

PART C – Decision under Appeal

The decision under appeal is the ministry's reconsideration decision dated September 16, 2010 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

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) Request for Reconsideration, dated June 6, 2010; (b) Letter from Prescribed Professional (PP), dated June 22, 2010; (c) Persons with Disabilities Designation Application: (i) Applicant Information (AI) dated June 24, 2010, (ii) Physician's Report (PR), dated June 22, 2010, (iii) Assessor's Report (AR), dated June 22, 2010.

At the hearing, it was reviewed by the ministry that the PP had indicated in the PR that the diagnosis for the appellant was that of chronic neck pain, arising from a motor vehicle accident (MVA), in 2000. The PP confirms in a note that the appellant suffers from stiffness in neck and decreased range of motion (ROM) and that he is unable to do any significant lifting (less than 40lbs). The appellant does take a narcotic (percocet) for pain maintenance, but the PP indicates that this treatment does not interfere with the appellant's ability to perform Daily Living Activities (DLAs), and in the PP's letter dated June 22, 2010, it states that, "the appellant does not report any side effects to the narcotics". The PP indicates that the physical functioning is good with the appellant being able to walk 4+ blocks, climb 5+ stairs unaided, lift up 35 lbs (for a short time only), and no limitation for remaining seated. No significant deficits listed for cognitive and emotional functioning.

The PP indicates that the appellant's impairment directly restricts the person's ability to perform DLAs in the following area: use of transportation, which is listed as a continuous restriction, as the appellant is unable to drive a car due to decreased ROM.

Included in the AR is the information that the appellant lives with family, and that the appellant has good functioning in communication: mobility and physical abilities are listed as independent with the exception of lifting/carrying and holding and that the appellant requires periodic assistance in lifting and carrying/holding (if items are over 40 lbs.). No other restrictions to DLAs are indicated in the AR. Social Functioning is listed as being good in both immediate and extended networks. The AR indicates that the appellant has assistance provided by the family and friends. Regarding that if help is required but there is none available, no comments are provided as to what assistance would be necessary. The PP does not indicate that any assistive devices are required or used.

At the hearing, the appellant confirmed the MVA in 1998 that has left him with decreased ROM and neck pain controlled by 3-4 pills per day (narcotic – percocet). The appellant confirms and described that an hour, 90 minutes after taking a pill, he can become ultra focused and appear deep in thought and that is his only side effect that he experiences at the moment.

The appellant in his AI, describes that he receives help from his son (10 yrs) and girlfriend around the house (help clean), cut the grass, and for help in carrying things (ie. Groceries). In the hearing, the appellant described that he can carry up to 20 lbs for approximately 30 minutes but that holding things in his left hand is limited due to nerve involvement (tingling sensation). He also explained that although he can climb up to 10 stairs unaided, he would need over an hour to rest and recover from doing so, due to pain and stiffness in his neck. The appellant also advised that he uses a walker or a cane.



The panel finds that the facts in this case are not in dispute.

PART F – Reasons for 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 evidence is that the information contained in the appellant's PWD application and subsequent submissions from his physician are not sufficient to determine that he meets the legislative criteria for designation as a PWD. Specifically, the PP does not indicate that the appellant has a severe physical impairment with his diagnosis of chronic neck pain. The DLAs do not appear to be significantly restricted as the PP states that the appellant is independent in all DLAs with the exception of carrying and lifting anything over 40lbs.

The appellant's position is that the evidence establishes that the appellant does have a severe physical and mental 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. Specifically, that the appellant has a severe physical impairment as he is in a lot of pain, and takes 3/4 pills a day of a narcotic for pain maintenance. The appellant cannot drive and relies on others to help him get around, and relies on his girlfriend and son to help him around the house, cut the grass and lifting/carrying. The appellant argues that all together this establishes the direct and significant assistance and supervision by another person to complete DLAs and therefore he meets all the legislated criteria.

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Regarding EAPWDR section 2(2), the confirmed diagnosis of chronic neck pain with pain maintenance of a narcotic, does not, itself, confirm a severe physical impairment. The PR indicates that the appellant has good physical functioning being able to walk 4+ blocks, climb 5 stairs unaided, lift less than 40 lbs and can remain seated for an unlimited time. The appellant also advised that he is unable to hold things for a long time in his left hand due to nerve involvement (tingling sensation). The PP and the appellant confirm that the use of the narcotic has created little to no side effects ('deep in thought' reaction approximately 60 minutes after he takes a dose). The PP does not confirm any impacts to cognitive or emotional functioning. The PP and appellant are consistent that due to decreased ROM, the appellant is unable to drive a car. The appellant confirms that he can carry and lift an object (example: grocery bags) up to 20 lbs for a period of 30 minutes before the pain would overwhelm him. The panel determined that given the evidence in totality, the ministry was reasonable in the determination that this legislative test of section 2(2) of the EAPWDA had not been met.

Respecting the existence of a severe mental impairment, the evidence provided by the PP in the PR identifies that there are no deficits in cognitive and emotional functioning. The same PP indicates in the AR that the appellant has no impacts in any functioning aspects. As such, the panel finds that the ministry reasonably determined that there is insufficient evidence to establish the existence of a severe mental impairment and that as neither a severe physical nor a severe mental impairment has been established, the legislative requirement of section 2(2) of the EAPWDA has not been met.

Regarding the appellant's ability to manage DLA, evidence submitted by the PR, AR dated June 22, 2010, the AI dated June 24, 2010, the letter from the PP, dated June 22, 2010, and from oral testimony from the appellant during the hearing, was consistent. The PR and AR indicated that the appellant requires no assistance and is independent in almost all aspects of DLAs with the exception being carrying and lifting over 40 lbs. The AR specifically notes that assistance is provided by family and friends (consistent with appellant who states that his girlfriend and son assist). However, no comments are provided by the PP with regard to what assistance is required, as the PP indicates that the appellant is independent in all aspects of DLAs with the exception of carrying and lifting which requires periodic assistance along with use of transportation as he does not have a Driver's License (DL). The appellant advised that he receives periodic assistance in the form of doing things around the house, cutting the lawn and carrying and lifting. The evidence does establish that the appellant's impairments have impacted his ability to perform some DLA (lift, carry over 40 lbs, use of transportation) but as there is insufficient documentation provided to confirm that the appellant's ability to complete DLAs are significantly restricted, the panel finds that the ministry reasonably determined 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.

With regard to the ministry's position that the appellant does not require help with DLAs, the PR and AR do not indicate that the appellant requires significant assistance in performing DLAs. In determining whether the ministry reasonably concluded that the appellant does not require help with DLA, the panel finds that the evidence of both the PR, AR is consistent that the appellant does not require the assistance of others for DLA, whereas the appellant indicates that he receives DLA assistance from his girlfriend and son for basic housework, carrying and lifting over 40 lbs. The appellant also notes that he periodically uses an assistive device (cane or walker). The panel finds that based on the whole of the evidence that the appellant does not have a severe physical or mental

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impairment, that the ministry reasonably determined that the appellant's impairment does not establish a direct and significant restriction and that as a result of those restrictions, the person requires help to perform those activities under section 2(2)(b)(ii) of the EAPWDA.

The panel finds that the ministry's decision was reasonably supported by the evidence and confirms the decision.