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PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (the ministry) reconsideration decision dated January 16, 2013 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:

- the appellant has a severe physical or mental impairment;
- 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; and,
- 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.

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

The evidence before the ministry at the time of the reconsideration decision included the following:

1) Person With Disabilities (PWD) Application comprised of the applicant information dated October 10, 2012 which did not include a description of the appellant's disability or how it affects his life, a physician report dated October 23, 2012 completed by the appellant's family physician of 10 years, and an assessor report dated October 31, 2012 completed by a psychiatric nurse who met with the appellant once for the purposes of completing the report; and,
2) Request for Reconsideration- Reasons.

Diagnoses

The appellant has been diagnosed by his general practitioner with Type II diabetes with a date of onset of 1998 and coronary artery disease with an onset in 2005, and hypertension.

Physical Impairment

- In the physician report, the general practitioner indicated that the appellant's diabetes is "poorly managed causing glucose fluctuations", with symptoms of hypoglycemia. His coronary artery disease is stable, elevated blood pressure. The physician added that there is "poor understanding of disease management" and that he "needs to improve glycemic control, blood pressure control."
- Functional skills reported in the physician report indicated that the appellant can walk 1 to 2 blocks unaided, he can climb 5 or more steps unaided, he can lift 5 to 15 lbs. and has no limitation with remaining seated.
- The physician reported that the appellant has not been prescribed any medications or treatments that interfere with his ability to perform his daily living activities (DLA) and he does not require any aids for his impairment.
- In the assessor report, the psychiatric nurse indicated that the appellant uses an assistive device for walking indoors and outdoors and climbing stairs, with the explanation: "...uses cane; unable to walk for more than a couple of blocks due to heart condition." The appellant is assessed as taking significantly longer than typical with lifting and carrying and holding, with the explanation that the appellant is unable to lift more than 2 lbs. The nurse added comments that "...mobility and physical activities are seriously impaired due to heart condition."
- The psychiatric nurse also indicated in the assessor report that the appellant uses a cane as an assistive device "...on most days." For additional information, the nurse commented that the appellant has "...multiple physical disabilities as well as mental problems. Needs continuous or periodical assistance with most daily living activities. English language skills are poor. Possible onset of dementia (poor memory, disorientation...)."
- In his Request for Reconsideration, the appellant stated that he has to use his cane 2 to 3 times per day because he is always dizzy, and he is always tired due to his conditions.

Mental Impairment

- The general practitioner did not diagnose a mental disorder.
- The general practitioner reported the appellant has difficulties with communication but does not specify the cause. In the assessor report, the psychiatric nurse reported a poor ability in the areas of speaking, reading and writing, attributed to English as a second language.
- The general practitioner reported a significant deficit with cognitive and emotional function in the "other" category, with the note "...poor understanding of disease management."
- In the assessor report, the psychiatric nurse indicated major impacts with cognitive and emotional functioning in the areas of emotion, attention/concentration, memory, motivation, and motor activity, as

well as moderate impacts in bodily functions, consciousness, impulse control, insight and judgment, executive, language, and other neuropsychological problems. The nurse wrote that the appellant's cognitive and emotional functioning "...is very significantly impaired." The nurse stated further that the appellant reported having depressed mood for years (3 to 4 days per week), generalized anxiety, and memory loss. The appellant reported lack of motivation most of the days. The nurse commented that, according to the appellant, he sometimes "get lost", disoriented and confused and the nurse concluded this is "...possible onset of dementia."

- The general practitioner indicated that there are no restrictions in the area of social functioning.
- The psychiatric nurse reported that the appellant requires continuous support/supervision in the areas of making appropriate social decisions, developing and maintaining relationships, dealing appropriately with unexpected demands, and securing assistance from others, and periodic support/supervision with interacting appropriately with others. The nurse wrote that "...impaired social functioning is evident (no relatives here, occasionally goes to church, most social contacts are with his roommate)." The appellant is assessed with marginal functioning in both his immediate and extended social networks.
- In his Request for Reconsideration, the appellant stated that he has depression.

