

PART C – DECISION UNDER APPEAL

The decision under appeal is the ministry's reconsideration decision dated May 13, 2009 which held that the appellant is not eligible for persons with disabilities designation because:

- the ministry is not satisfied that the appellant has a severe physical or mental impairment,
- a prescribed professional has not confirmed that the appellant's impairment directly and significantly restricts his ability to perform daily living activities ["DLAs"] either continuously or periodically for extended periods, and
- the appellant does not require significant help or supervision from another person, an assistive device or the services of an assistance animal.

PART D – RELEVANT LEGISLATION

(State the relevant Legislation considered)

Employment and Assistance for Persons with Disabilities Act ["EAPWDA"], section 2

Employment and Assistance for Persons with Disabilities Regulation ["EAPWDR"], section 2

PART E – SUMMARY OF FACTS

The appellant's advocate raised a preliminary matter. The concern was that the appeal record distributed to the parties did not include the adjudicator notes related to the ministry's original decision both of which were mailed to the appellant with the letter informing him that his application for persons with disabilities designation had been denied. The advocate took the position that if the ministry intended referring to those notes in the hearing, the appellant would ask for an adjournment. The ministry confirmed that the notes, which she called an Information Summary, were not in the appeal record she had received and would not refer to them. With that reassurance, the appellant agreed to proceed with the hearing.

The evidence before the ministry at reconsideration was the appellant's Application for Reconsideration and the appellant's Application for Persons with Disabilities including the Physician Report and the Assessor Report both of which were completed by the appellant's physician.

In the Physicians Report, the applicant is diagnosed with right knee pain due to a work related proximal tibial fracture requiring open reduction and internal fixation, chronic lower back pain and left shoulder pain due to a motor vehicle accident. The Diagnostic code used was for arthritis. When asked to indicate the severity of the medical conditions relevant to the person's impairment, the physician wrote "disability due to musculoskeletal issues; unable to work in majority of activity-related employment". Under functional skills, the physician indicates that the appellant can walk 4+ blocks, climb 5+ steps unaided, lift 5 to 15 pounds and can remain seated for less than one hour. The physician notes a significant deficit in emotional functioning and explains that the appellant's depression/anxiety complicates interactions "with other staff/ability to function adequately". No details are provided to explain the complications.

In the Assessor Report, the physician indicates that the appellant lives with his family and they provide continuous support and assistance. He writes that the appellant's mental and physical impairments that affect his ability to manage daily living activities ["DLA"] are depression, anxiety and chronic back pain and back and knee injuries. The appellant communicates well except for reading because of an inability to concentrate and focus. Regarding mobility and physical ability the appellant takes significantly longer walking indoors and out and climbing stairs. In additional comments, he says the appellant is restricted to walking no more than 1 block, lifting and carrying no more than 15 pounds. He is unable to kneel or bend his right knee or engage in repetitive activities. The physician adds that the appellant requires continuous support and assistance but there is no explanation as to what sort of support and assistance or how these relate to his physical and mental condition.

Under the heading of cognitive and emotional functioning, the assessor indicates that the appellant's emotional deficits have minimal impact on his functioning. Moderate impact on functioning is noted and explained by the physician in:

- Bodily functions – "eats one meal per day"
- Attention/concentration – "poor focus"
- Executive – "anxiety"
- Motivation

The physician as assessor also comments that the appellant lacks energy and appetite (eats only dinner), experiences depressive moods and sleeps 12 to 14 hours at night in addition to 3 to 4 hours in the day. There is no impact noted with the appellant's functioning in consciousness, impulse control, insight and judgement, memory, motor activity, language, psychotic symptoms, other neurological problems or other emotional or mental problems.

With regard to DLA, the assessor indicates that the appellant is independent in dressing, grooming, feeding self, meal planning, safe storage of food, taking and safely handling his medications, using transit schedules and arranging transportation. However, the assessor adds that the appellant takes significantly longer with bathing and toileting.

The assessor notes that the appellant is independent with transfers in and out of bed; however, he also says that the appellant is restricted by pain and needs continuous assistance from another person to transfer on and off chairs and with laundry and basic housekeeping. He says that the appellant also needs continuous assistance going to and from stores, carrying purchases home, and using public transit.

