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PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (the ministry) reconsideration decision of September 11, 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

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PART E – Summary of Facts

With the consent of the appellant, the ministry representative had an observer accompany her to attend the hearing.

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

- The appellant's application for designation as a PWD. The application included a self-report (SR) signed by the appellant on June 7, 2012, a physician report (PR) signed by the appellant's physician dated April 30, 2012, and an assessor report (AR) signed by a registered nurse dated May 29, 2012.
- A letter and decision summary from the ministry to the appellant, dated July 20, 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 August 8, 2012.
- A memo dated August 7, 2012 from a specialist at a bone and joint clinic diagnosing the appellant with right knee osteoarthritis.
- A hand-written note from the appellant's physician dated August 27, 2012.

In his SR the appellant wrote that his depression causes him to experience severe isolation for up to 3 weeks at a time. He currently has no consistent support except for a neighbour who helps with cooking and dishes. The appellant wrote that his DLA are also affected by his poor physical health – he has been unable to use his left hand since February 2011 due to surgery, and expects to never regain full use of the hand. At the time of the SR the appellant was still wearing a cast on his left wrist. He also wrote that he has arthritis in both knees which causes unbearable pain which limits his ability to walk most days. He uses a knee brace. Finally, the appellant noted that he has hepatitis C, which causes insomnia and leaves him in a permanent state of exhaustion. He has a very poor quality of life and assistance is needed in every aspect. The appellant requested new housing with disability access, homecare, and assistive devices such as a second knee brace and cane.

In the PR, the appellant's physician diagnosed him with depression, avascular necrosis (AVN) of the left scaphoid (wrist), and hepatitis C. The physician did not complete the section of the PR to indicate how long she has known the appellant, but indicated she had seen the appellant 11 or more times in the past 12 months and that he is a "good patient re: compliance". She wrote that the appellant is right-handed and that the bones in the left wrist will be fused. The appellant is unable to use his left hand because of limited movement and pain. Throughout the PR, the physician at first wrote that the AVN affected the appellant's right wrist and then subsequently corrected to refer to the left wrist. In the health history portion of the PR the physician reported that the appellant's depression is linked with severe insomnia. The appellant's memory is significantly impaired and he has suicidal thoughts and extreme anxiety with social isolation. With respect to hepatitis C the physician indicated the appellant has tried treatment twice but failed. The appellant has been prescribed medication which causes severe daytime drowsiness and mental slowing. The physician indicated the appellant does not require any prostheses or aids for his impairment. With respect to functional skills, the physician reported that the appellant can walk 4+ blocks and climb 5+ stairs unaided, has no limitations to remaining seated, but cannot do any lifting due to the left wrist AVN. She noted no difficulties with

longer to perform the tasks of dressing, brushing teeth, house work, and food preparation. The appellant has been diagnosed with osteoarthritis of his right knee and is unable to kneel without pain, has reduced movement in the right knee, and is unable to lift objects over 10 pounds.

At the hearing the appellant submitted the following 12 documents:

1. January 9, 2012 – report on CT scan of left wrist
2. January 30, 2012 – consult report re: left wrist
3. March 19, 2012 – x-ray/ultrasound report re: both knees
4. April 30, 2012 – procedure report re: left wrist
5. June 1, 2012 – post operative x-ray/ ultrasound report on left wrist
6. June 13, 2012 – post operative x-ray report left wrist
7. June 13, 2012 – outpatient department clinic note re: left wrist
8. June 15, 2012 – postoperative report re: left wrist
9. June 26, 2012 – surgical consult cover letter and report re: knees
10. July 26, 2012 – x-ray report re: knees
11. August 7, 2012 – physician's memo re: right knee (already included as part of the appeal record)
12. August 15, 2012 – outpatient department clinic note re: knees

On questioning, the appellant's advocate advised that she had had these documents for at least a week prior to the hearing, but had not submitted them earlier since in her previous experience it was permissible to submit them at the hearing. The panel reminded the advocate of section 5.2(g) of the tribunal's Practices and Procedures which specifies that additional documentation should be submitted to the tribunal at least 3 business days before the hearing. The ministry did not object to submission of the new information. The panel reviewed the documents and found that they provide more detail with respect to the appellant's physical impairments. The panel admitted the documents as evidence as they constitute written testimony in support of information and records that were before the ministry at the time of reconsideration, in accordance with s. 22(4) of the *Employment and Assistance Act.*

