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PART C – Decision under Appeal

The decision under appeal is the Reconsideration Decision of the Ministry of Social Development dated 29 June 2012 denying the appellant designation as a person with disabilities (PWD). The ministry determined that the appellant did not meet all of the required criteria for PWD designation set out in the Employment and Assistance for Persons with Disabilities Act, section 2. Specifically the ministry determined that the information provided did not establish that the appellant has a severe mental or physical impairment that in the opinion of a prescribed professional

(i) directly and significantly restricts the person's ability to perform daily living activities (DLAs) either continuously or periodically for extended periods; and,

(ii) as a result of those restrictions, the person requires help to perform those activities.

The ministry did determine that the appellant satisfied the other 2 criteria: he has reached 18 years of age; and his impairment in the opinion of a medical practitioner is likely to continue for at least 2 years.

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 failed to appear at the hearing at the scheduled time, date and place. After waiting 15 minutes and after verifying that the appellant had received notification of the hearing at least 2 business days before the hearing date by examining the Canada Post tracking sheet showing successful delivery of the Notice of Hearing, the hearing proceeded under section 86(b) of the Employment and Assistance Regulation.

The evidence before the ministry at reconsideration consisted of the following:

1. The appellant's PWD Designation Application, dated 03 February 2012. The application includes a Physician Report (PR) dated 07 March 2012 prepared by his General Practitioner (GP), an Assessor Report (AR), including an accompanying narrative, dated 06 February 2012 completed by a Registered Social Worker (SW) in private practice, and the appellant's Self Report (SR) prepared with the help of another person.
2. A letter dated 13 June from the SW in support of the appellant's Request for Reconsideration.

In the PR, the GP indicates he has known the appellant since September 2011 and has seen him 2-10 times in the past year. He diagnoses the appellant with neck injury (still has pain), left elbow dysfunction and brain injury (all from a motor vehicle accident (MVA) in April 2011), and arthritis in the right hip (osteoarthritis), onset unknown. Under health history, the GP writes: "This person was involved in a motor vehicle accident on 16 April 2011. He sustained a neck injury as well as a left leg and arm injury and a brain injury. The injury to his arm has left him with limited function of the left elbow. His brain injury impairs his cognitive functioning and his neck injury results in chronic pain. He also has hypertension, diabetes and has had a heart attack in 2008." The GP indicates that the appellant has not been prescribed any medication or treatments that interfere with ability to perform daily living activities (DLAs). The GP also indicates that the appellant does not require any prostheses or aids for his impairment.

Under degree and course of Impairment, the GP indicates that the appellant's impairment is likely to continue for two years or more, commenting that the brain injury and cognitive impairment, as well as elbow dysfunction, may last indefinitely.

As to functional skills, the GP indicates the appellant can walk 1 to 2 blocks unaided, climb 5+ stairs, lift 15 to 35 lbs and can remain seated for less than an hour. The GP indicates there are no difficulties with communications. With respect to cognitive and emotional function, the GP notes significant deficits in the following areas: executive, memory, motivation and attention or sustained concentration, with no deficits in the remaining 8 areas. In terms of DLAs, the GP indicates that the appellant is actively restricted on a continuous basis with basic housework, daily shopping (commenting this is moderate, due to pain mostly) and social functioning, with the comment that concentration and communication are affected. No restrictions are identified for personal self care, meal preparation, management of medications, mobility inside the home, mobility outside the home, and management of finances. Use of transportation is not assessed. As to assistance required with DLAs, the GP indicates "none." The GP states, under additional comments, that "The combination of cognitive impairment, pain and physical dysfunction adds up to a general impairment that makes gainful employment difficult."

In the AR, the SW indicates that he has known the appellant for two weeks and completed the form on the basis of 2 interviews totaling 3 hours. The SW reports that the appellant lives with his family; he returned to live with his parents in August 2011 to convalesce after his MVA (in April 2011). The SW lists the appellant's mental or physical impairments that impact his ability to manage DLAs as: an MI in 2008; type II diabetes; high cholesterol and hypertension; he had an MVA in [a third-world country] – severe – unconscious, with shattered left elbow, severe damage to right hip, back and neck injury and suspicion of traumatic brain injury.