The assessor's additional comments are that the appellant is "restricted from sitting/sleeping; unable to complete DLA; requires continuous support of parents." There is no explanation about how his sleeping is restricted or about which DLA

he can start but not complete.

The assessor writes that the appellant needs continuous assistance with food preparation, cooking and his diet and adds that he eats only one meal per day with the explanation that the appellant is restricted by energy, motivation and the desire to cook. The explanation provided by the assessor to his notation that the appellant uses an assistive device to do his banking and fill prescriptions is that he has restricted mobility and can only stand for 30 minutes. What assistive device is used is not mentioned. The assessor also says that the appellant takes considerably longer doing his budgeting, paying rent and bills and getting in and out of a vehicle.

Additional comments about the appellant's restrictions in DLA are that he has severe depression and anxiety attacks and has physical restrictions and therefore needs continuous assistance/support from family.

As assessor, the physician indicates that the appellant is independent in all social functioning but he functions marginally in both immediate and extended social networks. The physician notes that the appellant "reports social isolation, spends time alone". In the additional information section, the physician points out again that the appellant's impairment is mostly musculoskeletal.

With the assistance of an advocate, the appellant submitted new evidence to the Employment and Assistance Appeal Tribunal on May 26, 2009. It consisted of a letter from the same physician who completed the Physician and Assessor Reports. Dated April 22, 2009, the letter indicates that the physician reviewed the appellant's restrictions and confirms that the appellant does suffer from physical ailments that lead to the itemized restrictions. Along with this letter is a four page form ["the form"] prepared by the advocate for the physician to complete by selecting the itemized statements that apply to the appellant. In summary the physician confirms that the appellant:

- Suffers from severe conditions including depression, anxiety and chronic pain in his right knee, back, and left shoulder. The use of his right leg is restricted due to knee injury,
- Is directly and significantly restricted in his ability to perform DLA continuously as a result of his conditions,
- Takes longer to climb stairs and needs a hand rail to climb down as this activity causes the onset of knee pain,
- Takes longer to get on and off the toilet,
- Has an abnormal diet due to symptoms of depression,
- Is restricted in lifting and carrying laundry, restricts himself to small loads,
- Takes twice as long as normal when going to and from the store,
- Is unable to lift and carry purchases home,
- Experiences pain when getting in and out of a vehicle,
- Experiences depressive moods,
- Lacks motivation because of depression and pain, and
- Isolates himself socially.

The form provides a summary of the preceding items indicating that the appellant has walking canes in case he needs them and he needs assistance with shopping, laundry, and climbing stairs and support for coping with mental health conditions, building a social network and completing tasks like filling in forms, writing a letter and appropriate communication. The physician did not select items to confirm that the appellant is restricted in sitting, standing, lifting and carrying, bending, dressing, grooming, bathing, transferring on and off chairs, housekeeping, cooking, banking, filing and refilling prescriptions, using public transport, and planning, organizing, sequencing, abstract thinking and problem solving.

The physician's final statement on the form indicates that he has checked the applicable boxes where he confirms that the appellant is directly and significantly restricted in his ability to perform DLA and requires significant help to perform these activities.

In accordance with the Employment and Assistance Act, section 22 (4) (b), the panel admitted in evidence the above mentioned letter and form.

The appellant provided oral testimony that he lives with his parents who are pensioners. His Mother cooks, cleans and does most of his laundry. His parents do most of the shopping because if he goes to the store he can only stand for

about 10 minutes then needs to rest. He described considerable pain turning his head from side to side or looking up. He cannot bend backwards and has trouble getting on and off the toilet because his knee does not bend. That also prevents him from getting pots and pans out of his lower cupboards. He does not try to cook because his Mother does all the cooking. He cannot do activities like carve a turkey because the pressure of pushing down causes pain in his back and shoulder. He uses a hand rail on the stairs as his knee pains him and may give out. He also said he finds it hard to carry groceries up the 12 steps at his home because he has to use the hand rail and therefore has only one hand free to carry. The appellant said that he acquired a cane after his leg surgery and while it is available he seldom uses it. He says he seldom drives because he cannot turn to check the blind spot. When asked how he would manage with cooking, cleaning and laundry if he did not live with his parents, he answered that he would try to do them himself. When asked, he said he takes medication for his depression and anxiety but does not take medication or pain killers for his physical pain.

