

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development's (the "Ministry") August 24, 2012 reconsideration decision in which the Ministry determined that the Appellant was not eligible for Persons with Disabilities ("PWD") designation because he did not meet all of the requirements for PWD designation set out in section 2(2) of the Employment and Assistance for Persons with Disabilities Act. Specifically the Ministry was not satisfied that the Appellant has a severe mental or physical impairment that in the opinion of a prescribed professional

- (i) directly and significantly restricts his ability to perform daily living activities either continuously or periodically for extended periods; and,
- (ii) as a result of those restrictions he requires help to perform those activities.

The Ministry was satisfied that the Appellant has reached 18 years of age and in the opinion of a medical practitioner his impairment is likely to continue for at least 2 years.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act (EAPWDA) Section 2(2) and 2(3).

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR) Section 2.

PART E – Summary of Facts

For its reconsideration decision the Ministry had the following evidence:

1. Appellant's PWD application consisting of a self-report, a physician's report ("PR") and an assessor's report ("AR"). Both the PR and the AR were completed on May 3, 2012 by a doctor who indicated he has known the Appellant since March 29, 2012 and had seen him between 2-10 times in the 12 months preceding the reports.
2. Appellant's request for reconsideration with a written argument from his advocate. The advocate reviewed the PWD legislation and argued that based on all of the information provided the Appellant met the requirements for PWD designation. To support this argument, the advocate submitted an August 14, 2012 letter signed by the doctor who completed the PR and the AR. That letter is described below.
3. Copy of an August 15, 2012 Ministry fax to the doctor who completed the PR and the AR, asking the doctor to review the attached original PWD application and to address the following items:
 - Whether he wanted to make changes to PR regarding the Appellant's cognitive and emotional functioning;
 - To clarify which daily living activities the Appellant needs assistance with and the frequency of assistance (continuous or periodic); and,
 - Whether he would like to make changes to the AR information about the Appellant's physical functioning skills.

The doctor faxed that request and the forms back on August 23, 2012 with no changes.

In the self-report for his PWD application the Appellant wrote that a previous injury left his hip and leg shattered. He had a full hip replacement in October 2012 but he still has nerve damage that causes muscle weakness and leaves him in pain much of the time. The Appellant stated that he takes medications to regulate his blood pressure because he has hypertension and he takes pain killers. The Appellant wrote that he also has hepatitis C from a blood transfusion. The Appellant stated that he usually uses a cane for stability when walking. All of these factors have impacted his ability to secure employment. The Appellant wrote that he cannot lift heavy objects and has difficulty stooping over or bending his knees to lift properly. He indicated that he is not physically capable of doing difficult manual labor any more. The Appellant also wrote that just being on pain medication affects his ability to fully function, as well as his ability to walk normally. His usual employment requires physical exertion, heavy lifting, bending, stooping, etc. The Appellant stated that he is no longer able to do these things. He has become distraught because he cannot find work so that he can support and take care of himself.

The doctor, in the PR, described the Appellant's diagnoses as hepatitis C from a blood transfusion, left hip replacement in October 2010 and hypertension. With respect to the severity of the Appellant's impairments, the doctor wrote "pain to lt [left] hip – chronic". The doctor also wrote that the Appellant states that he is always in pain and has some limited movement of the left hip. The doctor indicated that the Appellant takes medications for hypertension and pain. The doctor also indicated that the Appellant uses a cane when he needs to walk more than 4 blocks and he has been referred to an orthopedic clinic. As for the Appellant's physical functional skills, the doctor reported that the Appellant can walk unaided on a flat surface for 2-4 blocks, can climb 5+stairs unaided, lift 15-35lbs and can remain seated for 1-2 hours. The doctor also reported that the Appellant does not have any significant deficits with cognitive and emotional functions.