With respect to ability to communicate, the SW rates the level of speaking ability satisfactory to poor, reading poor, writing poor, and hearing satisfactory. As to mobility and physical ability and the level of assistance required, the SW assesses the appellant as independent for walking indoors, taking significantly longer than typical for walking outdoors and climbing stairs and requiring periodic to continuous assistance for lifting and carrying and holding.

With respect to cognitive and emotional functioning, the SW assesses a major impact for bodily functions, emotion, attention/concentration, executive, memory, motivation, motor activity, and other neuropsychological and other emotional or mental problems. A moderate impact is assessed for consciousness, insight and judgment and language and a minimal impact for impulse control.

With respect to DLAs, under personal care, the appellant is assessed as taking significantly longer than typical for dressing, grooming, bathing, transfers in/out of bed and on/off of chair, with continuous assistance required for regulating diet. Under basic housekeeping, shopping, meals, and paying rent and bills, the appellant is assessed as requiring continuous assistance. Under medications, continuous assistance is required for filling/refilling prescriptions and periodic assistance for taking as directed. As for transportation, he is assessed as requiring continuous assistance for using public transit and for using transit schedules and arranging transportation. In terms of social functioning, he is assessed as requiring continuous support/supervision in all listed areas, with very disrupted functioning for both immediate and extended social networks.

In making these assessments, the SW provides much narrative commentary. Highlights include:

- Ability to communicate: processing time is very slow; poor retention - must read and reread to commit to memory.
- Mobility: walking outdoors – 1-2 blocks if walking slowly, very hard to climb an incline even a few degrees: pain worse than climbing stairs; hip pain escalates with speed. Climbing stairs - will climb seven of the 12 steps sequentially then shift to 2 feet per step for remaining stairs of flight; uses rails.
- Cognitive and emotional functioning - sleep is very broken through the night; over 90% of the time he sleeps in a reclining armchair. Consciousness - some confusion through the day, believed to be associated with short-term memory deficits but this has not been verified. Emotion - some anxiety about the future, with his mother noting the huge change in his mood. Insight and judgment - appellant is in denial about there being anything wrong with him cognitively; he has focused on the physical matters resulting from the accident. Attention/concentration - appellant is frustrated by the repetitions that are required for him to be able to learn something new; he reviews the procedures again and again in order to apply some new learning. Executive - many aspects of post traumatic brain injury were explored with the appellant, including depression, memory problems, being easily agitated, loss of attention/concentration and limitations with planning and organization; he had poor insight into

these situations and circumstances, although it is clear that he has been dramatically affected in all of these. Memory - long-term memory appears to be intact but short-term and intermediate memory both appear to be affected, while consolidating information into new memory is slow and requires many repetitions. Motivation - the appellant seems to have ideas about doing things, but seeing them through to conclusion is another matter entirely; with outside influence he is able to engage that left to his own devices he is not. Motor - he is easily agitated and his recovery from being agitated his lengthy; he does not have any sense of goals or alternatives for himself at this time. Language - processing time is very slow and his response time can be remarkably slow, to the point where the assessor thought he had lost track of the question and was searching for it. Other neuropsychological problems – though not making a diagnosis of post-traumatic brain injury, there are sufficient signs and symptoms that this possibility should be thoroughly explored. Other emotional – it appears that the appellant has been in denial about his overall mental health since the accident; counseling is strongly recommended.

