that confirms the appellant gets help with housekeeping and grocery shopping at least once per week and that without help the activities would not get done at all. The advocate argues that assistance is required for an extended period because the physician has indicated that the condition is likely to last for more than two years. The advocate argues that the appellant's functional skill limitations are indicative of a severe physical impairment rather than a moderate degree of impairment as the physician has provided evidence that the appellant cannot independently climb stairs because he must rely on the stair railing and periodically take breaks and the appellant states that he cannot stand for longer than 10 to 15 minutes, he walks a lot slower taking up to 15 minutes to walk one block, and it takes up to 10 minutes to ascend one flight of stairs. The advocate relies on the court decisions in Hudson and others as authority for the position that in interpreting social welfare legislation any ambiguity should be resolved in favour of the appellant seeking benefits under the legislation.

The panel finds that the evidence of a medical practitioner has confirmed a diagnosis of several chronic conditions, including peptic ulcer disease, alcoholism, post traumatic arthropathy, and malnutrition. In describing the severity of the medical condition relevant to the appellant's impairment, the physician notes that for the peptic ulcer and arthropathy the appellant experiences chronic pain and had an operation in 2006 for hematemesis (vomiting of blood), for the chronic alcoholism he has 4/4 on the CAGE (questionnaire for alcohol problems) and psychotherapy/cognitive-behavioural therapy, and the malnutrition is secondary to the alcoholism. The physician indicates that the appellant has not been prescribed medications or treatments that interfere with his ability to perform DLA and he does not require an aid for his impairment. The physician reports that the appellant can walk 1 to 2 blocks unaided on a flat surface, that he can climb one flight of stairs unaided, that he can lift 5 to 15 lbs. and can remain seated for 1 to 2 hours. The physician's additional comments include "...ADL's, IADL's independent; person with persistent multiple barriers." In the letter dated July 19, 2012, the physician indicates that the appellant relies on a stair railing to ascend one flight of stairs and though the appellant can walk short distances and climb one flight of stairs unaided, it takes him significantly longer to do so, it takes approximately 10 to 15 minutes to walk one block and at least 5 minutes to ascend one flight of stairs/ 10 minutes on bad days and he may need to take breaks. In his Personal Statement, the appellant states that he cannot walk for long without getting tired, that he cannot walk for more than 10 minutes maximum or two blocks at the most without being extremely fatigued. When walking outdoors, he has to take small steps and walks a lot slower, it takes him about 10 to 15 minutes to walk one

block. The appellant also states that he has to climb one flight of stairs to get to his apartment and he always has to rely on the stair railing to ascend the stairs. It also takes him at least 5 minutes to ascend one flight of stairs. On a really bad day, he would need to take a break on the stairs and it would take him over 10 minutes. On his worst days, the appellant cannot get out of bed. The appellant states that he cannot stand for longer than 10 to 15 minutes. In the assessor report, the physician indicates that the appellant is independent with walking indoors and walking outdoors, climbing stairs and standing, while taking significantly longer than typical with walking outdoors and climbing stairs. The physician indicates the appellant requires periodic assistance from another person with lifting and carrying and holding, with no further explanation provided.

The panel finds that the evidence demonstrates that the appellant is independent with mobility and is able to walk indoors and outdoors, climb stairs and stand without the use of an assistive device or any assistance from another person, although walking outdoors and climbing stairs takes longer as a result of breaks that the appellant must take due to fatigue on his 'bad days', for which there is no indication of the frequency. The panel finds that a handrail used for climbing stairs is not an assistive device as defined in the legislation. In the assessor report, the physician indicates the appellant requires periodic assistance from another person with lifting and carrying and holding, with no further explanation provided. The advocate argues that the additional statement provided by the physician confirms the appellant gets help with housekeeping and grocery shopping at least once per week and that without help the activities would not get done at all, that assistance is required for an extended period because the physician has indicated that the condition is likely to last for more than two years. However, the panel finds that the physician also indicated in the PWD application that the appellant is independent with his DLA and that the appellant is, rather, a person with persistent multiple barriers to employment, and the panel finds that the duration of the medical conditions is not indicative of the frequency and duration of the assistance required to perform tasks. Therefore, the panel finds that the ministry's determination that the evidence currently available does not establish a severe physical impairment was reasonable.

Severity of mental impairment:

The ministry argues that the evidence does not show that the appellant has a severe mental impairment. The ministry points out that the physician reports no significant deficits to cognitive and emotional functioning and adds no further comments in the additional letter submitted. The appellant does not argue that he has a severe mental impairment.

The panel finds that the evidence of a medical practitioner confirms a diagnosis of chronic alcoholism in the category of "other conditions," and the physician indicates that psychotherapy/cognitive behavioural therapy is appropriate for this condition. In the assessor report, the physician indicates that the appellant has a good to satisfactory ability to communicate in all areas. In the physician report, the physician indicates that there are no significant deficits with cognitive and emotional function. The physician did not complete the sections of the assessor report designed for an applicant with an identified mental impairment or brain injury, including details of impacts to cognitive and emotional functioning and to social functioning. Therefore, the panel finds that the ministry's decision, which concluded that the evidence does not establish a severe mental impairment, was reasonable.

Whether the ability to perform DLA is significantly restricted:

The ministry argues that the evidence does not establish that the appellant's daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods. The ministry points out that the physician reports that the appellant needs periodic assistance with laundry, basic housekeeping, going to/from stores, reading prices and labels, making appropriate choices, carrying purchases home, meal planning, food preparation, cooking, using transit schedules and arranging transportation, however no information was provided on how often the appellant requires assistance. The ministry argues that the physician indicates that the remainder of the appellant's DLA are independent and there is no indication that the appellant takes significantly longer to perform them.