In the January 30, 2012 consult report which was initiated for the left wrist, under the heading "social history", the consulting physician noted "[The appellant] is applying for disability again for psychiatric reasons, depression and anxiety." With respect to the wrist, in the June 13, 2012 outpatient department clinic note the physician noted that x-rays "show a satisfactory fusion mass in good alignment." The wrist operation occurred on April 30, 2012. In the August 15, 2012 outpatient department clinic note the consulting physician reported the results of his physical examination of the wrist as follows: "His range of motion is 35 degrees extension, 30 degrees of flexion. He can make a full fist. He can make a full curl. He reports pain at end range of motion which is a stretching pain, but otherwise nothing all of his original pain is better. His neurovascular status is normal and his incisions are healed." The consulting physician also noted that "He has ongoing problems with the knee, does not think he can return to construction work because of the knee and the wrist. I think it is reasonable that he will be able to return to construction work with regards to the wrist, but perhaps his

communication, but indicated the appellant has significant deficits with respect to 6 of 11 categories of cognitive and emotional function: executive (*planning, organizing etc.*), memory (*ability to learn and recall information*), psychotic symptoms (*delusions, hallucinations*), emotional disturbance (*depression, anxiety*), motivation (*loss of initiative or interest*), and attention/sustained concentration. The physician commented "depression – resulting in insomnia, mental slowness decreased ability to perform [DLA]". She noted that "AVN of left hand severely limits function of left hand – painful". Further with respect to restrictions of ability to perform DLA, the physician indicated that the appellant is continuously restricted in personal self-care (due to AVN), meal preparation, and basic housework (AVN). She also indicated a restriction of management of finances (decreased memory), but didn't indicate whether the restriction is continuous or periodic.

The registered nurse who completed the AR indicated that she has known the appellant since April 2012 and had seen him 2-10 times. The appellant lives alone. She reported the appellant's impairments as being avascular necrosis of left scaphoid, and depression/anxiety. His ability to communicate is satisfactory. In terms of mobility and physical ability, the appellant is shown as being independent with walking indoors and outdoors (though he takes significantly longer than typical outdoors because of depression/isolation-induced avoidance), climbing stairs and standing. He needs continuous assistance with lifting and periodic assistance with carrying/holding because he can't bear any weight with his left hand/arm. He can carry a single shopping bag of about 10 pounds on his right side only. With respect to impacts on cognitive and emotional functioning, the registered nurse indicates no impact with respect to 7 of 13 categories. There are minimal impacts on attention/concentration, executive, and motivation; moderate impacts on bodily functions (*sleep*), and memory; and a major impact on emotion (*e.g. excessive or inappropriate anxiety, depression, etc.*). The registered nurse wrote that despite being compliant with medications the appellant isolates and experiences increased anxiety and decreased attention span during depressive episodes, and his minimal use of the left hand causes the appellant to experience depression and loss of interest in activities. She reports the appellant as being independent in 8 of 8 categories of personal care, but he takes significantly longer than typical with dressing, grooming and bathing due to his left hand. The appellant is independent in 4 of 5 aspects of shopping, but takes significantly longer than typical with reading prices and labels and paying for purchases. The appellant requires continuous help carrying purchases home due to his left hand, and he experiences increased anxiety in stores dealing with the public. The appellant is independent in meal planning and safe storage of food, but requires periodic assistance with food preparation and cooking because of his left hand. He is independent in paying rent and bills (*but takes longer due to avoidance of lineups*), managing medications, and transportation (*but takes significantly longer than typical using public transportation because of avoidance of crowds*). The appellant is independent in 3 of 5 aspects of social functioning but needs periodic assistance with developing/maintaining relationships (*avoidance of other people due to depression/anxiety*) and dealing appropriately with unexpected demands (*can be overwhelmed*). He is marginally functioning in terms of both immediate (*no personal relationships*) and extended social networks. The registered nurse indicated the appellant would benefit from counselling and from consistent housekeeping services /home support. She indicated no use of assistive devices, but noted the appellant could benefit from an occupational therapist assessment to see if there are any assistive devices that could be helpful.

In the physician's hand-written note of August 27, 2012 she noted that the appellant doesn't have full range of motion in his left wrist because 4 bones have been fused. He is unable to do any manual labour in construction which is the only vocation in which he is trained. It takes him 1 to 2 hours

knee is going to be a limiting factor."

With respect to the appellant's knees, the June 26, 2012 report refers to chronic bilateral knee pain due to post-traumatic arthritis in both knees, but notes knee ROM [range of motion] is within normal limits. The physician notes "[The appellant] would likely no[t] benefit from an Unloader brace given the ligament laxity in the medial direction."

