

PART C – DECISION UNDER APPEAL

(State the reconsideration decision)

The decision under appeal is the ministry's reconsideration decision dated August 26, 2009 which held that the appellant did not meet all five criteria for the Persons with Disabilities (PWD) designation as outlined in section 2 of the *Employment and Assistance for Persons with Disabilities Act*; the ministry found that:

1. The appellant did meet the age requirement criteria; and
2. The appellant's medical practitioner confirmed that his impairment is likely to continue for more than two years; however
3. The appellant did not satisfy the minister that he has a severe physical or mental impairment; and
4. The appellant's prescribed professional did not confirm that the impairment directly and significantly restricts his ability to perform daily living activities, either continuously or periodically for extended periods; and
5. The appellant's prescribed professional did not confirm that, as a result of those restrictions, he requires help to perform daily living activities.

Therefore, the ministry concluded that the appellant is not eligible for the PWD designation.

PART D – RELEVANT LEGISLATION

(State the relevant Legislation considered)

Employment and Assistance for Persons with Disabilities Act, Section 2
Employment and Assistance for Persons with Disabilities Regulation, Section 2

PART E – SUMMARY OF FACTS

Please set out the facts as determined by the panel, based on the evidence at the hearing. Please note that subsection 22(4) of the Employment and Assistance Act states that, in a hearing referred to in subsection (3), a panel may admit as evidence only:

- (a) the information and records that were before the minister when the decision was being made, and
- (b) oral or written testimony in support of the information and records referred to in paragraph (a).

The following is a summary of key dates and information:

- on June 2, 2009, the appellant submitted an application for Persons with Disabilities (PWD) designation
- on July 16, 2009, the ministry denied the appellant's request for a PWD designation
- on August 6, 2009, the appellant submitted a Request for Reconsideration to the ministry
- on August 26, 2009, the ministry completed its review of the appellant's Request for Reconsideration
- on August 31, 2009, the appellant signed a Notice of Appeal

The evidence before the ministry was set out in the original application for PWD designation, Section 1 – Applicant information; and Sections 2 and 3 – Physician and Assessor Reports.

In the Physician Report, the appellant's physician (of four and one-half years) reports:

- the appellant's impairment is likely to continue for two years or more and is chronic and life long
- the appellant suffers from thoracic outlet syndrome, carpal tunnel syndrome, depression, narcotic addiction and chronic pain syndrome
- the appellant's functional skills: he is able to walk 2 to 4 blocks unaided; climb 2 - 5 steps unaided; lift 2 to 7 kg (15 to 35 lbs)—“7 lbs max;” limitation on how long he can remain seated is less than 1 hour and he has difficulties with cognitive communication
- there are significant deficits with cognitive and emotional function in the areas of executive (planning, organizing, sequencing, calculations, judgment), memory (ability to learn and recall information) emotional disturbance (e.g. depression, anxiety); motivation (loss of initiative or interest) and impulse control
- the severity of appellant's medical conditions relevant to his impairment is described by his physician in a five page medico-legal report dated March 11, 2009 (re motor vehicle accidents of January 30, 2006 and July 8, 2007)
- the appellant's physician describes the medications which interfere with the appellant's ability to perform daily living activities as: “Hydromorphone sedation, cognitive impairment” and the anticipated duration of the medications as “possibly lifelong”
- in response to the question, “Does the impairment directly restrict the person's ability to perform Daily Living Activities?” the appellant's physician notes that the appellant is restricted in the areas of personal self care, management of medications, basic housework and management of finances and these restrictions are continuous; the appellant is also noted as restricted with respect to social functioning, but there is no indication as to whether or not it is continuous or periodic
- the physician provides no responses to the following items:
 - “If “Periodic”, please explain:”
 - “If Social Functioning is impacted, please explain”
 - “Please provide additional comments regarding the degree of restriction”
 - “What assistance does your patient need with Daily Living Activities? (*“Assistance” includes help from another person, equipment and assistance animals.*) Please be specific regarding the nature and extent of assistance required.”

