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PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated September 9, 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,
- as a result of these restrictions, 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 appellant did not attend the hearing. After confirming that the appellant was notified, the hearing proceeded under Section 86(b) of the Employment and Assistance Regulation.

The evidence before the ministry at the time of the reconsideration decision included the Person With Disabilities (PWD) Application comprised of the applicant information dated March 27, 2012, a physician report (PR) completed by a physician who is a specialist in neurology and dated April 2, 2012, and an assessor report (AR) completed by a nurse practitioner who has known the appellant less than a year and dated March 7, 2013, as well as a Request for Reconsideration- Reasons dated August 7, 2013.

Diagnoses

The appellant has been diagnosed by his neurologist with "clinically isolated left hemiparesis syndrome" with an assigned diagnostic code indicating multiple sclerosis (MS) and onset of December 2011.

Physical Impairment

- In the PR, the neurologist indicated for the appellant's health history that the appellant has left hemiparesis with decreased strength and dexterity in his left arm and leg. The brain MRI confirms a large inflammatory lesion in the right hemisphere and first attack of MS.
- With respect to the degree and course of the impairment, the neurologist commented that the appellant has "...probable persisting/permanent deficits but duration and severity after a first attack is unknown/unclear at the current time."
- The neurologist indicated that the appellant has not been prescribed medications or treatments that interfere with his ability to perform daily living activities (DLA) and does require an aid for his impairment, with the note "planning cane, depending on clinical course."
- In the PR, the neurologist reported that the appellant is continuously restricted with mobility inside the home and mobility outside the home with a note that the appellant has difficulty ambulating.
- Functional skills reported by the neurologist in the PR indicated that the appellant can walk 2 to 4 blocks unaided on a flat surface, can climb 5 or more steps unaided, is unable to do any lifting and has no limitation with remaining seated.
- In the AR, the nurse practitioner indicated that the appellant requires periodic assistance from another person with all mobility and physical activities, including walking indoors and outdoors, climbing stairs, standing, lifting and carrying and holding. The nurse practitioner commented: "lack of strength and dexterity, reduced function left hand."
- In his self-report, the appellant wrote that due to the loss of strength and control of his left hand, he has not been able to work [in a physically-demanding job]. Due to his headaches, he finds it very difficult to concentrate. Due to his diaphragm not working correctly, it is difficult for him to breath when he gets active. When he gets active, he finds that he becomes off balance and has to use walls to walk. When he goes up stairs, he gets dizzy and out of breath. His eyesight has gotten worse in the last 6 months.
- The appellant wrote that he has good days but more bad days than good. The more rest he gets, the better he ends up feeling but he has a general ill feeling all of the time. He has bowel problems and he has had 4 accidents in the last 6 months.
- In his Request for Reconsideration, the appellant wrote that he has been on pills for 2 years since his first attack and all he does is stay in bed most days. He has no energy. He does not venture far from the home because he is afraid of having an accident (bowel movement). He is still waiting for his CT scan results.

Mental Impairment

- In the PR, the neurologist reported the appellant has difficulties with communication with a cognitive cause. The neurologist did not provide further comment.
- The neurologist reported significant deficits with cognitive and emotional function in the areas of executive, perceptual psychomotor, and attention or sustained concentration. No further comments were provided by the neurologist.
- In the AR, the nurse practitioner reported that the appellant has a good ability to communicate in all areas.
- In the AR, the nurse practitioner indicated a major impact with cognitive and emotional functioning in the area of other neuropsychological problems (psychomotor problems), and moderate impacts in bodily functions, emotion, attention/concentration, motivation, motor activity and other emotional or mental problems. The nurse practitioner assessed minimal or no impact in the remaining 7 areas of functioning.
- The nurse practitioner commented that the appellant has: 1) mobility issues with loss of strength left hand, loss of coordination, left-sided limp, 2) depression regarding physical state and inability to function well; irritability, 3) stress which increases frequency and severity of debilitating migraine headaches, 4) bowel and bladder incontinence which makes it difficult to travel outside the home, and 5) headaches which are exacerbated by riding bus or car.
- For social functioning, the nurse practitioner reported that the appellant is independent with making appropriate social decisions, with developing and maintaining relationships, interacting appropriately with others, and securing assistance from others, and requires continuous support/supervision with dealing appropriately with unexpected demands. The nurse practitioner wrote that the appellant experiences distress due to illness and capacity. The appellant is assessed with marginal functioning in his immediate social network ("family dysfunctional relationships") and good functioning with his extended social networks.
- In his Request for Reconsideration, the appellant wrote that he suffers with depression and a brain injury.

