

## **PART C – DECISION UNDER APPEAL**

(State the reconsideration decision)

The appellant is appealing the ministry reconsideration decision of January 22, 2010 denying him Persons with Disabilities (PWD) designation on the basis that he failed to meet several of the legislative criteria. The ministry found that the appellant met the age requirement, and has an impairment that his doctor has confirmed is likely to continue for at least two years. But the ministry was not satisfied that:

- the appellant has a severe physical or mental impairment
- the appellant's daily living activities are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods
- a prescribed professional has confirmed that as a result of direct and significant restrictions, the appellant requires help to perform daily living activities.

## **PART D – RELEVANT LEGISLATION**

(State the relevant Legislation considered)

Employment and Assistance for Persons with Disabilities Act, Section 2 (EAPWDA)  
Employment and Assistance for Persons with Disabilities Regulation, Section 2 (EAPWDR)

## **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 evidence before the ministry at reconsideration includes:

- A letter from the appellant dated December 10, 2009 (two pages)
- The Request for Reconsideration
- An undated letter from the appellant, beginning: To Whom it may concern
- A newspaper article
- A note from the appellant dated December 14, 2009
- A letter from the appellant's psychiatrist dated December 24, 2009 (two pages)
- A letter from the appellant's doctor dated December 11, 2009
- The appellant's application for PWD designation
- The ministry's denial letter dated November 24, 2009

At the hearing, the appellant and his advocate presented a submission along with an additional letter from the appellant's doctor. The panel accepted these into evidence as per Section 22(4) of the Employment and Assistance Act.

The ministry did not attend the hearing. After confirming that the ministry had been notified, the hearing proceeded under Section 86(b) of the Employment and Assistance Regulation.

The appellant, who is over the age of 18, has been diagnosed by his physician with several medical conditions including: chronic severe back pain; sciatica; type 2 diabetes; moderate to severe depression; bipolar affective disorder; cyclothymic personality. In the appellant's psychiatrist's letter, the psychiatrist stated that the appellant suffers from mood swings that have become "increasingly desperate", and notes that the appellant has indicated that he is likely to commit suicide if he does not get disability status. He described the appellant as a "cyclothymic individual, having definite cycles of depression and hypomania, but this is not of the same severity as that of other relatives". He further noted that the appellant has two prolapsed discs in his lumbar spine, and thoracic problems, as well as arthritis. He is blind in the left eye.

In terms of severity, the appellant's doctor writes that "at present time (the appellant) is ambulatory but his mental health problems are not under good control and would be classified as severe in intensity. This is confirmed by standard psychiatric rating scales." He further notes that bipolar affective disorder is considered to be a chronic congenital condition. The doctor adds, "For this reason he would be considered to be afflicted with this chronic severe mental health diagnosis of which a cure is unlikely". The same doctor notes in the physician's report that the appellant has "chronic severe pain" and that his symptoms will "likely worsen in the future." Finally, in the same doctor's letter dated February 16, 2010, he writes that he would "definitely classify this individual as suffering from a severe chronic disability".

[REDACTED]

In terms of functional skills, the doctor notes in the physician's report that the appellant is unable to walk unaided for more than 1 to 2 blocks, and that he is unable to remain seated for more than one hour. He indicates that the appellant can walk more than five steps unaided and that he is limited in lifting more than between 7 and 16 kilograms. In the assessor's report, the physician notes that while the appellant is independent with his walking indoors, climbing stairs and standing, he takes significantly longer walking outdoors, lifting, carrying and holding. The doctor adds that "pain limits physical activities and walking". He states that the appellant "is only capable of light activity". The doctor reports no difficulties with communication in the physicians report, though he indicates in the assessor's report that the appellant's ability to read is poor and that his vision is impaired. Finally, he writes in the physician's report that the appellant suffers a cognitive deficit in the area of memory, which is "aggravated by medications". And in the assessor's report, he adds that the appellant's mental impairment has a moderate impact in the areas of consciousness, attention/concentration and memory. The doctor notes that the appellant's mental impairment has no impact on all other areas of cognitive and emotional functioning.

In terms of daily living activities, the physician states that the appellant cannot walk for more than one to two blocks, that he is restricted in doing basic housework and daily shopping, and that he requires continuous support in these areas. The doctor explains that the appellant "takes longer shopping, uses a cart; difficulty with heavier housework". He notes in the physician's report that the appellant is not restricted, nor does he require any assistance in any other aspect of daily living. In the assessor's report, the doctor notes that the appellant is independent in 31 of 33 activities of daily living. He adds, however, that the appellant is unable to attempt working due to "flare-ups of his pain", and states in his letter that his diagnosis of depression is "also causing severe limitations in his ability to pursue any occupation. At the present time he would be considered to be disabled". In the letter he wrote dated February 16, 2010, the same doctor indicates that "due to these conditions (the appellant) would be unable to work at any regular job and he is even having some difficulty coping with his problems in his day-to-day functioning". The appellant's psychiatrist notes in his letter, that the appellant's "physical disabilities alone would preclude him now from any significant employment, and psychiatric disabilities, in terms of his depression, make it impossible for him to sustain employment".

