

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (ministry) reconsideration decision dated September 13, 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) B2 Form from Health Canada dated October 17, 2011 for Medical Marijuana Access which states in part that the appellant's medical conditions are HCV- Hepatitis C, Ischemic heart disease, Diabetes Type 2, rheumatoid arthritis, osteoarthritis, and migraines and the symptoms are fatigue/lethargy, severe joint pain (hips, back, hands, knees and shoulder) and insomnia;
- 2) Person With Disabilities (PWD) Application: applicant information dated June 18, 2012, physician report dated May 14, 2012, and assessor report dated May 14, 2012;
- 3) Letter dated May 23, 2012 from the ministry to the appellant stating in part that he is required to submit further information to confirm his eligibility;
- 4) Letter dated July 24, 2012 from the ministry to the appellant denying his request for PWD designation and enclosing a copy of the original decision summary; and,
- 5) Request for Reconsideration- Reasons.

In his Notice of Appeal, the appellant stated that the reasons for the denial were addressed in the original application. The appellant stated that the decision is based on erroneous information not supplied by him. His physician filled out the required paper work and addressed the issues for denial.

In his Request for Reconsideration, the appellant stated that his physician has diagnosed him with Hepatitis C and Ischemic Heart Disease. The physician stated that "...treatment is very debilitating and will likely adversely affect his current symptoms of Hepatitis C. Treatment will last a minimum of 48 weeks. During this time flu-like symptoms associated with Hepatitis C may cause him to become bed ridden. He would require significant assistance from others in order to complete and attend to daily living activities." The physician stated that the impairment is likely to continue for two years or more from the date of the application. The physician stated that there are significant deficits with cognitive and emotional function in the areas of memory and emotional disturbance. The physician added comments that "...symptoms fatigue, weakness, abdominal pain, flu-like symptoms and joint problems occasionally make it difficult for him to get out of bed. On these occasions he would require substantial assistance from others to accomplish daily living tasks. Insomnia and low energy associated with treatment makes it difficult for him to maintain good energy and effort to attend to daily living tasks." The physician stated that all 6 categories of mobility and physical ability require periodic assistance from another person. The physician reported that he requires periodic assistance from another person with two areas of personal care, with basic housekeeping, with shopping, and with managing meals, finances, medications, and transportation. The appellant stated that the Medical Access Regulation Form B2 lists other debilitating conditions that were not set out in the PWD application, namely: Diabetes Type 2, rheumatoid arthritis, osteoarthritis, and migraines. The appellant stated that these, as well as the Hepatitis C and Ischemic Heart Disease are recognized as chronic, incurable conditions.

The appellant stated that he has been in a federal penitentiary for over 2.5 years and he does not have a general practitioner yet but he has been treated for all these ailments while in custody. The appellant stated that he suffers from intense PTSD (post traumatic stress disorder) and migraine headaches as a result of severe head trauma. His rheumatoid arthritis currently attacks his spine and hip and he will soon require a hip replacement and he is in agony completing any tasks. The health issues he suffers from listed in the application are only "the tip of the iceberg" in relation to his current disposition. The physician who completed the PWD application has provided treatment both during incarceration and while out on release.

In his self-report included with the PWD application, the appellant stated that he has Hepatitis C. He recently had a double-bypass, suffers from insomnia, and has been diagnosed with Type 2 Diabetes. The appellant stated that he has rheumatoid and osteoarthritis in his spine, right ankle, right shoulder and it is agony. His left leg below the knee is made of titanium and not functioning and his hips are soon going to need to be replaced. He suffers from debilitating migraines as the result of head trauma. He is currently taking the cure for Hep C. The appellant stated that he cannot sleep, he cannot eat and he is in a constant state of pain. The appellant stated that he cannot sit for long and cannot stand for long periods. He is weak from his heart and the

medications make him weak. Without medications, he cannot even get out of bed some days.