- DLAs: the range of motion/flexion of left elbow markedly reduced; he has developed ways to use a single hand to dress; in feeding self, he cannot reach left hand to mouth; he needs several tries to get momentum to sit up and get out of bed and many times he pushes often to be able to stand. His mother does the laundry and shopping is her domain, though he can carry light bags and helps carry purchases into house. His mother does the cooking and there is some question as to whether he could manage meal preparation on his own – he seems forgetful with basic things like making coffee, forgetting where he is in the process. He cannot drive safely as he cannot do a shoulder check. He needs to be encouraged by his mother to take his medications; he resists because of fear of becoming addicted or causing headaches, which are constant and variable. He cannot remember his phone number at home or his PIN at the bank.
- Social functioning: while social involvement may be beneficial, appellant avoids; explaining very disrupted social functioning, the SW reports there is some contact with girlfriend oversees and one friend here, but appellant not venturing out on her own; confidence is reduced.

The SW indicates that help required for DLAs is provided by family. The SW writes: "at this juncture the writer has serious doubts about [appellant's] ability to manage on its own. He is likely to be reclusive and not venture out. He has not come to grips with the profound cognitive, emotional and physical changes since his serious MVA in 2011."

Under additional comments, the SW writes: "The interview with [the appellant's] mother was revealing. [The appellant's] insights are very limited. He does not grasp the many changes that have occurred at all levels - physical and psychological. The mother indicated that she sees the subtle shifts in thinking that the appellant has not come to grips with them."

In his SR, the appellant covers, in narrative form, the material addressed in the AR.

In his letter to the ministry in support of the appellant's Request for Reconsideration, the SW takes issue with several points raised in the ministry's original decision. He adds that he spoke with the appellant's mother. She reiterated that her son is becoming far more reclusive and more isolated. He spends an inordinate amount of time in his room or on the computer and not engaging with others in the house. According to her the appellant's quiet times used to last for two or three hours; they now last 2 to 3 days. Intensity of this behavior is new. She also added that her son is not able to do the

tasks around the house that he had been able to do throughout the years. He also has to be reminded to take his medication and to go to appointments with his doctor. The SW also wrote that since the time of the initial application, the appellant has attended at a mental health and addiction services office to see a counselor and has also been referred to see a psychiatrist. These referrals came from his physician.

In his Notice of Appeal dated 11 July 2011, the appellant gave as his Reasons for Appeal: "I think the decision was unfair."

At the hearing, the ministry stood by its Reconsideration Decision.

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PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry reasonably determined that the appellant is ineligible for PWD designation because he did not meet all the requirements in section 2 of the EAPWDA. Specifically the Ministry determined that the information provided did not establish that the appellant has a severe mental or physical impairment that in the opinion of a prescribed professional

(i) directly and significantly restricts her ability to perform daily living activities either continuously or periodically for extended periods; and,

(ii) as a result of those restrictions she requires help to perform those activities.

The Ministry did determine that he met the 2 other criteria in EAPWDA section 2(2) set out below.

The following section of the EAPWDA applies to this appeal:

2 (2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person has a severe mental or physical impairment that

(a) in the opinion of a medical practitioner is likely to continue for at least 2 years, and

(b) in the opinion of a prescribed professional

(i) directly and significantly restricts the person's ability to perform daily living activities either

(A) continuously, or

(B) periodically for extended periods, and

(ii) as a result of those restrictions, the person requires help to perform those activities.

(3) For the purposes of subsection (2),

(a) a person who has a severe mental impairment includes a person with a mental disorder, and

(b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires

(i) an assistive device,

(ii) the significant help or supervision of another person, or

(iii) the services of an assistance animal.

The following section of the EAPWDR applies to this appeal:

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.

At the beginning of its decision, the ministry comments that the appellant's PWD application is "problematic" as the AR was completed by a social worker who had met with the appellant twice and used a home assessment and interview with his mother as sources of information - no other medical reports were used to substantiate the information. The ministry notes that the AR states that the form is intended to be completed by a prescribed professional having a history of contact and recent experience with the applicant and is to be based on knowledge of the applicant, observations, clinical data and experience. Moreover, the AR was completed before the PR, and therefore the SW would not have had the benefit of the GP's opinion on diagnoses, restrictions to DLAs or assistance required. The panel notes that the ministry has not, for these reasons, explicitly discounted the evidence set out in the AR except where there is a lack of corroboration (see below). The panel considers the lack of other medical reports as a key issue in this appeal, but sees this as more relevant to the adequacy of information provided by the GP and not, as implied by the ministry, to the material covered by the SW.