In the AR the same doctor reported that with respect to mobility and physical ability, the Appellant is independent walking indoors, standing, lifting, and with carrying and holding. The doctor also reported that the Appellant uses a cane to walk outdoors for more than 4 blocks and uses hand rails when climbing stairs. The doctor wrote "N/A" in the section regarding cognitive and emotional functioning. With respect to the Appellant's ability to manage daily living activities, the doctor reported that the Appellant independently manages all of the daily living activities listed in the AR; namely, all aspects of personal care, basic housekeeping, shopping, meals, paying rent and bills, medications, transportation and social functioning. The only comment the doctor made was with respect to carrying purchases home. He noted that the Appellant is independent in this activity, but he added "not too heavy". The doctor also indicated that the Appellant has good functioning in his immediate and extended social networks.

The following statements about the Appellant are in the August 14, 2012 letter signed by the doctor:

- The Appellant has pain in both hips. He had his left hip replaced years ago and he has also developed pain in his right hip. The Appellant has seen an orthopedic specialist for the pain in both hips.
- The Appellant was on pain medication which caused internal bleeding.
- The Appellant has difficulty with walking more than 2-4 blocks due to pain. He also has difficulty with prolonged standing and climbing more than 5 stairs. He uses a cane to help him with mobility and he needs to hold hand rails to help him to go up stairs.
- The Appellant has difficulty with carrying more than 10 pounds from shopping.
- The Appellant denied any significant problem with housekeeping except for lifting heavy weights and if he stands for prolonged periods.
- The Appellant has hypertension. He takes medication for that.
- The Appellant had depression in the past and still feels depressed, lacks motivation, and experiences tiredness off and on. The Appellant is on medication for his depression and his depression affects his mood, sleep, motivation and fatigue.
- The Appellant has medical conditions which will likely continue for more than 2 years, and which affect his mobility (i.e., walking, standing, climbing stairs), his ability to carry groceries, to bank, to visit his healthcare professionals, etc.
- The Appellant needs significant help to perform his daily living activities.

For this appeal hearing, the advocate submitted written argument and the same August 2012 letter. The arguments are set out in Section F of this decision.

The Ministry relied on its reconsideration decision.

PART F – Reasons for Panel Decision

The issue in this appeal is whether the Ministry reasonably determined that that the Appellant was not eligible for PWD designation because he did not meet all of the requirements for PWD designation as set out in section 2(2) of the EAPWDA, and specifically that the Appellant does not have a severe mental or physical impairment that in the opinion of a prescribed professional (i) directly and significantly restricts his ability to perform daily living activities either continuously or periodically for extended periods; and, (ii) as a result of those restrictions he requires help to perform those activities.

The eligibility criteria for PWD designation are set out in the following sections of the EAPWDA:

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 "daily living activities" referred to in EAPWDA section 2(2)(b) are defined in the EAPWDR as:

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.

The Panel will consider each party's position regarding the reasonableness of the Ministry's decision under the applicable PWD criteria at issue in this appeal.

Severe Impairment

In its reconsideration decision the Ministry stated that it considered the Appellant's self-report, the PR, the AR and also the doctor's August 14, 2012. The Ministry reviewed the medical conditions the doctor identified in the PR and AR, as well as the additional diagnosis of depression in the August 2012 letter. It considered the information in the AR about the Appellant's physical abilities, including the ability to walk 2-4 blocks unaided, climb 5+stairs, lift 15-35 pounds and remain seated for 1-2 hours. The Ministry also noted that the doctor indicated that the Appellant uses a cane to walk more than 4 blocks and uses a hand rail when climbing stairs; however, all other aspects of mobility and

physical ability are independent. In terms of mental impairment, the Ministry noted that the doctor indicated there are no significant deficits with cognitive and emotional functions. The Ministry also referred to the Appellant's self-report about his hip replacement, ongoing pain, muscle weakness, medications for various conditions and the Appellant's description about being distraught about not finding work. The Ministry pointed out that employability is not a consideration for PWD designation.