The ministry relied on the appeal record, primarily the reconsideration decision. In summary, the ministry's position is that the physician and assessor reports did not satisfy the minister that the appellant has a severe physical or mental impairment that directly and significantly restricts his ability to perform DLA and that he needs the help of another person either continuously or periodically for extended periods.

In accordance with the Employment and Assistance Act, section 22 (4) (b), the panel admitted the appellant's oral testimony and that of the ministry.

PART F – REASONS FOR PANEL DECISION

The issue in this appeal is whether the ministry's decision to deny the appellant person with disabilities designation was reasonably supported by the evidence or was a reasonable application of the applicable legislation. The EAPWDA, section 2 states that there are 5 criteria to be met to be eligible for the designation:

- The appellant must have reached the age of 18,
- The minister must be satisfied that the person has a severe physical or mental impairment,
- In the opinion of a medical practitioner the impairment will continue for at least two years,
- In the opinion of a prescribed professional the impairment must directly and significantly restrict the person's ability to perform DLA either continuously or periodically for extended periods, and
- As a result of those restrictions, the person requires an assistive device, significant help or supervision from another person or the services of an assistance animal to perform DLA.

The ministry determined that the appellant meets criteria 1 and 3 but was not satisfied that the appellant meets 2, 4 or 5.

The appellant argues that he does have a severe physical and mental impairment that directly and significantly restricts his ability to perform DLA and that he needs significant and continuous help and supervision from another person.

The ministry argues that the physician's comments do not support the conclusion that the appellant has a severe physical and mental impairment that directly and significantly restricts his ability to perform DLA.

In the Physician and Assessor Reports on several occasions, the physician provides his opinion that the appellant suffers from a severe physical and mental impairment. Therefore, the panel finds that the ministry's decision to deny that the appellant has a severe physical and mental impairment is not reasonably supported by the evidence. In addition, in the form, the physician once again indicates that the appellant has a severe physical and mental impairment. The panel finds as fact that the appellant meets criteria 2; that is, the appellant has a severe physical and mental impairment.

However, the panel also finds that the Reports and form do not support a conclusion that the impairment directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods for the following reasons.

There are a number of inconsistencies in the reports and form which cast considerable doubt on a conclusion that the appellant's physical impairments directly and significantly restrict his ability to perform DLA. In addition, the panel heard and observed the appellant in the hearing. Examples of the inconsistencies and the panel's findings are:

1. In the Physician Report, the physician indicates that the appellant can walk more than 4 blocks. In the Assessor Report, the physician says the appellant can walk less than one block and that takes considerably longer than normal because of pain. The panel finds that the Assessor Report provides more detail and therefore finds that the appellant can walk less than one block and that it takes him longer than normal.
2. With regard to shopping, the physician said the appellant is restricted to standing in line to no more than 30 minutes and uses an assistive device. The physician also mentions that the appellant has a cane available if he needs it. The appellant said he cannot stand for more than 10 minutes and says he has a cane but seldom uses it. The appellant has no other assistive device. The panel finds that the appellant can stand in line for no more than 30 minutes and that he seldom uses his cane for assistance.
3. The physician says the appellant is unable to lift and carry more than 15 lbs and is unable to lift and carry his purchases home from the store. On the form, the physician selects that the appellant is unable to lift and carry his purchases home; however, at the end of the form the physician did not select "Lifting and carrying – requires continuous assistance on an ongoing basis". Also on the form the physician selects "Shopping – requires continuous assistance on an ongoing basis. The appellant testified that it is hard to carry things up his 12 steps because he has to hold onto the railing. The panel finds that the appellant requires continuous assistance to shop and carry items home and that he can lift and carry no more than 15 lbs unaided.
4. The physician says the appellant needs continuous assistance transferring on and off chairs but he is independent getting in and out of bed. On the form, the physician did not select that the appellant needs assistance getting on and off chairs; however, he did select the item that describes in detail the method used by the appellant to be independent getting in and out of bed. The panel relies on the physician's most

recent information and therefore finds that the appellant is independent transferring on and off chairs.