At the hearing the appellant, through his advocate, said that if one reads the application package and additional evidence in its entirety, it proves the appellant's case. The advocate expressed the opinion that the physician was likely only going by memory when she filled out the PR and didn't include the total assessment or address the appellant's knee problem. The assessor confirms the appellant's daily struggles. He needs orthopedic shoes, knee braces etc. that he won't be able to get on basic income assistance. The assessor said that in her observation the appellant has deteriorated in the last one and a half years – unless he has an appointment to attend he doesn't leave his house because it is hard to get around. On questioning, the advocate said that some DLA take longer, others can't be done at all. For example, bathing – reaching for body parts is difficult. When asked why the registered nurse didn't mention mobility in the AR, the advocate said that the appellant may have assumed that since the registered nurse worked in the same clinic as the appellant's physician that she would have access to the file material. The advocate said that depression/anxiety is not the primary impairment. The advocate also stated that she works with people on disability all the time and all others that she sees like the appellant are on disability assistance.

The panel accepted the appellant's oral testimony into evidence as being in support of the information and records that were before the ministry at the time of reconsideration, in accordance with s. 22(4) of the *Employment and Assistance Act*.

The ministry relied on its reconsideration decision and did not submit any new evidence.

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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 periodically 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.

(2) For the purposes of the Act, **"prescribed professional"** means a person who is authorized under an enactment to practice the profession of

(a) medical practitioner,

(b) registered psychologist,

(c) registered nurse or registered psychiatric nurse,

(d) occupational therapist,

(e) physical therapist,

(f) social worker,

(g) chiropractor, or

(h) nurse practitioner.

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Severe Physical Impairment

The appellant's position is that he has almost no use of his left hand and his mobility is severely limited by osteoarthritis in his knees. Through his advocate the appellant argued that the physician must have filled the PR out from memory and presumably forgot to address the knee problem.

The ministry's position, as set out in the reconsideration decision, is that the physician and assessor (registered nurse) have not provided sufficient evidence to establish a severe physical impairment. The ministry acknowledges limitations with the left hand, but says no evidence was presented which indicates the appellant cannot manage many of his DLA with his right hand.

To assess the severity of an impairment one must consider the impact on daily functioning in terms of functional skill limitations, cognitive and emotional deficits, restrictions on the ability to perform DLA, and assistance required. On assessing the evidence, the panel notes that in the PR the appellant's physician reports the appellant's physical functional skills as having no limitation, other than "no lifting" due to AVN of the left wrist. In terms of DLA the only physical limitations arise from the left wrist. There is no diagnosis in the PR of knee problems or any indication of limitations to DLA due to knee problems. The same is true of the AR. The only physical limitations noted are due to loss of use of the left hand. No knee problems are noted and despite the advocate telling the panel that the appellant limits his outings because "it is too hard to get around", the AR – like the PR – reports the appellant as being independent with respect to walking indoors, climbing stairs and standing. The only limitation to walking is noted as being "avoidance of outdoors due to depression/isolation". In her August 27, 2012 hand-written note the appellant's physician noted that the appellant has reduced range of motion in his right knee, but the consulting physician's report of June 26, 2012 describes the range of motion as being within normal limits. Even in the additional medical information submitted by the appellant at the hearing, there is no medical evidence provided as to whether or how the condition of the appellant's knees limits his ability to perform DLA.

The appellant's physician and the registered nurse have provided no explanation as to why the appellant's lifting ability and other DLA are so limited by his left hand when his dominant right hand apparently has no impairment. With respect to impacts on the left wrist, it appears the physician and the registered nurse may be relying on the appellant's narrative in concluding that the appellant's DLA are limited by his left hand. The consulting physician, who conducted a post-operative physical exam of the left hand and wrist, expressed the opinion that it is reasonable to believe the wrist would not prevent the appellant from returning to construction work. That conclusion cannot be reconciled with the evidence in the PR and AR that the appellant's left wrist significantly impacts his ability to perform such DLA as personal self-care and basic housework.

Given the lack of medical evidence of restrictions posed by the right knee, and the conflicting evidence with respect to the severity of the limitations resulting from the left wrist, the panel finds that the ministry reasonably concluded that the appellant does not have a severe physical impairment.