The physician who completed the physician report is a specialist in internal medicine and indicated the appellant has been his patient for 3 years and that he has seen the appellant 2 to 10 times in the past 12 months. In the physician report, the physician confirmed a diagnosis of Hepatitis C and Ischemic heart disease. In describing the severity of the medical condition relevant to the appellant's impairment, the physician noted "...Hepatitis C is associated (with) symptoms of fatigue, weakness, abdominal pain, appetite loss, diarrhea, fever, chills, night sweats, and joint problems. Untreated it would likely lead to end stage liver disease, cirrhosis or hepatocellular carcinoma (liver cancer). He is currently undergoing treatment. Treatment is very debilitating ... will last a minimum of 48 weeks... flu-like symptoms associated with Hepatitis C may cause him to become bedridden. He would require significant assistance from others in order to complete and attend to daily living activities." The physician indicated that the appellant has been prescribed medications or treatments that interfere with his ability to perform daily living activities (DLA) and he does not require an aid for his impairment ("N/A"). The physician reported that it is unknown how far the appellant can walk unaided on a flat surface, how many stairs he can climb unaided, how much he can lift and how long he can remain seated. The physician indicated that there are no difficulties with communication. The physician reported that there are significant deficits with cognitive and emotional function in the areas of memory, emotional disturbance, and attention or sustained concentration, with no further comments provided. For additional comments, the physician stated that the appellant is "...currently on treatment for Hepatitis C; treatment is very debilitating and will likely adversely affect his current symptoms of Hepatitis C; treatment is expected to last a minimum of 48 weeks; symptoms (of) fatigue, weakness, abdominal pain, flu-like symptoms, and joint problems occasionally make it difficult for him to get out of bed; on these occasions he would require substantial assistance from others to accomplish daily living tasks; insomnia and low energy associated with treatment makes it difficult for him to maintain good energy and effort to attend to daily tasks."

The appellant's physician also completed the assessor report and indicated the appellant has a satisfactory ability to communicate in all areas. The physician indicated that the appellant requires periodic assistance from another person in all areas of mobility and physical ability, including walking indoors and outdoors, climbing stairs, standing, lifting and carrying and holding. In the explanation, the physician noted that "...fatigue, weakness, and joint problems associated with Hepatitis C makes mobility and physically strenuous tasks a challenge for him. He would require significantly longer and frequent rests in order to accomplish tasks effectively." The physician indicated that the appellant is independent with most tasks of personal care including dressing, grooming, bathing, toileting, with transfers in/out of bed and transfers on/off chair, while requiring periodic assistance from another person with feeding self and regulating diet ("appetite loss and abdominal pain associated with Hepatitis C makes it difficult for him to attend to food and diet-related tasks"). The physician reported that the appellant requires periodic assistance with doing laundry and with basic housekeeping ("fatigue, weakness and joint problems...makes basic housekeeping tasks challenging for him"). The physician indicated that the appellant requires periodic assistance from another person with all tasks of shopping, including going to and from stores, reading prices and labels, making appropriate choices, and paying for purchases ("fatigue, weakness and joint problems...makes it difficult for him to attend to shopping tasks"). The physician reported that the appellant requires periodic assistance from another person with all of the tasks of managing meals ("...difficult for him; he often does not have the motivation to prepare and eat food"), finances ("memory and concentration problems associated with Hepatitis C makes it difficult for him to organize and budget finances"), medications ("memory and concentration problems makes it challenging for him to remember prescriptions and medication requirements") and transportation ("treatment for Hepatitis C will likely adversely affect his current symptoms"). The physician indicated that the sections of the assessor report for an applicant with an identified mental impairment or brain injury and which sets out impacts to cognitive and emotional functioning is "N/A", or not applicable. The section which sets out impacts to social functioning has not been completed. In response to the question regarding help required and not available, the physician noted "...he would likely benefit from counseling, social assistance, and financial assistance."

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 acknowledges that there are impairments to the appellant's physical functioning and that the appellant's physician indicates in the B2 Form that the appellant experiences severe joint pain, however the physician also describes the appellant's physical functioning as "unknown." The ministry argues that specific information is not provided by the physician regarding how much longer than typical activities take and the type and amount of assistance required is not described to establish the degree of impairment. The ministry points out that although the physician reports that physical functioning and some DLA will take significantly longer, no description is provided regarding how much longer than typical these activities take. The ministry argues that while the physician reports that periodic assistance is required for the appellant's physical activities and some DLA, the frequency and duration of the assistance is not described to establish the degree of restriction.

The appellant argues that he has a severe physical impairment as a result of several medical conditions, including Hepatitis C, Ischemic heart disease, Diabetes Type 2, rheumatoid arthritis, osteoarthritis, and migraines. The appellant argues that the physician stated that treatment for his Hepatitis C is "very debilitating" and that during this time "flu-like symptoms associated with Hepatitis C may cause him to become bed ridden." The appellant argues that the pain experienced from rheumatoid and osteoarthritis in his spine, right ankle, and right shoulder "is agony." The appellant argues that he cannot sleep, he cannot eat and he is in a constant state of pain so he cannot sit for long and cannot stand for long periods. The appellant argues that he is weak from his heart and the medications make him weak but without medications, he cannot even get out of bed some days. The appellant points out that the physician reported that he requires periodic assistance from another person with all 6 categories of mobility and physical ability.