With respect to the appellant's need for assistance, the doctor has not indicated that the appellant requires or currently receives any assistance from friends, family or support workers, or from any assistive device. When asked in the physician's report to indicate what type of assistance his patient needs with his daily living activities, the doctor writes: "improvement of his medical condition".

Finally, the appellant's psychiatrist concludes his letter by stating that he feels "there is no doubt this man should have been assessed as requiring Provincial Disability".

At the hearing, the appellant's advocate stated that the ministry, in its reconsideration decision, failed to take into account the appellant's written testimony concerning the severity of his condition, and the limitations on his daily living. At the hearing and in the appeal record, the appellant stated that he suffers from severe and prolonged back pain, neck pain, headaches, dizziness, blurred vision, severe pain, sharp shooting pains; numbness and tingling in his arms, hands, fingers, legs, toes and feet. He adds that he is agitated, depressed, has trouble with focusing, concentration, memory, and reading. He notes that the severe pain affects his sleeping and prevents him from living and working

[REDACTED]

normally. At the hearing, the appellant stated that he is in constant pain and that he suffers from that pain when he is doing any activity of daily living, including dishes, getting dressed, etc. He noted that doing the laundry is extremely painful, and that he has to use a cart to transport his clothes as he is unable to carry anything. He stated that he can walk up and down stairs but that it takes him a long time and it is extremely painful. He said there are several activities he is unable to do himself, including vacuuming and walking more than one block. He also stated that he does not cook for himself; he visits his mother's home by bus every Sunday, and picks up a week's worth of food which he then brings home in his cart and reheats through the week.

In the appeal record, the ministry noted that an inability to work is not a criterion for determining Persons with Disabilities designation. The appellant's advocate stated that the doctors, in suggesting that it would be impossible for the appellant to work, is stating in fact that the appellant is unable to perform most activities of daily living.

Finally, the appellant appeared at the hearing with a cane and informed the panel that he has depended on the cane for at least a year and a half.

## PART F – REASONS FOR PANEL DECISION

(State the reasons for the panel decision)

Under appeal is the ministry's reconsideration decision denying the appellant Persons with Disabilities (PWD) designation on the basis that he failed to meet several of the legislative criteria. The ministry found that the appellant met the age requirement, and has an impairment that his doctor has confirmed is likely to continue for at least two years. But the ministry was not satisfied that:

- the appellant has a severe physical or mental impairment
- the appellant's daily living activities are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods
- a prescribed professional has confirmed that as a result of direct and significant restrictions, the appellant requires help to perform daily living activities.

The criteria for being designated a Person with Disabilities (PWD) are set out in Section 2 of the EAPWDA. It states:

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.

Section 2(3)(b) of the EAPWDA states that 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.

Section 2(1)(a) of the EAPWDR defines daily living activities:

(a) in relation to a person who has a severe physical impairment or a severe mental impairment as preparing own meals, managing personal finances, shopping for personal needs, using public or personal transportation, 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.

ATTACH EXTRA PAGES IF NECESSARY

The ministry's position is that the appellant is not eligible for designation as a Person with Disabilities first because the information presented does not indicate that the appellant has a severe mental or physical impairment. The ministry argues that while the information indicates that the appellant's conditions cause limitations to his functioning, these limitations do not result in a severe physical or mental impairment. The ministry further argues that the doctor has indicated that the appellant is independent with all but two activities of daily living, and thus the appellant cannot be seen to be directly and significantly restricted as a result of his impairment. Finally, the ministry argues that the prescribed professional has not confirmed that the appellant requires an assistive device or animal, or significant help of another person to perform his daily living activities.

The appellant's position is that both his physician and his psychiatrist have indicated that he suffers from a severe mental and physical impairment. He argues that he is suicidal; that his chronic pain limits his ability to walk, shop, clean his house, cook, and perform many other activities of daily living. He states that because he has no support in the form of friends or family, he is forced to perform some daily living activities himself – for instance, standing to do dishes – but that these activities are extremely painful. His position is also that the doctors, indicating that he is completely unable to work and that he is "disabled", implies that he is unable to perform activities of daily living. Finally, he argues that he requires assistance to perform a range of daily living activities including cooking, carrying items, vacuuming and other housecleaning, and that he has used a cane as an assistive device for more than a year.