Daily Living Activities (DLA)

- In the PR, the neurologist reported that the appellant is continuously restricted with mobility inside the home and mobility outside the home, but did not indicate restrictions to the other listed DLA, including personal self care, meal preparation, management of medications, basic housework, daily shopping, use of transportation, management of finances, and social functioning. The neurologist commented regarding the assistance requires with DLA that the appellant has "...difficulty ambulating and performing bilateral dexterous activities (i.e. utensils, tools, etc.)."
- In the AR, the nurse practitioner indicated that the appellant takes significantly longer than typical with 5 out of 8 tasks of the DLA personal care, including dressing, grooming, bathing, toileting and feeding self, with the comment added that "use of left hand impairs ability- loss of dexterity; disability affects ability to use utensils." Transfers in/out of bed and on/off chair are indicated as being performed independently.
- The appellant is assessed as also taking significantly longer than typical with doing his laundry and basic housekeeping, with the note that the comments are the same as for those regarding personal care, i.e. use of left hand impairs ability.
- For shopping, the appellant is independent with 3 of 5 tasks and takes significantly longer than typical with going to and from stores ("difficulty with travel") and carrying purchases home ("unable to carry groceries").
- The nurse practitioner assessed the appellant as taking significantly longer with food preparation and cooking while being independent with meal planning and safe storage of food.
- The appellant is independent with budgeting and paying rent and bills and takes significantly longer

than typical with banking ("due to transportation and dexterity").
- All listed tasks for the DLA medications are managed independently, with no comments added.
- For managing transportation, the appellant is assessed as taking significantly longer than typical with getting in and out of a vehicle ("dexterity") and using public transit ("not longer but limited by neuro symptoms"), and independent with using transit schedules and arranging transportation.
- In his self report, the appellant wrote that the loss of strength and control of his left hand has made it difficult to wash dishes, that he has broken plates and dropped a pot because his hand has "given out." It is hard for him clean his house and, when he tries, he gets light-headed and tired. He has paid his niece to clean his house. It is difficult for him to use a fork and knife because of his left hand.
- The appellant wrote that due to "travelling issues" and being easily out of breath, he has his family buy his food and he does not go out shopping.
- In his Request for Reconsideration, the appellant wrote that he needs others to do his shopping and remind him to pay bills.

Need for Help

- In the AR, the nurse practitioner indicated that help required for DLA is provided by the appellant's family.
- For assistance provided through the use of assistive devices, the nurse practitioner noted "N/A," or not applicable to the appellant.

In his Notice of Appeal, the appellant expressed his disagreement with the reconsideration decision. The appellant wrote that he has been dealing with these problems for almost two years with only slight improvement in the beginning of treatment, but now his symptoms are only worsening both mentally and physically. His concentration and mental function give him the most trouble. His daily activities suffer because he has no energy/ strength to do them and has to rely on others.

The ministry relied on its reconsideration decision. At the hearing, the ministry pointed out that restrictions to the ability to work is not a consideration for PWD designation as it is with the Persons with Persistent Multiple Barriers to employment (PPMB) status, which may be another option for the appellant to consider. The ministry pointed out that there was no further medical information provided on this appeal; however, updated information could be included if the appellant is not successful with the appeal and if he were to apply for PWD designation again. The ministry acknowledged that sometimes the medical professionals completing either the PR or the AR do not have much time to review the relevant information and that an advocate can often assist with this process.

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PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry's reconsideration decision, which found 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.

Severe Physical Impairment

The appellant's position is that a severe physical impairment is established by the evidence of the decreased strength and dexterity in his left arm and leg and lack of balance and energy due to his MS diagnosis, as well as bowel problems and migraine headaches.

The ministry's position is that there is not sufficient information to establish that the appellant has a severe physical impairment. The ministry pointed out that the neurologist indicated that the appellant is able to walk 2 to 4 blocks unaided, climb 5 or more stairs unaided, that he is unable to lift any amount and has no limitations with remaining seated. The ministry argued that the nurse practitioner assessed the appellant as requiring periodic assistance in all aspects of mobility and physical abilities with the explanation that the appellant lacks strength and dexterity due to reduced function in his left hand, but no information is provided on how often the appellant requires assistance. The ministry argued that the appellant's functional skill limitations are more in keeping with a moderate degree of physical impairment.