The appellant has not put forward any express arguments in support of his position in this appeal. The panel will draw on the letter from the SW in support of his Request for Reconsideration where applicable.

Severity of mental impairment

In its reconsideration decision the ministry reviewed the information relating to mental status as set out in the PR and AR. The ministry noted that the GP indicated several deficits to cognitive and emotional functioning relating to the brain injury, including executive, memory, motivation and attention/concentration and restrictions to communications and social functioning. The ministry also noted the major impacts on daily functioning as assessed by the SW under cognitive and emotional function. The ministry provided an analysis as to whether the impacts were corroborated by the physician or whether they were due to a mental impairment/brain injury or from a physical condition. The position of the ministry is that the extensive narrative provided by the SW does not substantiate a severe impact as they are not related to an identified mental impairment or brain injury, the narrative does not support a severe impact, and the GP does not corroborate impacts in some of the categories. With no supporting medical documentation such as a neurological or psychiatric consultation, the ministry is not satisfied that the information provided demonstrates a severe mental impairment.

It would appear that appellant relies on the GPs diagnosis of a brain injury, the deficits to cognitive and emotional functioning reported by the GP and the major impacts to cognitive and emotional function assessed by the SW as the basis for demonstrating that a severe mental impairment has been established. The severity of mental impairment is further substantiated by the fact, as reported by the SW in his letter, that the appellant has been referred to a psychiatrist.

The evidence is that the GP has diagnosed a brain injury, as a result of an MVA, to be the appellant's mental impairment. The panel notes that the ministry definition of impairment (page 8 of the Application) is "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." The GP has reported four significant deficits "secondary to his brain injury"

(though there is no explanation as to what that wording means) and the SW has assessed several major cognitive and emotional as well as social functioning impacts. These deficits and impacts relate to the second half of the definition (causing....). However, the panel considers it reasonable in assessing the severity of impairment for the ministry to expect the appellant, through his medical practitioner, to provide a detailed description of the "loss or abnormality of..... structure or function," as per the definition. In the case of the brain injury, this would mean a clinical assessment of what areas of the brain were damaged, and how and to what extent, and the likely impacts on cognitive, emotional, sensory and motor function. Without such an assessment - the ministry suggests through a neurological or psychiatric consultation report - or by some other evaluation, the panel finds that the ministry reasonably determined that the information provided does not establish a severe mental impairment.

Severity of physical impairment

In terms of physical functioning, the ministry notes the appellant's functional skills as reported by the GP (walk 1-2 blocks unaided, etc) and that the SW states that the appellant is independently able to do most aspects of mobility and physical abilities with periodic help to lift/carry/hold. No assistive devices are routinely used to help compensate for impairment. The functional skill limitations are not significantly restricted and, in the ministry's view, are more in keeping with a mild to moderate degree of impairment. As a result the ministry is not satisfied that the information provided is evidence of a severe physical impairment.

The position of the appellant, as reflected in the SW's letter, is that the GPs report that the appellant can walk 1-2 blocks should not be interpreted to mean that two blocks is the norm; rather two blocks is the maximum and that if there is any kind of incline the distance drops to about 300 feet; in addition he walks slower and pain in the hip increases with distance walked as well as speed. The same applies to lifting: there are significant restrictions when using the left arm alone and the use of both arms improved the amount that could be lifted. The SW learned that 8 pounds would be the "safe" maximum to lift with the left arm alone and double this using both. These restrictions demonstrate a severe physical impairment.