Daily Living Activities (DLA)

- In the physician report, the general practitioner commented that the appellant "...claims he has difficulty with ADL intermittently due to weakness and dizziness."
- The general practitioner indicated that the appellant's impairment directly restricts the appellant's ability to perform DLA and he wrote "symptoms of hypoglycemia," and that the appellant is not restricted with any listed areas of DLA, including personal self care, meal preparation, management of medications, basic housework, daily shopping, mobility inside and outside the home, use of transportation, management of finances, and social functioning.
- In the assessor report, the psychiatric nurse reported that all 8 listed tasks of the DLA personal care take significantly longer than typical with continuous assistance required from another person with grooming, toileting and feeding self/regulating diet.
- The appellant requires continuous assistance with doing his laundry and basic housekeeping, with the explanation that his roommate helps with these tasks.
- In the assessor report, the appellant is assessed by the psychiatric nurse as needing periodic assistance with going to and from stores and carrying purchases home ("60% of time roommate helps") and continuous assistance with reading prices and labels and making appropriate choices ("always needs assistance due to poor English"). The additional comments are that the appellant requires continuous assistance with most DLA.
- All listed tasks for the DLA meals and paying rent and bills require periodic assistance 50% of the time and the appellant's roommate helps.
- For managing medications, the appellant is assessed by the psychiatric nurse as requiring periodic assistance with filling/refilling prescriptions (70% of the time roommate helps) and safe handling and storage (60% of the time roommate helps), and continuous assistance with taking as directed ("often forget to take medications").
- The nurse indicated that the appellant takes significantly longer with all tasks of managing transportation, that he needs to sit down on a bus and is unable to stand due to his heart condition. The additional comments are that the appellant requires continuous or periodic assistance with DLA.

Need for Help

- The general practitioner reported that the appellant does not require any aids for his impairment.
- The psychiatric nurse indicated in the assessor report that help required for DLA is provided by the appellant's friends, with the comment that his "roommate helps with most DLA; no relatives here; social isolation is evident."

In his Notice of Appeal, the appellant expressed his disagreement with the reconsideration decision.

At the hearing, the appellant provided an additional 3-page document which is an undated print-out of information that he supplied to an advocate "quite a while ago" and includes the following:

- The appellant's conditions are coronary heart disease, Type II diabetes, hypertension, and depression. The appellant had quadruple bypass surgery in August 2005 and experiences fatigue and dizziness throughout the day after any physical activity. He has pain and tightness in his chest 3 to 4 times per week. He experiences sweating, dizziness, fatigue and blurry vision 2 to 4 times per week due to low blood sugar, sleep disturbances 3 to 4 times per week, dizziness in mornings due to high blood pressure and depressed moods 2 to 3 times per week.
- The appellant is unable to walk more than 2 to 4 blocks, to climb more than 7 to 8 stairs, and to lift more than 5 to 10 lbs. due to dizziness, tightness in his chest and shortness of breath. He uses a cane 2 times per month, uses the railing when climbing stairs, and requires help with lifting and carrying.
- The appellant takes 2 times longer with walking indoors due to dizziness and fatigue and stays seated for the majority of the day. He needs help or he is unable to walk outdoors (2-4 blocks), climb stairs (7-8 stairs), lift (5-10 lbs.), or carry and hold due to dizziness, tightness in chest, shortness of breath and fatigue.
- For personal care, some tasks take 2 times longer due to dizziness and tightness in his chest (dressing, grooming, transfers) or due to issues with swallowing food as a result of his surgery (feeding self).
- For housekeeping, the appellant is unable to do his laundry and housekeeping more than once per month due to dizziness, fatigue, shortness of breath and tightness in his chest and he requires continuous assistance from his roommate.
- With shopping, the appellant is independent with reading labels and prices and making appropriate choices and requires help or he is unable to go to and from stores (restricted from going more than 1-2 times per week due to dizziness, tightness in chest, fatigue and shortness of breath), pay for purchases (unable to stand longer than 7-10 minutes in line-ups due to dizziness and fatigue) and carry purchases home (unable to carry more than 5-10 lbs.).
- For meals, the appellant is independent with planning and takes longer with preparation and cooking (takes frequent breaks due to dizziness and fatigue) and is restricted 1-2 times per week with safe storage due to memory issues.
- The appellant is independent with budgeting and paying rent and bills and is unable to do banking as he is restricted from standing longer than 7-10 minutes in line-ups.
- For managing his medications, the appellant needs help with filling/refilling prescriptions (mobility issues) and taking as directed (restricted 1-2 times per month due to memory issues) and is independent with safe handling/storage.
- With managing transportation, the appellant needs help getting in/out of a vehicle (uses the car door for support due to dizziness and tightness in chest), requires a seat on the bus due to dizziness and is independent with understanding/arranging schedules.
- For social functioning, the appellant needs support and supervision with making appropriate social decisions, dealing appropriately with unexpected demands, and securing assistance from others.

