

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (ministry) reconsideration decision dated October 11, 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 established 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) Letter dated December 13, 2010 from a physician who is a specialist in general surgery to the appellant's physician stating in part that the appellant developed an ulcer on the plantar surface of the right big toe at the metacarpal pharyngeal level, which discharges purulent material intermittently. The ulcer started about 3 months ago and it has increased in size and is not healing; he has no pain and denies any tingling or numbness in his feet and has intake sensations. There is no calf pain or history of intermittent claudication; he can walk a long distance and work all day without any discomfort or pain in his legs. Recommendation is debridement in the operating room;
- 2) Operative Report dated January 14, 2011 for debridement and excision of a necrotic ulcer;
- 3) Examination Report dated September 1, 2011 by ophthalmologist which states in part a diagnosis of mild non proliferative diabetic retinopathy (NPDR), that after 15 years of diabetes it is no unusual to see some mild NPDR and this should be tracked on an annual basis;
- 4) Letter dated September 6, 2011 from a physician who is a specialist in endocrinology and metabolism to the appellant's doctor stating in part that the appellant has a history of Type 2 diabetes for about 26 years, complicated by hypertension, erectile dysfunction and probably retinopathy, and had poor glycemic control and required more insulin;
- 5) Person With Disabilities (PWD) Application: applicant information dated July 26, 2012, physician report dated August 1, 2012, and assessor report dated August 1, 2012;
- 6) Letter dated September 11, 2012 from the ministry to the appellant denying his request for PWD designation and enclosing a copy of the original decision summary; and,
- 7) Request for Reconsideration- Reasons.

Prior to the hearing, the appellant provided a letter from his physician dated October 31, 2012 which states in part that the appellant has developed peripheral and vascular insufficiency in his feet as a result of long-standing diabetes. He has burning pain in his feet and is barely able to walk. His feet are changing in shape as a result of arthritis in his feet; he is developing Charcot joints. He is being booked with a vascular surgeon for further assessment and treatment. With these findings and continuous fear of developing ulcers in his feet, he is unable to earn his livelihood. The ministry did not object to the admissibility of this document. The panel reviewed the letter and admitted it into evidence, under Section 22(4) of the Employment and Assistance Act, as relating to the appellant's diagnosed medical condition and being in support of the information that was before the ministry on reconsideration.

In his Notice of Appeal, the appellant stated that the decision is based on some facts of the doctor's and those facts are not a basic determinant for the appellant to protect his rights as a serious diabetic patient. For example, he cannot even rotate "the fingers" of his feet. The appellant stated that his doctors have been on holidays and it has been difficult to get any additional information from them.

In his Request for Reconsideration, the appellant stated that he suffers with diabetic peripheral neuropathy with the following serious problems: 1) continuous numbness in the feet all day, 2) sharp pain in the feet, 3) loss of balance- sometimes he cannot put on his shoes, 4) foot shape has completely changed- contact pressure changes, 5) always cracked skin, and 6) the left foot is also affected and he has been advised to meet with the surgeon again but he does not like to do continuous surgeries because this could lead to the loss of one or both feet. The appellant stated that he does not understand what is meant by "a block", which he sees as varying in length. The appellant stated that his present condition indicates that he cannot climb some types of staircases without having a rest. The appellant stated that he cannot lift heavy weights because he has balancing problems in his feet and sometimes he cannot wear his shoes. The shape of his feet has changed and with a weight the contact pressure of his feet will increase and some places will be affected severely. The appellant stated that he already has serious problems with his eyes, that he uses glasses, with hearing and uses a hearing device and sexual impotence. The appellant stated that his serious complication of diabetes could lead to the loss of his feet or a leg.

In his self-report included with the PWD application, the appellant stated that he experiences severe pain and swelling and continuous numbness. His eyesight is becoming weaker gradually. He has hearing difficulties. The appellant stated that it is very difficult to stand more than 2 hours without a break. Sometimes his blood sugar level goes down and he needs to sleep following this incident. When he gets some sugar he needs to sleep at least one hour to recuperate to a normal condition. His feet are becoming like before, to the pre-surgery condition.

At the hearing, the appellant stated that he had difficulty providing further information from the physicians as the doctor and the specialist were both leaving the country on vacation. The appellant stated that he met with his doctor who asked him a few questions and then filled out the form on his own and the appellant did not see the responses until the time of reconsideration. The appellant stated that his family doctor has referred him to the specialist for vascular surgery because he expects that he requires further surgery. The appellant stated that he personally prefers a holistic approach rather than further surgery as he believes there are many risks to surgery and he is concerned about the high cost of Home Medicare to provide post-surgery care. The appellant explained that his doctor sent him to see the specialist who did various tests and sent his report back to the doctor who then wrote the letter dated October 31, 2012.