The Ministry reviewed the information in the August 2012 letter. It noted that the original diagnoses were confirmed. However, a diagnosis of depression was added, as well as the statement that the Appellant has pain in both hips and is seeing an orthopedic specialist. As for mobility, the Ministry noted that in the letter the Appellant is described as having difficulty with walking more than 2-4 blocks, with prolonged standing, with climbing more than 5 stairs and with carrying more than 10 pounds. The Ministry further noted the statement that the Appellant needs significant help with daily living activities, but there were no details. Also, the Ministry pointed out that it contacted the doctor to see if he wanted to change or clarify the information in the PR and the AR and it provided the doctor with the original application. The doctor returned the faxed request with no changes made to the Appellant's original application regarding physical impairments, help with daily living activities or significant deficits with cognitive and emotional functions that would impact the Appellant's daily living. Based on the information submitted with the Appellant's request for reconsideration and his original PWD application, the Ministry was not satisfied that the information established a severe mental or physical impairment.

The Appellant submitted that he suffers from hepatitis C, left hip replacement, hypertension and depression. Even with the hip replacement, he still suffers from weakness and chronic pain most of the time. The Appellant also submitted that taking his pain medication affects his ability to fully function throughout the day. The Appellant argued that the restrictions identified in the doctor's August 2012 letter are in addition to the information in the PR and the AR. In the letter, the Appellant is described as having pain in both hips, as having difficulty with walking more than 2-4 blocks, standing for prolonged periods, climbing more than 5 stairs due to the hip pain, and needing a cane for mobility. The Appellant also submitted that he has difficulty when carrying purchases from the store weighing more than 10 pounds, and that he has issues when lifting or standing for prolonged periods to complete laundry or housekeeping. According to the Appellant, the doctor stated that his medical conditions affect his mobility with walking, standing, climbing stairs, shopping, carrying groceries, banking and visiting health care professionals. The Appellant argued that that doctor confirmed that he requires significant assistance to perform daily living activities. The Appellant also submitted that the doctor confirmed that he suffers from depression, from a lack of motivation, from fatigue and from sleep disturbances, and that he is taking medication for his depression.

The Panel notes that the Ministry considered the information in the PR, the AR, the Appellant's self-reports and the doctor's August 2012 letter. After receiving the August 2012 letter, the Ministry sent the doctor the original PWD application so that the doctor could provide additional information and/or clarification. The doctor, however, provided no other information or clarification. Specifically the doctor did not explain why there were some differences about the Appellant's medical conditions and their effects on his daily functioning in the PR/AR and in that August 2012 letter.

The Panel also notes that there are not many differences between the information in the PR/AR and the August 2012 letter. The evidence indicates that Appellant's physical limitations are within the

same range in all the documents. The Appellant can walk 2-4 blocks with a cane and climb stairs using hand rails. The Appellant indicated that he cannot lift heavy objects and has difficulty stooping over or bending his knees to lift properly. The doctor reported limitations with lifting heavy items. However, notwithstanding these limitations, in the AR the doctor also reported that the Appellant is independent in walking indoors, standing, lifting, and carrying and holding. The doctor indicated that the Appellant is independent with all aspects of personal care, basic housekeeping, shopping (except carrying heavy items) and transportation. These are activities which require some degree of physical ability. Even in the August letter, the doctor stated that the Appellant denied any significant problem with his housekeeping except for lifting weight. The doctor's comment about the Appellant needing significant help to perform his daily activities was not supported by any examples, by any details about the kind of help needed or how often help is needed, even after a request for such information. Therefore, the Panel gives that statement little weight. Based on all of the evidence, the Panel finds that the Ministry reasonably determined that the Appellant did not establish that he has a severe physical impairment.

With respect to a severe mental impairment, the Panel notes that in the PR and the AR the doctor did not diagnose any mental health conditions, and specifically reported no significant deficits with cognitive and emotional functions. In the August 2012 letter, the Appellant is described as having "had depression in the past and he still feels depressed, lack of motivation, tiredness on and off. He is on medication for his depression. He has sleep disturbances on and off." However, even after a request for more information, the doctor provided no details about how the Appellant's depression, lack of motivation and tiredness affect his ability to function on a daily basis. The only other information from the Appellant is that he feels distraught about his inability to find work to support himself. Therefore, based on all of the evidence, the Panel finds that the Ministry reasonably determined that the Appellant did not establish that he has a severe mental impairment.