With respect to the issue of a severe mental impairment, the panel notes the appellant's physician has indicated that the appellant suffers from moderate to severe depression and bipolar affective disorder. In the appellant's psychiatrist's letter, the psychiatrist stated that the appellant suffers from mood swings that have become "increasingly desperate", and notes that the appellant has indicated that he is likely to commit suicide if he does not get disability status. While the appellant's doctor indicates in the assessor's report that the mental impairment has had a moderate impact on his cognitive and emotional functioning in the areas of consciousness, attention/concentration and memory, he also writes that "at present time (the appellant) is ambulatory but his mental health problems are not under good control and would be classified as severe in intensity. This is confirmed by standard psychiatric rating scales". He further notes that bipolar affective disorder is considered to be a chronic congenital condition. The doctor adds, "for this reason he would be considered to be afflicted with this chronic severe mental health diagnosis of which a cure is unlikely". The panel thus finds that the appellant has a severe mental impairment and that the ministry's decision was not reasonable in this instance.

With respect to the issue of a severe physical impairment, the doctor notes that the appellant suffers from chronic severe back pain and that his symptoms will "likely worsen in the future". He adds that he would "definitely classify this individual as suffering from a severe chronic disability". The doctor notes that as a result of his physical impairment the appellant cannot walk more than 1 to 2 blocks, nor sit for more than one hour. While the doctor has stated that the appellant can lift between 7 and 16 kilograms, and walk up more than five steps unaided, he has also noted that the appellant is limited with his walking, lifting and carrying/holding. Moreover, the appellant has noted that he cannot carry even his laundry without the aid of a cart, and that he takes significantly longer to walk up stairs (and indeed that it is extremely painful to do so). The panel thus finds that the appellant has a severe

physical impairment and that the ministry's decision was not reasonable in this instance.

With respect to the limitations to daily living activities experienced by the appellant as a result of his mental impairment, the panel notes that the doctor has indicated that the appellant is independent in all areas of social functioning and indeed, that he experiences good functioning with respect to his relationships with his immediate and extended social networks. In their letters, the physician and psychiatrist do not indicate how the mental impairment directly impacts the appellant's ability to perform any daily living activities, though his psychiatrist has indicated that the appellant's depression makes "it impossible for him to sustain employment". The panel notes that an ability to seek and maintain employment is not a criterion for PWD designation. Moreover, the panel cannot conclude that the appellant's inability to be employed as a result of his depression equates to his inability to perform activities of daily living for the same reason. The panel thus finds that the appellant's mental impairment, in the opinion of a prescribed professional does not directly and significantly restrict his ability to perform daily living activities either continuously or for extended periods.

With respect to the limitations to daily living activities experienced by the appellant as a result of his physical impairment, the panel notes that the doctor has indicated that the appellant is continuously restricted in two of 33 areas of daily living named in the PWD application. These are: basic housekeeping and shopping. The appellant has indicated that he does his own dishes, and tidies up, but that he is in extreme pain when he does these activities. He has stated that he cannot perform heavier housekeeping activities such as vacuuming. He and his doctor have indicated that he cannot shop without aid of a cart. The appellant has stated in his testimony that the severe pain he experiences (pain that is confirmed to be chronic and severe by his physician) significantly limits his ability to stand, bend, carry, sit and walk, all of which are required for the two aspects of daily living listed above, and for many other aspects of daily living including cooking, personal care, and laundry. The appellant has further noted that he does not cook for himself, and indeed that his mother prepares seven days of meals, which he wheels to his home in a cart. He has also stated that he has trouble with personal care and that doing his laundry causes severe pain. The panel concludes, therefore, that the appellant's testimony, rather than contradicting the doctor's assessment, serves as a logical extension of the doctor's findings. The panel further notes that the appellant's doctor has indicated that the appellant is restricted in his ability to move about outdoors, a daily living activity defined in the legislation. The doctor and the appellant have both noted that the appellant is unable to walk more than one block. The panel thus finds that the appellant's physical impairment, in the opinion of a prescribed professional, directly and significantly restricts his ability to perform daily living activities on a continuous basis.

Finally, with respect to the issue of assistance with daily living activities, the appellant has stated that he has relied upon his cane for at least a year and a half, his cart for carrying groceries and laundry, and his mother for all his cooking. He has also indicated that there are several activities of daily living – vacuuming, for instance – that he simply cannot perform. The panel finds, therefore, that the appellant does require help to perform his activities of daily living.

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