The appellant stated that he does not have proper blood circulation in his feet, that the blood does not flow upwards. The appellant stated that his previous employment working as an attendant at a gas station likely made the condition worse as he would often stand for 13 to 14 hours at a time, with nowhere to sit down. The appellant stated that his employer at the gas station noticed that his feet did not look right and required that he see his doctor before returning to work. The appellant stated that when he walks he experiences a "shock wave" from the bottom of his feet and he must stop and move his foot for about a minute and then he can resume walking. The appellant stated that he believes it will not be long before he will need to use a walking stick, probably within 6 to 7 months. When he lifts weights, some points on his feet no longer have contact with the standing surface and he will sometimes experience the "shock wave." The appellant stated that he lives in a basement suite and there are 5 steps to a landing and he must stop at the landing, that the 2 steps to the entrance are OK but he cannot climb a ladder. The appellant explained that he and his wife cook enough for several days at a time and they do not lift heavy weights. In response to a question, the appellant stated that he is a good cook but that his wife mostly does the food preparation and cooking and they do not need to worry about storage of food because they eat mostly dried fish. The appellant stated that he and his wife have no one else to rely on so they have to do things for themselves. The appellant explained that for dressing, his wife sometimes helps him put on his socks and shoes. In response to a question, the appellant stated that his wife does the housekeeping and laundry because he is not able to do it.

The physician who completed the physician report indicated the appellant has been his patient since 2008 and that he has seen the appellant 11 or more times in the past 12 months. The physician confirmed a diagnosis of diabetic peripheral neuropathy and, in describing the severity of the medical condition relevant to the appellant's impairment, the physician noted "...has diabetes for 30 years; on insulin developed complications; has retinopathy and diabetic peripheral neuropathy; had surgery on right foot- ulcer in January 2011." The physician indicated that the appellant has not 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. The physician reported that the appellant can walk less than 1 block unaided on a flat surface, he can climb 2 to 5 steps unaided, he cannot lift any weight and there is no limitation with how long he can remain seated. The physician indicated that there are no difficulties with communication. The physician reported that there are no significant deficits with cognitive and emotional function.

The appellant's physician also completed the assessor report and indicated the appellant has a good or satisfactory ability to communicate in all areas. The physician indicated that the appellant is independent with walking indoors and walking outdoors ("has to stop after some time"), with climbing stairs ("has to stop after 2-5 stairs") and standing ("has to sit after 10-15 minutes"). The physician has not made an assessment for assistance with lifting but notes "can't lift" and for carrying and holding he writes "not far." The physician

indicated that the appellant is independent with most tasks of personal care including grooming, bathing, toileting, feeding self, regulating diet, with transfers in/out of bed and transfers on/off chair, with a note for dressing that "...wife helps some times." The physician did not assess the appellant with doing laundry and basic housekeeping but noted for both that "...wife does it." The physician indicated that the appellant is independent with most tasks of shopping, including going to and from stores, reading prices and labels, making appropriate choices, and paying for purchases, while requiring continuous assistance from another person with carrying purchases home, noting "wife helps." The physician did not assess the appellant for the tasks of managing meals but notes for each that "...wife does it." The physician assessed no impact from the appellant's impairment on his cognitive and emotional functioning, with the exception of motor activity which has a moderate impact with no other explanation provided. The physician assessed the appellant as independent in all areas of social functioning, with good functioning in both his immediate and extended social networks.

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 has not met all the criteria in Section 2(2) of the EAPWDA. In particular, whether the ministry reasonably concluded that the appellant 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 the physician indicates that the appellant can walk less than 1 block, climb 2-5 stairs, cannot lift and has no limitation when it comes to remaining seated, however he also indicates in the assessor report that the appellant can independently walk indoors, walk outdoors, climb stairs and stand. The ministry argues that although the physician indicates that the appellant cannot lift, it is unclear why the appellant has this limitation. The ministry argues that the physician indicates that the appellant has limitations when it comes to carrying and holding, however the comment "not far" does not describe how the impairment impacts the appellant's ability to manage these tasks. The ministry points out that the physician does not indicate that the appellant requires any equipment or devices to help compensate for his impairment.

The appellant argues that he has a severe physical impairment as a result of diabetic peripheral neuropathy. The appellant argues that he has many problems as a result of this condition, namely continuous numbness in the feet, sharp pain in his feet, loss of balance so sometimes he cannot put on his shoes, his foot shape has completely changed and the contact pressure changes, he has cracked skin and his left foot has also been affected. The appellant argues that the standard of walking "a block" is variable depending on the length of the block, and the type of stairs will also make a difference, and he cannot climb some types of staircases without taking a rest. The appellant argues that he cannot lift heavy weights because he has balancing problems in his feet and sometimes he cannot wear his shoes. The appellant argues that he already has serious problems with his eyes for which he uses glasses, with his hearing and he uses a hearing device and with sexual impotence. The appellant argues that his serious complication of diabetes could lead to the loss of his feet or a leg.