The appellant argues, through his advocate, that the evidence of his physician establishes that he is directly and significantly restricted in his ability to perform his DLA periodically for extended periods of time. The advocate argues that the additional statement by the physician confirms that the appellant gets help with housekeeping and grocery shopping at least once per week and that, without help, the activities would not get done at all. The advocate argues that being unable to perform activities without help demonstrates that he help is necessary. The advocate argues that the assistance is required for an extended period because the physician has indicated that the condition is likely to last for more than two years. The advocate referred to the court decision in Hudson as authority for the position that there must be evidence from a prescribed professional indicating a direct and significant restriction on at least two DLA and that there is no statutory requirement that more than two DLA be restricted.

The panel finds that the legislation requires that the ministry must be satisfied that the opinion of a prescribed professional confirms that the appellant's ability to perform DLA is directly and significantly restricted either continuously or periodically for extended periods. In terms of preparing his own meals, the physician indicated that the appellant is independent with safe storage of food while requiring periodic assistance from another person with meal planning, food preparation, and cooking, with no further explanation or description provided. In the letter dated July 19, 2012, the physician indicates that the appellant requires periodic assistance from another person with cooking. In his Personal Statement, the appellant states that he cannot stand for longer than 10 to 15 minutes and this interferes with his ability to prepare any food that would take longer than this time. For managing personal finances, the physician reports that the appellant is independent with all tasks of paying rent and bills including banking and budgeting. In terms of shopping for his personal needs, the physician indicates that the appellant is independent with going to and from stores and paying for purchases while requiring periodic assistance from another person with reading prices and labels, making appropriate choices, and carrying purchases home, with no further comments provided. In his Personal Statement, the appellant states that he relies on the help of his friends for grocery shopping and things that require any sort of heavy lifting.

For use of public or personal transportation facilities, the physician indicates that the appellant is independent with using public transit while requiring periodic assistance for using transit schedules and arranging transportation, with no further comments provided. The appellant states, in his Personal Statement, that he cannot wait for transit for a long time due to his difficulties standing and he must sit down when he is travelling. With respect to performing housework to maintain the appellant's place of residence in an acceptable sanitary condition, the physician reports that the appellant requires periodic assistance from another person with doing laundry and basic housekeeping, with no other comments added. The appellant states that without the help of his friends he would be unable to properly do his daily chores such as housekeeping or dishes. The appellant states that once a week he brings friends over to help because he cannot move furniture or do his dishes.

For moving about indoors and outdoors, the appellant is independent with mobility and is able to walk indoors and outdoors, climb stairs and stand without the use of an assistive device or any assistance from another person, although walking outdoors and climbing stairs takes longer as a result of breaks that the appellant must take due to fatigue on his 'bad days', for which there is no indication of the frequency. Regarding performing personal hygiene and self care, the physician indicates that the appellant is independent with all tasks, including dressing, grooming, bathing, toileting, feeding self, regulating diet, transfers in/out of bed and on/off chair. With respect to managing his personal medications, the physician reports that the appellant is independent with all tasks, including filling/refilling prescriptions, taking as directed, and safe handling and storage. For making decisions about personal activities, care or finances and relating to, communicating or interacting with others effectively, the physician did not complete the sections of the assessor report designed for an applicant with an identified mental impairment or brain injury and providing details of impacts to social functioning. However, the physician reports that the appellant has a good to satisfactory ability to communicate in all areas. In his Personal Statement, the appellant states that at least once a week his fatigue is so severe it prevents him from leaving his apartment and this is socially isolating for him.

Although the appellant's physician has reported the requirement for periodic assistance in basic housekeeping, 3 out of 5 tasks of shopping, 3 out of 4 tasks of managing meals and 1 task of managing transportation, the panel finds that the ministry reasonably concluded that there is not sufficient evidence to determine that the need for assistance is for extended periods. In the additional letter dated July 19, 2012, the physician reports that the appellant is 'often' very fatigued and is thus restricted in DLA that involve anything more than slight physical exertion, however it is not clear from this additional information how often the assistance is required and for how long. The advocate argues that the assistance is required for an extended period because the physician has indicated that the condition is likely to last for more than two years, however the panel finds that the duration of the medical conditions is not indicative of the frequency and duration of the assistance required to perform tasks. The advocate argues further that there is no statutory requirement that more than 2 DLA be restricted, however the panel finds that the ministry reasonably determined that the evidence does not establish a direct and significant restriction on a minimum of two DLA on either a continuous basis or periodically for extended periods of time. Therefore, the panel finds that the ministry's determination that the evidence of a prescribed professional does not establish a direct and significant restriction on the appellant's ability to perform DLA either continuously or periodically for extended periods, as required by Section 2(2)(b)(i) of the EAPWDA, was reasonable.

Whether help to perform DLA is required:

In determining whether the ministry reasonably concluded that the appellant does not require the significant help or supervision of another person or the use of an assistive device, the panel notes the information from the physician that the appellant lives alone and receives assistance from friends and volunteers and does not use an assistive devices. As it has not been established that the ability to perform DLA is significantly restricted, the panel finds that the ministry's conclusion that the requirement for significant help or supervision of another person, an assistive device, or the services of an assistance animal to perform DLA, under Section 2(2)(b)(ii) of the EAPWDA, has not been met was reasonable.

Conclusion:

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