Panel Decision

The diagnosis of a medical condition is not itself determinative of a severe impairment. To assess the severity of an impairment one must consider the nature of the impairment and its impact on the appellant's ability to manage his DLA as evidenced by functional skill limitations, the restrictions to DLA, and the degree of independence in performing DLA. The ministry describes this approach well when it defines the word "impairment" in the PR as being "a loss or abnormality of psychological, anatomical or physiological structure or function causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration." This definition is not set out in legislation and is not binding on the panel, but in the panel's view it quite appropriately describes the legislative intent.

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 medical practitioner or prescribed professional respecting the nature of the impairment and its impact on daily functioning.

The medical practitioner, the appellant's neurologist, has diagnosed the appellant with "clinically isolated left hemiparesis syndrome" indicating MS with an onset of December 2011, or approximately 4 months prior to the date of the report. In the PR, the neurologist reported that the appellant can walk 2 to 4 blocks unaided on a flat surface, can climb 5 or more steps unaided, is unable to do any lifting and has no limitation with remaining seated. In the AR, the nurse practitioner indicated that the appellant requires periodic assistance from another person with all mobility and physical activities, including walking indoors and outdoors, climbing stairs, standing, lifting and carrying and holding and commented: "lack of strength and dexterity, reduced function left hand." The nurse practitioner reported that the appellant does not use an assistive device. The panel finds that the ministry reasonably determined that it is difficult to assess the appellant's need for periodic assistance as there is no description provided as to the nature of the assistance required, its frequency or duration. In his self-report, the appellant wrote that due to the loss of strength and control of his left hand, he has not been

able to work [in a physically-demanding job] . The panel finds that it is not clear whether there are limitations with use of the appellant's right hand and that the ministry reasonably concluded that the appellant's functional skills limitations, other than lifting, are more in keeping with a moderate degree of impairment.

The neurologist commented in the PR that the appellant has "...probable persisting/permanent deficits but duration and severity after a first attack is unknown/unclear at the current time" and, regarding aids for his impairment, that they are "...planning cane, depending on clinical course." The neurologist indicated in the health history portion of the PR that the brain MRI confirms a large inflammatory lesion in the right hemisphere and first attack of MS. In his Request for Reconsideration, the appellant wrote that he has been on pills for 2 years since his first attack and all he does is stay in bed most days, that he has no energy and does not venture far from the home because he is afraid of having an accident (bowel movement). The appellant stated in the Request for Reconsideration that he is still waiting for his CT scan results. The medical practitioner did not diagnose a disease of the digestive system in the PR and there were no further medical reports available to provide an update. The panel concludes that the ministry reasonably determined that the evidence currently available regarding the appellant's physical condition does not establish that the appellant has a severe physical impairment under section 2(2) of the EAPWDA.

Severe Mental Impairment

The appellant's position is that a severe mental impairment is established by the evidence of his depression and brain injury.

The ministry's position is that the information provided is not sufficient evidence of a severe mental impairment. The ministry argued that the neurologist assessed significant deficits to cognitive and emotional functioning in the areas of executive, perceptual psychomotor and attention or sustained concentration; however the nurse practitioner assessed no impact to executive functioning, major impact to other neuropsychological problems (psychomotor problems), and a moderate impact to attention/concentration. At the hearing, the ministry pointed out some of the inconsistencies between the PR and the AR, for example with the assessment of the appellant's ability to communicate, which creates uncertainty and makes it difficult for the ministry to arrive at a definitive conclusion on the issue of severity.

Panel Decision

The appellant's neurologist did not diagnose a mental disorder in the PR, but identified significant deficits to cognitive and emotional functioning in the areas of executive, perceptual psychomotor, and attention or sustained concentration, without providing further comments. In the AR, the nurse practitioner indicated a major impact with cognitive and emotional functioning in the area of other neuropsychological problems (psychomotor problems), and moderate impacts in bodily functions, emotion, attention/ concentration, motivation, motor activity and other emotional or mental problems. The nurse practitioner assessed minimal or no impact in the remaining 7 areas of functioning. The nurse practitioner commented that the appellant has mobility issues with loss of strength left hand, a loss of coordination and left-sided limp, depression regarding his inability to function well, stress which increases frequency and severity of debilitating migraine headaches which are also aggravated by travel, and bowel and bladder incontinence which makes it difficult to travel outside the home. The panel finds that the narrative points to impacts from the appellant's physical conditions rather than from a mental disorder. In the PR, the neurologist reported the appellant has difficulties with communication with a cognitive cause, with no other explanation provided. The nurse practitioner reported , on the other hand, that the appellant has a good ability to communicate in all areas.