The panel finds that the evidence of a medical practitioner confirms a diagnosis of diabetic peripheral neuropathy, as set out in the physician report. In describing the severity of the medical condition relevant to the appellant's impairment, the physician noted "...has diabetes for 30 years; on insulin developed complications; has retinopathy and diabetic peripheral neuropathy; had surgery on right foot- ulcer in January 2011." The physician indicated 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 reported that the appellant can walk less than 1 block unaided on a flat surface, he can climb 2 to 5 steps unaided, he cannot lift any weight and there is no limitation with how long he can remain seated. The physician also indicated in the assessor report that the appellant is independent with walking indoors and walking outdoors ("has to stop after some time"), with climbing stairs ("has to stop after 2-5 stairs") and standing ("has to sit after 10-15 minutes"). The physician has not made an assessment for assistance with lifting but notes "can't lift" and for carrying and holding he writes "not far."

In the letter dated October 31, 2012 the physician indicates that the appellant has burning pain in his feet and he is barely able to walk, that his feet are changing in shape as a result of arthritis in his feet and he is developing Charcot joints. The appellant stated that when he walks he experiences a "shock wave" from the bottom of his feet and he must stop and move his foot for about a minute and then he can resume walking. The appellant stated that he believes it will not be long before he will need to use a walking stick, probably

within 6 to 7 months, but he currently does not use an assistive device for walking. The appellant stated that when he lifts weights, some points on his feet no longer have contact with the standing surface and he will sometimes experience the "shock wave" and lose his balance and that he cannot lift heavy weights as a result. The evidence demonstrates that the appellant must take frequent breaks to move his foot before continuing walking but he does not currently use an aid for mobility and he can climb 5 steps unaided, and that his functional skills are more in keeping with a moderate degree of impairment. 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 has not diagnosed a mental disorder and indicates that the appellant does not have any significant deficits to cognitive and emotional functioning. The ministry argues that the physician indicates that the appellant's impairment has no impact on 13 out of 14 areas of cognitive and emotional functioning, with a moderate impact to manage motor activity but no comments to explain this limitation. The ministry argues that the physician indicates that the appellant can independently manage all of his social functioning and he has good functioning with his immediate and extended social networks. The appellant does not argue that he has a severe mental impairment.

The panel finds that the evidence of a medical practitioner does not confirm a diagnosis of a mental disorder. The physician reported that there are no significant deficits with cognitive and emotional function. The physician assessed no impact from the appellant's impairment on his cognitive and emotional functioning, with the exception of motor activity which has a moderate impact with no other explanation provided. The physician assessed the appellant as independent in all areas of social functioning, with good functioning in both his immediate and extended social networks. In the assessor report, the physician indicated that the appellant's ability to communicate is good or satisfactory in all areas. 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 the physician indicates that the appellant can independently manage the majority of his DLA. While the physician reports that the appellant's wife manages basic housekeeping and all areas of meals, it is unclear if the DLA performed by the appellant's wife indicate a preferred social situation or whether the appellant requires periodic or continuous assistance to manage these tasks. The ministry argues that the physician indicates that the appellant requires continuous assistance with carrying purchases home, however "wife helps" does not describe why the appellant requires this level of assistance. At the hearing, the ministry added that there are other options to the appellant's wife carrying purchases home, such as the use of a wheeled cart to transport groceries. The ministry argues that the physician reports that for personal care, dressing, the appellant's "wife helps sometimes" however this does not confirm that the appellant's impairment significantly restricts his ability to manage his DLA continuously or periodically for extended periods of time.

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

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 in the assessor report that the appellant's wife does all tasks. When asked for clarification, the appellant stated that he is a good cook but that he and his wife do the cooking for several days at a time and they do not need to worry about safe storage of food. For managing personal finances, the physician reported 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 indicated that the appellant is independent with most tasks, including going to and from stores, reading prices and labels, making appropriate choices, and paying for purchases, while requiring continuous assistance from another person with carrying purchases home, with the explanation that "...wife helps." For use of public or personal transportation facilities, the physician indicated that the appellant is independent 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's wife does it and the appellant clarified at the hearing that she does it because he is unable to do it.

For moving about indoors and outdoors, the physician indicated that the appellant is independent with walking indoors and walking outdoors, although he has to stop after some time. Regarding performing personal hygiene and self care, the physician indicated that the appellant is independent with most tasks of personal care, including grooming, bathing, toileting, feeding self, regulating diet, transfers in/out of bed and on/off chair, while his wife helps sometimes with dressing. The appellant stated that his wife sometimes helps him to put on his socks and shoes. With respect to managing his personal medications, the physician reported that the appellant is independent with all tasks, including filling/refilling prescriptions, taking as directed and safe handling and storage.

The panel finds that the ministry reasonably determined that the physician indicates that the appellant performs a majority of his DLA independently, or 24 tasks out of a total of 33. The evidence of the physician confirms that the appellant's wife does the housekeeping and managing meals, one task of shopping requires continuous assistance, and sometimes his wife helps with a task of personal care, and the appellant's evidence clarified a need for continuous assistance only with the housekeeping. 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 the physician does not indicate that the appellant requires any assistive device. The ministry argues 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 his wife and receives assistance from her. As it has not been established that the appellant's 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.