In the Assessor Report, the appellant's physiotherapist (of two years) reports:

- the appellant's treatment program consisted of physiotherapy for cervical and thoracic region
- with respect to cognitive and emotional functioning, the physiotherapist reports "no impact" in the following areas: bodily functions, consciousness (e.g. orientation, alert/drowsy, confusion), impulse control, insight and judgment, motor activity, language, psychotic symptoms, other neuropsychological problems, other emotional or mental problems, and "minimal impact" in the following areas: emotion, attention/concentration, executive, memory, motivation; the physiotherapist notes under comments: "As observed in the physiotherapy clinic during physiotherapy treatment"
- the appellant lives alone
- with respect to mental or physical impairments that impact the appellant's ability to manage daily living activities, the physiotherapist comments: "Cervical & Thoracic Pain & Stiffness; Joint Restriction; Bilateral Carpal Tunnel; Thoracic Outlet surgery May 2/08"
- the appellant is listed as "independent" with respect to "Mobility and Physical Ability" in the areas of walking indoors, walking outdoors, climbing stairs and standing, and requires periodic assistance from another person with respect to climbing stairs and standing [note with respect to these latter two items, the appellant is also listed as "independent"], lifting and carrying and holding; the physiotherapist adds the following comments: "Static lifting positions, standing or sitting cause Cervical Thoracic stiffness and pain. Often causes headaches. Contributes to hand numbness"
- the appellant is listed as "Independent" with respect to Daily Living Activities of personal care, basic housekeeping, shopping for personal needs, meal preparation, management of finances, management of medications, utilizing personal and public transportation facilities and social functioning
- in response to the following items, "Describe how the mental impairment impacts the applicant's relationship with his/her immediate social network..." and "extended social networks," the physiotherapist comments that he does not have enough information to comment
- with respect to assistance provided by other people, the physiotherapist notes that he is not able to comment and with respect to assistance provided through the use of assistive devices, he comments "none of these" and also checks the box indicating that the applicant (appellant) does not have an assistance animal
- under the section entitled "Additional Information," the physiotherapist states: "I am a physiotherapist, therefore I commented on those areas that I felt that I have enough information to do so;" under this same section, the panel notes that it appears that the appellant added the following comment: "He didn't have my doctors reports at this time. That's why no comments."

The appellant, in his application for PWD and in his request for reconsideration, notes the following:

- he suffers from pain and on five out of seven days it is a 10 (on a scale of 1 – 10) with the remaining two days averaging 8
- he struggles to get out of bed every day and suffers from depression and thoughts of suicide
- he takes two Dilaudid-8's each morning and they take effect twenty minutes later allowing him to crawl on his knees to wash his face and brush his teeth because it is too painful to stand; eventually he stands in a hunched position and takes his dog for a walk
- he is unable to work because of his condition
- his diet is very poor because of his lack of income and he has lost 12 pounds in the last 8 – 9 months

- he has become addicted to painkillers and when he tries to wean himself off with his doctor's knowledge, he has severe pain, headaches, numbness, shooting pain in his head, neck, shoulder, back, arms, hands & fingers; his jaw locks and he grinds his teeth (resulting in three broken teeth)
- he is still recovering from thoracic outlet surgery which takes about 2 years, after which they will do the other side
- he has been diagnosed with carpal tunnel on both sides and is waiting for surgery
- he has had two automobile accidents
- his condition is worsening daily; he has a lot more damage and deterioration
- he can no longer do his daily chores; his brother came to help him for a ten day period
- his hands hurt and writing is difficult because of cramping
- he needs help so that he can go back to school and try a real estate course as he cannot go back to work as a contractor

In its submission at the hearing, the ministry restated the ministry's position as set forth in the reconsideration decision that the appellant does not meet all of the specified criteria under the legislation to qualify for a PWD designation and that employability is not a criterion for PWD status.

The panel finds the ministry's oral presentation/written submission admissible pursuant to section 22(4)(b) of the *Employment and Assistance Act* (EAA) on the basis it is oral and written evidence in support of the information and records that were before the minister when the decision being appealed was made.

The evidence in dispute is the severity of the appellant's impairment and whether or not his impairment directly and significantly restricts his daily living activities either continuously or periodically for extended periods, requiring assistance.

Based on the appeal record and the additional written evidence set out above, the panel makes the following findings of fact:

- the appellant suffers from thoracic outlet syndrome, carpal tunnel syndrome, depression, narcotic addiction and chronic pain syndrome
- the appellant is able to walk 2 to 4 blocks unaided; climb 2 - 5 steps unaided; lift 7 lbs maximum, remain seated for less than 1 hour

ATTACH EXTRA PAGES IF NECESSARY

PART F – REASONS FOR PANEL DECISION

(State the reasons for the panel decision)

This appeal results from a reconsideration decision of the ministry which upheld the denial of a PWD designation to the appellant.