At the hearing, the appellant provided the following oral evidence:

- The appellant stated that he had a heart attack in 2005 and had surgery but he still has problems with his chest and he cannot keep a job anymore. He always gets tired and dizzy and he has to be careful and carry a cane. He tries to walk for his exercise about an hour each day. In the washroom, he has to hold on to a handle to steady himself.
- The appellant stated that he sometimes forgets to take his medications and sometimes when he is out walking he will get lost and he does not know where he is. The appellant stated that he is taking 5 different types of medications. The appellant stated that he does not sleep very well because he has to

get up to drink water 3 to 4 times per night.

- The appellant stated that he has a problem with low blood sugar level and sometimes he only eats bread and his hands begin to shake because he is so hungry. The appellant explained that he had several teeth extracted so it is difficult to chew many foods, such as meat, and so he often eats soup. The appellant stated that sometimes his blood sugar level gets so low that he cannot move for up to 2 hours. In response to a question, the appellant stated that about 8 years ago he received some instruction about a diabetic diet and what foods to eat but he has forgotten. The appellant stated that he used to cook with sugar in all his foods.
- The appellant stated that for approximately a year he has been very dizzy and he suspects he may need more surgery. His doctor has sent him for many tests at the hospital, about 3 or 4 times per month, and the doctor always says the tests are fine.
- The appellant stated that when he walks his chest is "too heavy" and he cannot swallow very well, it is like something is stuck in his throat.
- The appellant stated that he lives with a roommate who has "mental problems" and the appellant helps him and the roommate helps the appellant with carrying things.
- The appellant stated that his doctor is very busy and only meets with the appellant for a short time, maybe 15 minutes, to fill out the report, and the appellant has resorted to going to a walk-in clinic to get medications when he has an infection. The appellant could not recall meeting with a nurse for the purposes of having the assessor report completed and had no memory of being asked questions by a nurse.

The ministry did not object to the admissibility of the print-out and the panel admitted the document and the appellant's oral evidence, pursuant to Section 22(4) of the Employment and Assistance Act, as providing a self-report by the appellant about his medical conditions and being in support of information that was before the ministry on reconsideration.

At the hearing, the ministry relied on its reconsideration decision.

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PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry's reconsideration decision, that the appellant is not eligible for designation as a person with disabilities (PWD), was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. The ministry found 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.

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.

Evidentiary Considerations

The panel finds that the evidence of the appellant's physician contained in the physician report and that of the psychiatric nurse in the assessor report is markedly different in some respects. For example, the physician assesses the appellant as able to walk 1 to 2 blocks unaided and to climb 5 or more step unaided and to lift 5 to 15 lbs., and that he does not require an aid for his impairment, while the nurse reported that the appellant's mobility and physical activities are "seriously impaired" and that he uses a cane on most days. The appellant's physician has known the appellant for 10 years while the psychiatric nurse met with the appellant for the first time when he completed the report. The ministry points out that the assessor section of the PWD application is intended to be completed by an assessor who has a history of contact and recent experience with the appellant and is to be based on knowledge of the appellant, observations, clinical data and experience. For these reasons, the panel finds that the ministry's determination that more weight be placed on the evidence of the physician where it conflicts with that of the psychiatric nurse was reasonable.