5. The comment that the appellant sleeps 12 to 14 hours at night and 3 to 4 during the day seemed inconsistent with the physician's comment that the appellant's sleeping is restricted. On the form, the physician selected that the appellant is restricted from sleeping on his side or stomach. The panel relies on the physician's explanation in the form and therefore finds that the appellant sleeps 12 to 14 hours at night and 3 to 4 during the day and is restricted from sleeping on his side or stomach.
6. The physician indicates several times in both reports and the form that the appellant needs help with his diet and stressed that the appellant eats only one meal per day, dinner. Although the physician also says that this is because of the appellant's depression, lack of motivation and lack of appetite, there is no explanation provided about how this habit is affecting the appellant's physical or mental health. The panel finds that the appellant needs help with his diet. The panel also finds that the evidence does not establish that the appellant's abnormal diet directly and significantly restricts his ability to perform DLA either continuously or periodically for extended periods, and as a result of those restrictions, that he requires an assistive device, significant help or supervision from another person or the services of an assistance animal to perform DLA.
7. About cooking, the physician says the appellant is restricted by lack of energy, motivation, appetite and desire to cook. The appellant mentions his restriction is that he cannot bend over to pick up the pots and pans from the lower cupboard and he would have to sit down frequently. The panel finds that the appellant's restriction with cooking does not directly and significantly restrict his ability to perform that DLA either continuously or periodically for extended periods, and as a result of those restrictions, that he requires an assistive device, significant help or supervision from another person or the services of an assistance animal.
8. The physician says the appellant needs continuous assistance with laundry. In the form he indicates that the appellant is restricted to lifting and carrying laundry and restricts himself to small loads. The panel relies on the physician's more recent information and finds that the appellant can do his laundry, albeit in small loads. Therefore, the panel finds that appellant's restriction with doing laundry does not significantly restrict his ability to perform that DLA either continuously or periodically for extended periods, and as a result of those restrictions, that he requires an assistive device, significant help or supervision from another person or the services of an assistance animal.

With regard to cognitive and emotional functioning, the physician did not answer the question "are there any significant emotional deficits?" Under that heading and question, the physician ticked emotional disturbance and added the comment "depression/anxiety complicates interaction with other staff/ability to function adequately. There is no explanation about the interactions or functioning. This appears to be related to the appellant's work, which is not one of the criteria for PWD designation. Elsewhere, the physician notes that the appellant's emotional deficit has minimal impact on his ability to perform DLA, indicating that the main problems are musculoskeletal. He said the appellant has severe depression and anxiety attacks and has physical restrictions, "hence needs continual assistance /support from his family". The physician further indicates that the appellant is independent in social functioning but functions marginally in both immediate and extended social networks. He also indicates that there is nothing required in the way of help or supervision to maintain the appellant in the community. The panel finds that a prescribed professional has not provided the opinion that the appellant's emotional impairment directly and significantly restricts his ability to perform DLA either continuously or periodically for extended periods, and as a result of the restriction, he requires an assistive device, significant help or supervision from another person or the services of an assistance animal to perform DLA.

The physician notes moderate impacts on the appellant's ability to perform DLA in the areas of bodily functions, attention/concentration and motivation. The panel finds that the evidence does not support a conclusion that the appellant's impairment directly and significantly restrict the person's ability to perform DLA either continuously or periodically for extended periods, and as a result of those restrictions, he requires an assistive device, significant help or supervision from another person or the services of an assistance animal to perform DLA. Even though the appellant has severe physical and mental impairments, the panel finds that he is able to perform most DLA. The panel acknowledges that it takes the appellant considerably longer to perform DLA and unfortunately he experiences pain with many DLA. Nevertheless, for the most part, the panel finds that he can perform them independently.

In conclusion, the panel finds that the ministry's decision to deny the appellant persons with disabilities designation was reasonably supported by the evidence and is a reasonable application of the applicable legislation and confirms the decision.