The issue to be decided on this appeal is whether or not the appellant, who the ministry acknowledges has met two out of five of the legislative criteria for a PWD designation (*age requirement and impairment likely to continue for at least two years*), has met the remaining three requirements listed in Section 2(2) and (3) of the *Employment and Assistance for Persons with Disabilities Act* (EAPWD Act) namely:

- The minister must be satisfied that the applicant has a severe mental or physical impairment; and
- A prescribed professional must confirm that the impairment directly and significantly restricts the applicant's ability to perform daily living activities either continuously, or periodically for extended periods; and
- A prescribed professional must confirm that, as a result of those restrictions, the applicant requires help to perform the daily living activities if, in order to perform them, the person requires an assistive device or an assistance animal, or the significant help or supervision of another person;

and whether or not the ministry's reconsideration decision finding that the appellant had not met the above three requirements was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant.

"Daily living activities" in relation to persons who have a severe physical or a severe mental impairment are defined in Sections 2(1)(a) and 2(1)(b), of the EAPWD Regulation.

The ministry argues that although the appellant has met the age criterion and a medical practitioner has confirmed that his impairment is likely to continue for more than two years, the assessments by the prescribed professionals (the appellant's doctor completed the Physician Report and his physiotherapist completed the Assessor Report) do not satisfy the minister that the appellant has a severe mental or physical impairment and do not establish that the impairment significantly restricts his daily living activities either continuously or periodically for extended periods requiring assistance.

The appellant argues that he meets the test for a PWD designation because of his constant pain, his past and pending surgeries and because he can no longer perform his daily chores and recently required his brother to help him for a ten day period.

The appellant's physician describes the severity of the appellant's medical condition (thoracic outlet syndrome, carpal tunnel syndrome, depression, narcotic addiction and chronic pain syndrome) as chronic and life long. The appellant's physician also notes that the appellant is restricted in the areas of personal self care, management of medications, basic housework and management of finances and that these restrictions are continuous; he also notes that the appellant is restricted with respect to social functioning, but does not indicate whether or not it is continuous or periodic. The appellant's physician fails to provide any explanations in his report with regard to the degree of appellant's restrictions or the nature and extent of the assistance he requires with his daily living activities.

The appellant's physiotherapist in the Assessor Report indicates there is "no impact" with respect to cognitive and emotional functioning in the areas of bodily functions, consciousness (e.g. orientation, alert/drowsy,

ATTACH EXTRA PAGES IF NECESSARY

confusion), impulse control, insight and judgment, motor activity, language, psychotic symptoms, other neuropsychological problems, other emotional or mental problems, and "minimal impact" in the following areas: emotion, attention/concentration, executive, memory, motivation. Near the end of his report, the physiotherapist notes that he has only commented on those areas where he had enough information to comment (during the appellant's treatment at the Physiotherapy Clinic). The appellant appears to have added an explanatory note that his physiotherapist made no comments because he did not have the appellant's doctor's reports. The panel notes that the Physician Report was signed on April 21, 2009 and the Assessor Report was signed on May 22, 2009 indicating that his physiotherapist may have had the Physician Report at the time he prepared his report. Also, the Assessor Report has in its introductory paragraphs, a note stating: "Please complete this section based on your knowledge of the Applicant, observations, clinical data and experience."

The panel finds, based on the available evidence, that the appellant does not have a severe mental or physical impairment and that the evidence is inconclusive with respect to whether or not the appellant requires periodic or continuous assistance with his daily living activities. The appellant indicates that he now needs help with household chores and his brother came to help him for a ten day period. The appellant's physician notes that certain daily living activities are restricted continuously, but provides no indication as to the nature and extent of the assistance required. The appellant's physiotherapist notes that the appellant is "independent" with respect to most daily living activities and there is "no impact" or "minimal impact" on daily functioning. The physiotherapist does note that periodic assistance from another person is required for climbing stairs, standing, lifting, and carrying and holding (although he also notes that the appellant is "independent" with respect to climbing stairs and standing, which is conflicting evidence). He fails to provide any evidence of the amount and type of periodic assistance required.

The panel finds that there is insufficient evidence from a prescribed professional to establish that the appellant's impairment directly and significantly restricts his ability to perform daily living activities, either continuously or periodically for extended periods, and as a result of those restrictions, the appellant requires help to perform those activities. Based on the evidence provided by the appellant's physician in the Physician Report and by his physiotherapist in the Assessor Report, the ministry's reconsideration decision denying a PWD designation to the appellant was not unreasonable.

Therefore, the panel finds that the ministry's reconsideration decision is a reasonable application of the applicable enactment in the circumstances of the appellant and confirms the decision.