

## **PART C – DECISION UNDER APPEAL**

(State the reconsideration decision)

The decision under appeal is the ministry's reconsideration decision dated August 20, 2009 which held that the appellant did not meet 3 of the 5 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 2 years. However, the ministry was not satisfied that the appellant has a severe physical or mental impairment or that his daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods. The ministry also found that as the appellant is not significantly restricted with DLA, it could not be determined that he 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**

(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 evidence before the ministry at the time of the reconsideration decision included: (a) Advocate submission, dated July 30, 2009; (b) Persons with Disabilities (PWD) Designation Application; (i) Applicant Information, dated April 17, 2009, (ii) Physician Report dated April 4, 2009, (iii) Assessor Report, dated April 4, 2009.

For the written hearing, the ministry provided evidence in its reconsideration decision that a prescribed professional who has seen the appellant over 11 times in the last year, completed the PWD Designation Application (Sections (ii), (iii)) has confirmed a diagnosis of Achilles tendonitis, onset 2008 that is severe L Achilles tendonitis, with difficulty walking and climbing stairs. The prescribed professional indicated that the appellant has, however, good functioning, being able to walk 2-4 blocks, climb 2-5 steps, lifting 2-7 kgs and is able to sit 2-3 hours. Additionally, the appellant, according to the prescribed professional, requires periodic assistance for walking, stair climbing, lifting carrying and holding, "when (the appellant) has ankle and foot pain, unable to do above (list). The prescribed professional also confirms that the appellant requires periodic help with transfers, basic housekeeping, shopping, meals, paying rent/bills, medications and transportation. The same prescribed professional does indicate that there deficits to cognitive and emotional functioning in the areas of emotional disturbance and motivation due to anhedonia with no impacts on daily functioning reports. Due to medications and pain, the appellant has problems with memory, consciousness, memory, attention and irritability. The prescribed professional notes that the appellant uses a cane, crutches (when necessary) and braces.

For the written hearing, the appellant provided evidence with a submission from an advocate and from another prescribed professional. The second prescribed professional (physician) completed his assessment July 28, 2009. In this assessment, the physician indicates that the appellant suffers from acute tendonitis, joint infusion, severe osteoporosis of the hips (although the physician notes for this specific diagnosis "to review records"). The physician notes that the primary condition has deteriorated rapidly since the time of the initial application in April 2009. The physician reports that the appellant is restricted in the following functions: walking less than one block, unable to climb any stairs at all, unable to lift and carry, and is limited to sitting less than 20 minutes before he must move due to pain. Social functioning with others is noted as marginal, due to the appellant's inability to develop and maintain positive relationships with social networks. The second physician also notes continuous assistance for basic mobility, walking indoors/outdoors, dressing, bathing, cooking, basic housekeeping, transfers and for transportation, banking, paying bills, filling and refilling prescriptions. The second physician also states the appellant has difficulty in consciousness, memory, attention, irritability, fatigue, lack of motivation due to pain. The second physician states that the appellant uses a cane, crutches, and shower/grab bars.

The panel finds: (a) the appellant has severe L achilles tendonitis, joint diffusion, and osteoporosis; (b) the appellant's physical functioning has deteriorated from the original application – April 4, 2009, to July 28, 2009; (c) Social functioning is marginal; (d) the appellant is restricted in the following areas and requires continuous assistance in basic mobility, walking indoors/outdoors, dressing, bathing, cooking, basic housekeeping, transfers and for transportation, banking, paying bills, fill and re-filling prescriptions; (c) the appellant has difficulty with memory, consciousness, attention and irritability due to pain and medications; (d) the appellant uses crutches, a cane and shower/grab bars.