Restrictions to Daily Living Activities

The Ministry submitted that it reviewed all aspects of the PR and all aspects of the AR. It noted that in those reports the doctor indicated that all of the Appellant's daily living activities are independently managed and he does not take significantly longer with any of them. The doctor also reported that the Appellant is independent in all aspects of social functioning. The Ministry considered the August 2012 letter from that doctor. It pointed out that it contacted the doctor for clarification about what type of assistance the Appellant needed and which daily living activities were impacted. The Ministry provided the doctor with a copy of the Appellant's PWD application on which to indicate any changes. The doctor returned that application without any changes. Therefore, the Ministry was not satisfied that the information provided demonstrated that the Appellant has a severe mental or physical impairment that in the opinion of a prescribed professional significantly restricts his ability to perform daily living activities either continuously or periodically for extended periods.

The Appellant submitted that the doctor confirmed that he requires significant assistance to perform daily living activities. The Appellant stated that, according to his doctor, his medical conditions affect his mobility with walking, standing, climbing stairs, shopping, carrying groceries, banking and visiting health care professionals. The Appellant also submitted that the *Interpretation Act* requires that the word "may" be construed as empowering and liberal, and cited the *Hudson* case as a reference.

To satisfy the requirements of section 2(2)(b) of the EAPWDA, the Appellant must provide the opinion

of a prescribed professional establishing that his daily living activities are directly and significantly restricted by a severe mental or physical impairment. In this case, the doctor who completed the PR and the AR is that prescribed professional. The Panel notes that the Ministry did consider the doctor's AR and PR in its reconsideration decision and specifically found that the doctor reported that not only are all daily living activities managed independently, but also no daily living activities take significantly longer to perform. In addition the Ministry contacted the doctor in August 2012 to give him an opportunity to change or clarify the information in the PR and the AR, but the doctor returned those reports unchanged. As for the doctor's August 2012 letter, the Panel notes that although there is a statement about the Appellant needing significant help to perform his daily activities, there are no details about what the Appellant needs help with, how much help he needs or how often he needs any help. In fact, that letter also has the statement that the Appellant denied any significant problems with his housekeeping, except for lifting heavy things. Therefore, based on all of the evidence, the Panel finds that the Ministry reasonably concluded that in the opinion of a prescribed professional the Appellant's impairments do not directly and significantly restrict his ability to perform daily living activities either continuously or periodically for extended periods.

Help with Daily Living Activities

The Ministry's position is that because it determined that the Appellant's daily living activities are not significantly restricted by a severe impairment, it could not determine that significant help is required from other persons. The Ministry noted that the doctor reported that the Appellant uses a cane for mobility, but it submitted that use of an assistive device such as a cane does not in itself establish a severe impairment.

The Appellant's position is that the doctor confirmed that he has significant restrictions in his ability to manage his daily living activities and that he needs assistance with such activities. He also uses a cane to help with his mobility.

The Panel notes that section 2(2)(b)(ii) of the EAPWDA also requires the opinion of a prescribed professional, which in this case is the Appellant's doctor. In the PR and the AR, the doctor did not report any need for help or any help given to the Appellant, only that the Appellant uses a cane for mobility when walking. Also, although the Appellant is described as needing significant help to perform his daily living activities in the August 2012 letter, there are no details about the help. The Panel already explained why it gives that statement little weight. Therefore, based on all of the evidence and the applicable enactments, and given the Panel's finding above that the Ministry's determination that the Appellant's daily living activities are not directly and significantly restricted was reasonable, the Panel finds that the Ministry's determination that the Appellant does not meet the requirements of section 2(2)(b)(ii) of the EAPWDA also was reasonable.

The Panel finds that the Ministry's reconsideration decision was reasonably supported by the evidence and was a reasonable application of the applicable enactments in the Appellant's circumstances. Therefore, the Panel confirms that decision.