In the PR, the neurologist did not report restrictions to the appellant's social functioning. In the AR, the nurse practitioner reported that the appellant is independent with making appropriate social decisions, with developing and maintaining relationships, interacting appropriately with others, and securing assistance from others, and requires continuous support/supervision with dealing appropriately with unexpected demands. The nurse practitioner wrote that the appellant experiences distress due to illness and capacity, and the panel

finds that the narrative indicates impacts more from the appellant's physical condition than from a mental disorder per se. The appellant is assessed with marginal functioning in his immediate social network ("family dysfunctional relationships") and good functioning with his extended social networks. The panel finds that the evidence demonstrates that the appellant independently manages all other listed "mental" tasks of daily living, including making appropriate social decisions and interacting appropriately with others, and managing all tasks of both his medications and finances, although banking takes longer due to his dexterity difficulty. 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 and mental impairments directly and significantly restrict his ability to perform DLA to the point that he requires the assistance of another person in many tasks of his DLA.

The ministry's position is that the evidence of the prescribed professionals is that the appellant performs the majority of his DLA independently. The ministry argued that the information provided by the prescribed professionals does not establish that the appellant's impairments significantly restrict his ability to perform DLA either continuously or periodically for extended periods of time.

Panel Decision
The evidence of a prescribed professional, the appellant's neurologist, is that the appellant is continuously restricted with mobilizing indoors and outdoors, that the appellant has "...difficulty ambulating and performing bilateral dexterous activities." The prescribed professional also reported that the appellant can walk 2 to 4 blocks unaided and is not currently using an assistive device, although the use of a cane was planned at the time. The neurologist did not report restrictions to any of the appellant's other DLA.

In the AR, the nurse practitioner indicated that the appellant is independent with 3 tasks of the DLA personal care and takes significantly longer than typical with 5 out of 8 tasks as "...use of left hand impairs ability- loss of dexterity; disability affects ability to use utensils." The appellant is also assessed as taking significantly longer than typical with the DLA basic housekeeping. In his self report, the appellant wrote that the loss of strength and control of his left hand has made it difficult to wash dishes, that he has broken plates and dropped a pot because his hand has "given out," and it is hard for him clean his house because he gets light-headed and tired. The appellant wrote that he has paid his niece to clean his house. The nurse practitioner reported that the appellant takes significantly longer than typical with the physical tasks of shopping due to his restrictions with lifting and mobility. In his self-report, the appellant wrote that due to "travelling issues" and being easily out of breath, he has his family buy his food and he does not go out shopping. In his Request for Reconsideration, the appellant wrote that he does not venture far from his home because he is afraid of having an accident (bowel movement). The nurse practitioner assessed the appellant as taking significantly longer with tasks of managing meals (food preparation and cooking) and finances (banking, "due to transportation and dexterity"). All listed tasks for the DLA medications are managed independently, with no comments added by the nurse practitioner. For managing transportation, the appellant is assessed as taking significantly longer than typical with getting in and out of a vehicle ("dexterity") and using public transit ("not longer but limited by neuro symptoms"), and independent with using transit schedules and arranging transportation.

There is no information provided by the nurse practitioner about how much longer than typical it takes the appellant to perform the identified tasks of DLA, and the panel finds that the ministry reasonably concluded that there is not sufficient evidence from the prescribed professionals to establish that the appellant's ability to perform DLA is restricted either continuously or periodically for extended periods of time. The panel finds that the ministry reasonably concluded that the information from the prescribed professionals does not establish that the appellant's impairment related to his medical diagnoses of MS directly and significantly restricts DLA either continuously or periodically for extended periods, 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 significant assistance of others to perform many of his 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 the prescribed professional indicated that the use of a cane was planned, depending on clinical course.

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.

The evidence of the prescribed professional establishes that the help required for DLA is provided by the appellant's family and he does not currently routinely use an assistive device. The panel finds that the ministry reasonably determined that 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, as defined by section 2(3)(b) of the EAPWDA.

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.