Severe Mental Impairment

The appellant's position, as expressed in his SR, is that his depression causes him to isolate himself and that due to his "severe" isolation many of his DLA do not get done at all. The appellant's advocate pointed out that the evidence, when considered as a whole, shows that the appellant meets the PWD criteria and that the mental impairment is not the primary factor.

The ministry's position, as expressed in the reconsideration decision, is that the AR shows only moderate, minimal or no impact to the appellant's cognitive and emotional functioning. There is no information to explain the frequency and duration of depressive episodes. The appellant's physician indicates the appellant is not restricted in his ability to manage social functions. The ministry maintains there is not enough evidence to establish a severe mental impairment.

In the PR the physician noted depression has led to significant deficits with cognitive and emotional function which affect the appellant's ability to perform only 1 DLA, that being management of finances

(because of decreased memory). The AR provides more detail on cognitive and emotional functioning, showing that the only major impact is to emotion (depression), with moderate impacts to bodily functions (*sleep disturbance*) and memory. The physician indicated no restriction of social functioning, and the registered nurse confirmed that the appellant is functioning marginally in this area. Other impacts of the appellant's mental impairment are with respect to some aspects of mobility, use of public transportation, and payment of rent and bills – according to the registered nurse all due to avoidance of going out because of depression. The advocate, on the other hand, has said that much of the appellant's reluctance to leave the home is due to his knees which make it "too hard to get around", and that the appellant's mental impairment "is not the primary impairment".

Viewed as a whole, neither the professional medical evidence nor the appellant's own testimony supports the appellant's position that his mental impairment is severe. Accordingly, the panel finds that the ministry reasonably determined that the appellant has not satisfied this criterion.

Restrictions to DLA

The appellant's position is that his ability to perform DLA is directly and significantly restricted by his mental and physical impairments, in some respects continuously and other respects periodically for up to 3 weeks at a time.

The ministry's position, as set out in its reconsideration decision, is simply that the physicians have not provided enough evidence to confirm that the appellant's impairments significantly restrict his ability to manage his DLA.

As noted above in the discussion of severity, the appellant's physician noted direct restrictions of 4 DLA – 2 expressly due to his left wrist (personal self-care and basic housework), 1 presumably due to his left wrist (meal preparation) and 1 due to decreased memory (management of finances). The physician did not expressly note whether management of finances was continuously or periodically restricted, but the context indicates the restriction is probably continuous. The appellant's physician has noted that "AVN of left hand severely limits function of left hand – painful", yet the consulting surgeon who conducted a post-operative physical examination of the left hand after the PR was completed feels that it likely does not limit the appellant's ability to do construction work. Most restrictions identified by the registered nurse in the AR are not marked as being either continuous or periodic, are described only as "takes significantly longer than typical", and most are explained as "being due to no use of left hand".

Given the conflicting evidence regarding the significance of the restrictions caused by the left hand, the positive post-operative reports by the consulting physician, the lack of any supporting evidence to show that the knee problem restricts the appellant's ability to perform DLA, and the evidence that the appellant manages his DLA independently except for periodic assistance from his neighbour with respect to cooking and washing dishes, the panel finds that the ministry reasonably concluded that the appellant's ability to perform DLA is not directly and significantly restricted either continuously or periodically for extended periods.

Help with DLA

The appellant's position is that he requires assistive devices and home care in order to manage his DLA.

The ministry's position, as set out in its reconsideration decision, is that as it has not been established that DLA are significantly restricted it cannot be determined that significant help is required from other persons. The ministry also referred to the evidence of the registered nurse that the appellant does not require the use of either an assistive device or an assistance animal.

On the evidence, the appellant says that the only consistent assistance he receives is help from a neighbour with respect to cooking and dish washing. It is difficult to describe this as being the "significant help or supervision of another person" as required by EAPWDA s. 2(3)(b)(ii). Neither the appellant's physician nor the registered nurse identified the appellant as using assistive devices, though the registered nurse indicated that an occupational therapist may be able to determine whether there are any assistive devices that could be helpful. The appellant wrote in his SR that he uses one knee brace, but the consulting physician indicated in his June 26, 2012 report that at least one type of knee brace would not be helpful. There is no evidence that the appellant requires an assistance animal.

The panel finds that based on the evidence the ministry reasonably determined that the appellant does not require help to perform DLA as defined by the legislation.

Conclusion

Having reviewed and considered all of the evidence and the relevant legislation, the panel finds that the ministry's decision declaring the appellant ineligible for PWD designation was reasonably supported by the evidence and was a reasonable application of the legislation in the circumstances of the appellant, and therefore confirms the ministry's decision.