The GP has diagnosed the appellant's physical impairments as neck injury and left elbow dysfunction, both as a result of the MVA, and osteoarthritis in the right hip. A left leg and arm injury are also mentioned. The panel notes, however, that as with the head injury discussed above, there is no detailed description of the nature and extent of these conditions. For example, there is no information as to whether the neck injury involves the spinal column or instead is restricted to muscle damage or whether it's a combination of both. Similarly, though the SW refers to the left elbow as being "shattered," there is no clinical description on which to assess the severity of the condition. And for none of these conditions is there any reference to whether it is serious enough that therapy (massage or physical therapy) or surgery is contemplated. Without such information, and for the reasons cited by the ministry, the panel finds that the ministry reasonably determined that the information provided did not establish a severe physical impairment.

Whether DLAs directly and significantly restricted

As to whether the information provided establishes that in the opinion of a prescribed professional the impairment directly and significantly restricts DLAs either continuously or periodically for extended

periods, the ministry noted that the GP reports continuous restrictions to basic housework, daily shopping and social functioning; the latter is described as "concentration and communication is affect[ed]." The degree of restriction is "moderate due to pain mostly." No restriction is reported to 7 of 10 other DLAs. The ministry takes the view that as the appellant is able to walk up to two blocks and lift up to 35 pounds, it is reasonable that any restriction would relate to further distances and heavier loads. The ministry also referred to the AR, in which the SW reports that many activities require continuous assistance from another person, but the ministry finds that this is not substantiated by the narrative. For instance, personal care – regulating diet: "mother's domain is the kitchen, she sets the menu." The ministry concludes that as the majority DLAs are performed independently or requiring little help from others, and as a severe impairment has not been established, the information provided does not establish that this criterion has been met.

The position of the appellant is that his ability to perform DLAs in several areas, as outlined in the AR, are so restricted that he requires the help of others, particularly, his mother, to function on a day-to-day basis. In particular, the SW reported that there is some question as to whether the appellant could manage meal preparation on his own because of his forgetfulness.

The evidence of the GP is that the appellant is restricted on a continuous basis in his ability to do basic housework and daily shopping, and in social functioning. However, as the ministry notes, for the first two, the GP assesses the degree of restriction as moderate and social functioning as affected by communications and concentration. The narrative in the AR describes how in these and other DLAs the appellant benefits from the help of his mother. While he cannot drive to do the shopping and his planning skills are reduced, this is his mother's domain and the GP considers his degree of restriction to be moderate, "due to pain mostly." Similarly, while he experiences pain when reaching or pulling, there is no indication that he cannot make his bed, use a vacuum cleaner or do his laundry or otherwise perform daily housekeeping tasks – just that he benefits from his mother taking charge of these activities – and therefore no evidence that he is significantly restricted in doing this DLA. As to the 2 DLAs applicable to someone with a mental impairment - make decisions about personal activities, care or finances; and relate to, communicate or interact with others effectively – the evidence shows that he tends to isolate, but otherwise no significant restriction has been reported. The panel therefore finds that the ministry reasonably determined that the information provided does not establish that this criterion had been met.

Whether help is required

With respect to whether the information provided establishes that to perform the directly and significantly restricted daily activities the appellant requires an assistive device, the significant help of another person or the services of an assistance animal, the position of the ministry is that, as it has not been established that DLAs are significantly restricted, it cannot be determined that significant help is required as defined in the legislation. The position of the appellant appears to be that he requires help of his mother for daily sustenance and support as he works through the physical and mental difficulties he faces as a result of the MVA.

The panel acknowledges that the appellant benefits from the help of his mother in many areas of his life. However, the panel is guided by the legislation that requires, first of all, that a severe impairment be established. The opinion of a prescribed professional that DLAs are directly and significantly restricted by the severe impairment is then required before this need for help criterion can be

considered. Taking into account the panel's findings above on the other 2 criteria, the panel finds that the ministry reasonably determined that this criterion had not been met.

Accordingly, the panel finds that the ministry determination that the appellant was not eligible for PWD designation was reasonably supported by the evidence. The panel therefore confirms the ministry decision.