The panel finds that the evidence of a medical practitioner confirms a diagnosis of Hepatitis C and Ischemic heart disease, as set out in the physician report. In describing the severity of the medical condition relevant to the appellant's impairment, the physician noted "...Hepatitis C is associated (with) symptoms of fatigue, weakness, abdominal pain, appetite loss, diarrhea, fever, chills, night sweats, and joint problems... he is currently undergoing treatment. Treatment is very debilitating ... will last a minimum of 48 weeks... flu-like symptoms associated with Hepatitis C may cause him to become bedridden. He would require significant assistance from others in order to complete and attend to daily living activities. " The panel finds that the physician refers to the possibility of symptoms that would cause the appellant to be bedridden and require assistance from others, however he does not specify whether these symptoms are currently being experienced by the appellant. Although the additional medical conditions of Diabetes Type 2, rheumatoid arthritis, osteoarthritis, and migraines have been listed by the physician in a B2 Form for Medical Marijuana Access dated October 17, 2011, the medical practitioner has not provided an opinion that these conditions are likely to continue for at least 2 years, as required by the legislation. In the physician report, the physician indicated that the appellant has been prescribed medications or treatments that interfere with his ability to perform DLA and he does not require an aid for his impairment ('N/A').

The physician indicated in the physician report that it is unknown how far the appellant can walk unaided on a flat surface, how many stairs he can climb unaided, how much he can lift and how long he can remain seated. In the additional comments, the physician added "...symptoms (of) fatigue, weakness, abdominal pain, flu-like

symptoms, and joint problems occasionally make it difficult for him to get out of bed; on these occasions he would require substantial assistance from others to accomplish daily living tasks." In the assessor report, the physician indicated that the appellant requires periodic assistance from another person in all areas of mobility and physical ability, including walking indoors and outdoors, climbing stairs, standing, lifting and carrying and holding. In the explanation, the physician noted that "...fatigue, weakness, and joint problems associated with Hepatitis C makes mobility and physically strenuous tasks a challenge for him. He would require significantly longer and frequent rests in order to accomplish tasks effectively." In his self-report, the appellant stated that he cannot sleep, he cannot eat and he is in a constant state of pain. The appellant stated that he cannot sit "for long" and cannot stand for "long" periods. He is weak from his heart and the medications make him weak. Without medications, he cannot even get out of bed "some days." The evidence demonstrates that the degree of the appellant's impairment fluctuates, that he is bedridden "some" days, or "occasionally" and that there is a need for periodic assistance with mobility and physical ability, however the panel finds that the ministry reasonably concluded that there is insufficient information provided regarding the restrictions to the appellant's functional skills and the frequency and duration of the assistance required in order to establish the degree of restriction. Therefore, the panel finds that the ministry's determination that the evidence 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 some deficit to cognitive and emotional functioning however he does not identify a mental health related diagnosis. The ministry argues that the physician does not identify impacts to the appellant's cognitive/emotional functioning and most DLA are not restricted by mental impairment.

The appellant argues that he has a severe mental impairment as a result of intense PTSD (post traumatic stress disorder) and migraine headaches as a result of severe head trauma. The appellant argues that the health issues he suffers from as listed in the application are only "the tip of the iceberg" in relation to his current disposition. The appellant argues that the physician reported that there are significant deficits with the appellant's cognitive and emotional function in the areas of memory and emotional disturbance.

The panel finds that the evidence of a medical practitioner does not confirm a diagnosis of a mental disorder. The appellant stated that he has PTSD as a result of severe head trauma, however the panel finds that this has not been confirmed by his physician. In the physician report, the physician indicated that there are no difficulties with communication. The physician reported that there are significant deficits with cognitive and emotional function in the areas of memory, emotional disturbance, and attention or sustained concentration, with no further comments provided. However, the physician indicated that the sections of the assessor report for an applicant with an identified mental impairment or brain injury are not applicable as the section which sets out impacts to cognitive and emotional functioning is marked "N/A", or not applicable, and the section which sets out impacts to social functioning has not been completed by the physician. Therefore, the panel finds that the ministry's decision, which concluded that the evidence does not establish a severe mental impairment, was reasonable.