Severe Physical Impairment

The appellant's position is that a severe physical impairment is established by the evidence of his fatigue and dizziness due to his diabetes, coronary artery disease and hypertension, which results in restrictions to his mobility and the need to use a cane, and the pain and tightness in his chest due to his coronary artery disease.

The ministry points out that the appellant's general practitioner reported that the appellant is able to walk 1 to 2 blocks and to climb 5 or more step unaided, to lift 5 to 15 lbs., and that he has no limitations to sitting. The ministry argues that the physician indicated that the appellant's diabetes is poorly managed causing glucose fluctuations, that he has symptoms of hypoglycemia, that his coronary artery disease is stable, and that the appellant has a poor understanding of disease management. The ministry argues that although the psychiatric nurse reported that the appellant's mobility and physical activities are seriously impaired due to his heart condition, this level of impairment is not supported by the physician's assessment of the appellant's functional skills or DLA. The ministry argues that the appellant's physician indicated that no aids are required for the appellant's impairment; however, the psychiatric nurse reported that the appellant uses a cane for walking indoors and outdoors and climbing stairs, and that he "uses cane on most days." The ministry argues that the appellant's physical functional skill limitations are more in keeping with a moderate degree of impairment.

Panel Decision

The legislation clearly provides that the determination of severity of impairment is at the discretion of the minister, taking into account all of the evidence including that of the appellant. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a prescribed professional respecting the nature of the impairment and its impact on daily functioning.

The medical practitioner, the appellant's general practitioner of 10 years, has diagnosed the appellant with Type II diabetes, coronary artery disease and hypertension and has described his diabetes as "poorly managed" causing glucose fluctuations and his coronary artery disease as "stable." The medical practitioner reported that the appellant has poor understanding of disease management and that he "...needs to improve glycemic control, blood pressure control." The medical practitioner commented that the appellant has symptoms of hypoglycemia. The appellant is assessed by the medical practitioner as able to walk 1 to 2 blocks and to climb 5 or more steps, and that he does not require an aid for his impairment. While the psychiatric nurse, as assessor, indicated that the appellant uses a cane for walking indoors and outdoors and for climbing stairs and that his "...mobility and physical activities are seriously impaired due to heart condition," the appellant's evidence in his self-report and at the hearing is that these impacts are caused by dizziness, fatigue, tightness in his chest, shortness of breath and fatigue. The appellant stated that he uses a cane because he is dizzy all the time and that he gets tired. The panel finds that the medical practitioner has attributed these symptoms to a lack of disease management by the appellant and not as an inevitable result of the appellant's medical conditions. Although the appellant may use a cane, the evidence does not establish that he would "require" an aid for his impairment if he were to manage his conditions. The appellant acknowledged that he has forgotten the instruction he received regarding maintaining a diabetic diet and he cannot eat some foods because he had many teeth extracted. The appellant stated that he has regular testing for his heart at the hospital and his doctor always tells him that his heart is fine. The evidence demonstrates that the appellant experiences impacts to his physical functioning primarily as a result of dizziness and fatigue, which are symptoms of his medical conditions which are not being properly managed. Therefore, the panel finds that the ministry reasonably determined that the appellant's level of physical functioning is more in keeping with a moderate degree of impairment and does not establish that the appellant has a severe physical impairment under section 2(2) of the EAPWDA.

Severe Mental Impairment

The appellant argues that he has a severe mental impairment as a result of depression.