**ATTACH EXTRA PAGES IF NECESSARY**

## **PART F – REASONS FOR PANEL DECISION**

(State the reasons for the panel decision)

The issue under appeal is whether the ministry reasonably concluded that the appellant is ineligible for PWD as he does not have a severe physical or mental impairment and that his daily living activities (DLA) are, in the opinion of a prescribed professional, not directly and significantly restricted either continuously or periodically for extended periods and as a result of those restrictions, it could not be determined that he 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. The minister may designate a person as a PWD when the following requirements are met. Pursuant to section 2(2) the applicant must have reached the age of 18 and the minister must be satisfied that the person has a severe mental or physical impairment. Under section 2(2)(a) the impairment must be likely, in the opinion of a medical practitioner, to continue for at least 2 years. Section 2(2)(b)(i) requires that the impairment, in the opinion of a prescribed professional, directly and significantly restricts the person's ability to perform daily living activities (DLA) either continuously or periodically for extended periods. Section 2(2)(b)(ii) states that as a result of those restrictions, in the opinion of the prescribed professional, the person must require help to perform DLA. Section 2(3)(b) of the EAPWDA states that a person requires help in relation to a DLA if the person requires an assistive device, the significant help or supervision of another person, or the services of an assistance animal.

Section 2(1)(a) of the EAPWDR defines DLA for a person who has a severe physical or mental impairment as preparing own meals, managing personal finances, shopping for personal needs, using public or personal transportation facilities, performing housework to keep one's residence in acceptable sanitary condition, moving about indoors and outdoors, performing personal hygiene and self care and managing personal medication. Section 2(1)(b) adds two additional activities for a person with a severe mental impairment: making decisions about personal activities, care or finances; and, relating to, communicating or interacting with others effectively.

The ministry's position is that the evidence does not establish that the appellant has a severe physical impairment that in the opinion of a prescribed professional significantly restricts DLA or necessitates help with DLA.

The appellant's position is that the evidence establishes that the appellant does have a severe impairment that does significantly and continuously restrict his ability to perform DLA and that he could use the help of another person to complete DLA.

Regarding the existence of a severe physical impairment, the panel finds that the evidence establishes that the appellant has severe L Achilles Tendonitis, joint diffusion and osteoarthritis. Although the prescribed professional in the Physician and Assessor's Report (April 4, 2009) states that the condition has flare ups that cause increased pain and loss of functioning during high pain cycles, the second physician's report (July 28, 2009) states that the appellant's condition has deteriorated rapidly since April 4, 2009, and that the appellant's physical functioning is diminished to marginal levels (walking less than one block, unable to climb any stairs at all,

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unable to lift and carry, and is limited to sitting less than 20 minutes before he must move due to pain). Deficits in cognitive functioning include difficulty with consciousness, memory, attention and irritability due to pain and medications. Social functioning is also confirmed as marginal. As such the panel finds that there is sufficient documentary evidence to confirm that the appellant's impairment is severe. Therefore, the panel finds that the ministry did not reasonably conclude that the evidence does not establish a severe physical impairment and that the legislative requirement of section 2(2) of the EAPWDA has been met.

Respecting the existence of a severe mental impairment, the evidence provided by the prescribed professional does not identify a mental impairment in the Physician's Report nor indicated any mental deficits in the Assessor's Report. As such, the panel finds that the ministry reasonably determined that there is not sufficient evidence to establish the existence of a severe mental impairment.

Regarding the appellant's ability to manage DLA, the panel has relied on the evidence of the prescribed professional's Report dated July 28, 2009, which establishes that the appellant is significantly restricted in the majority of DLA. The physician lists the appellant's restrictions requiring continuous assistance as: basic mobility, walking indoors/outdoors, dressing, bathing, cooking, basic housekeeping, transfers and for transportation, banking, paying bills, fill and re-filling prescriptions. The prescribed professional's evidence regarding the independence of the appellant to complete DLA does establish that the appellant's impairment has directly and significantly restricted the appellant's ability to perform DLA. Therefore the panel finds that the ministry did not reasonably conclude that the evidence does not establish a direct and significant restriction, in the opinion of a prescribed professional, of the appellant's ability to perform DLA as required by section 2(2)(b)(i) of the EAPWDA.

In determining whether the ministry reasonably concluded that the appellant does not require help with DLA, the panel finds that as the evidence of a prescribed professional establishes that the appellant is not independent with the majority of DLA, the appellant's need for help has been established. Therefore, as the panel finds that the evidence does establish a direct and significant restriction to DLA, the panel finds that the ministry was not reasonable in its determination that the requirement for help to perform the DLA under section 2(2)(b)(ii) of the EAPWDA had not been met.

The panel finds that the ministry's reconsideration decision was not reasonably supported by the evidence and rescinds the decision.