Whether ability to perform DLA is directly and significantly restricted:

The ministry argues that the evidence does not establish that the appellant's 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 no severe impairment has been established and argues that the information provided does not establish significant DLA restrictions. The ministry argues that there are restrictions to some DLA however specific information regarding how much longer than typical activities take and the type and amount of assistance required is not described to establish the degree of restriction.

The appellant argues that the evidence of the physician establishes that the appellant is directly and significantly restricted in his ability to perform his DLA either continuously or periodically for extended periods.

The physician added comments that "...symptoms fatigue, weakness, abdominal pain, flu-like symptoms and joint problems occasionally make it difficult for him to get out of bed. On these occasions he would require substantial assistance from others to accomplish daily living tasks. Insomnia and low energy associated with treatment makes it difficult for him to maintain good energy and effort to attend to daily living tasks." The physician reported that he requires periodic assistance from another person with two areas of personal care, with basic housekeeping, with shopping, and with managing meals, finances, medications, and transportation.

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, in the assessor report, the physician indicated that the appellant requires periodic assistance from another person with all tasks with the explanation that "...appetite loss makes meal planning and food preparation difficult for him; he often does not have the motivation to prepare and eat food." For managing personal finances, the physician reported that the appellant requires periodic assistance with all tasks of paying rent and bills including banking and budgeting, with the explanation that "...memory and concentration problems associated with Hepatitis C makes it difficult for him to organize and budget finances."

In terms of shopping for his personal needs, the physician indicated that the appellant requires periodic assistance from another person with all tasks of shopping, including going to and from stores, reading prices and labels, making appropriate choices, paying for purchases, and carrying purchases home, with the explanation that "...fatigue, weakness and joint problems associated with Hepatitis C make it difficult for him to attend to shopping tasks." For use of public or personal transportation facilities, the physician indicated that the appellant requires periodic assistance with all tasks, with no comments provided. With respect to performing housework to maintain the appellant's place of residence in an acceptable sanitary condition, the physician indicated that the appellant requires periodic assistance from another person, and added that "...fatigue, weakness, and joint problems associated with Hepatitis C makes basic housekeeping tasks challenging for him; he requires significantly longer in order to complete these tasks."

For moving about indoors and outdoors, the physician indicated that the appellant requires periodic assistance from another person with walking indoors and walking outdoors, with the comment that "...fatigue, weakness and joint problems associated with Hepatitis C makes mobility and physically strenuous tasks a challenge for him; he would require significantly longer and frequent rests in order to accomplish tasks effectively; treatment negatively affects these symptoms." Regarding performing personal hygiene and self care, the physician indicated that the appellant is independent with most tasks of personal care, including dressing, grooming, bathing, toileting, transfers in/out of bed and on/off chair, while requiring periodic assistance from another person with feeding self and regulating diet ("...appetite loss and abdominal pain associated with Hepatitis C makes it difficult for him to attend to food and diet related tasks"). With respect to managing his personal medications, the physician reported that the appellant requires periodic assistance from another person with all tasks, including filling/refilling prescriptions, taking as directed and safe handling and storage, with the added explanation that "...memory and concentration problems makes it challenging for him to remember prescriptions and medication requirements."

While the physician assessed the appellant as requiring periodic assistance from another person with many of his DLA, with the exception of personal care, the panel finds that the explanation/description provided by the physician for each DLA relates to the reason for the difficulty with the tasks without an indication of the frequency or duration of the need for assistance. As the evidence demonstrates that the degree of the appellant's impairment fluctuates, that he is bedridden "some" days, or "occasionally," specificity is required in order to determine that the appellant experiences restrictions to various tasks periodically *for extended periods*, as required by the legislation. The panel finds that the ministry reasonably determined that the available 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:

The ministry's position is that since it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required from other persons. The appellant's position is that he requires the significant help or supervision of another person in order to perform his directly and significantly restricted DLA.

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 and the appellant that he lives with family, friends or a caregiver and receives assistance for DLA from community service agencies. In the assessor report, in response to the question regarding help required and not available, the physician noted that the appellant "... would likely benefit from counseling, social assistance, and financial assistance." There is no further information regarding the assistance currently provided to the appellant and the physician indicated that the appellant does not currently use an assistive device. 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.