The ministry's position is that there is no mental health diagnosis and, therefore, no mental impairment. The ministry argues that the section of the assessor report regarding impacts to cognitive and emotional functioning, as completed by the psychiatric nurse, is intended for applicants who have an identified mental impairment or brain injury. The ministry argues that the significant deficit with cognitive and emotional functioning identified by the medical practitioner is with regard to understanding disease management.

Panel Decision

The general practitioner has not diagnosed a mental disorder. The appellant stated that he suffers from depression and the psychiatric nurse indicated possible onset of dementia with major or moderate impacts in 12 of 14 areas of cognitive and emotional functioning and reported that the appellant's cognitive and emotional functioning "...is very significantly impaired." However, the panel finds that these diagnoses have not been confirmed by a medical practitioner with an opinion that the conditions are likely to continue for two years or more, as required by the legislation. The medical practitioner reported a significant deficit with cognitive and emotional function in the "other" category, with the note "...poor understanding of disease management." Therefore, the panel finds that the ministry reasonably determined that a severe mental impairment was not established under section 2(2) of the EAPWDA.

Restrictions in the ability to perform DLA

The appellant's position is that his physical impairment directly and significantly restricts his ability to perform DLA to the point that he requires the use of a cane as an assistive device or the continuous assistance of another person in tasks of all of his DLA.

The ministry's position is that while the evidence of the prescribed professional is that the appellant has certain limitations as a result of his medical conditions, it does not consistently support that his impairment directly and significantly restricts his DLA continuously or periodically for extended periods. The ministry points out that the section of the assessor report relating to impacts to social functioning is intended for applicants who have an identified mental impairment or brain injury.

Panel Decision

The evidence of the appellant's long-time general practitioner is that the appellant can manage walking distances of 1 to 2 blocks and climbing 5 or more steps without the use of an assistive device, and that he is not restricted in any of his DLA. The general practitioner noted that the appellant's diabetes is "poorly managed causing glucose fluctuations", with symptoms of hypoglycemia, and that he "...claims he has difficulty with ADL intermittently due to weakness and dizziness." In the assessor report, the psychiatric nurse reported that that the appellant has chest pain, fatigue and dizziness throughout the day, depressed mood, sleep deprivation, blurred vision, impaired memory, and anxiety and, as a result, requires continuous or periodic assistance with most of his DLA. As a medical practitioner has not diagnosed a mental disorder, the panel finds that it is difficult to isolate the impacts to DLA associated with the symptoms, such as depressed mood and anxiety, from those resulting from the conditions diagnosed by the physician. In the appellant's self-report, the need for assistance with DLA is attributed to the appellant's symptoms of dizziness, tightness in chest, fatigue and shortness of breath. Looking at the evidence that is consistent with that of the general practitioner, on which more weight is placed, the panel concludes that the noted restrictions in the appellant's ability to perform DLA were reasonably viewed by the ministry as not consistently supporting a direct and significant restriction of the appellant's ability to perform DLA in the opinion of a prescribed professional thereby not satisfying the legislative criterion of section 2(2)(b)(i) of the EAPWDA.

Help to perform DLA

The appellant's position is that he requires the use of a cane as an assistive device and the significant assistance of his roommate to perform DLA.

The ministry's position is that because it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required, and that it is unclear whether a cane is required.

Panel Decision

Section 2(2)(b)(ii) of the EAPWDA requires that, as a result of direct and significant restrictions in the ability to perform DLA, a person requires help to perform those activities. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

While the panel finds that the evidence of the prescribed professional establishes that the appellant receives assistance from his roommate with tasks of some DLA and that the appellant currently uses a cane as an assistive device, the panel also finds that the ministry reasonably determined that it is not clear that a cane is required and, as direct and significant restrictions in the appellant's ability to perform DLA have not been established, it cannot be determined that the appellant requires help to perform DLA as a result of those restrictions.

Conclusion

Having reviewed and considered all of the evidence and relevant legislation, the panel finds that the ministry's reconsideration decision which determined that the appellant was not eligible for PWD designation was reasonably supported by the evidence, and therefore confirms the decision.