

PART C – DECISION UNDER APPEAL

The Reconsideration Decision dated January 20, 2010 is the decision under appeal wherein the ministry denied the appellant's request to be designated a Person with Disabilities. The ministry found upon reconsideration that:

- 1) The minister was not satisfied that the appellant has a severe physical or mental impairment as the severity of his medical conditions relevant to impairment was described by his physician in terms that the ministry did not consider severe. The ministry stated that information provided by the appellant's physician in a follow up form letter dated December 18, 2009 did not contain information of current severe impairments or restrictions to daily living activities.
- 2) The ministry was not satisfied that the appellant's daily living activities are directly or significantly restricted either continuously or periodically for extended periods citing as evidence information submitted on the appellant's application. The ministry stated that the additional information submitted with the appellant's request for reconsideration did not substantially alter the information in the original application and did not describe a significant restriction.
- 3) The appellant's prescribed professional had not confirmed that, as a result of direct and significant restrictions, the appellant required help to perform daily living activities.

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 information before the ministry at reconsideration was:

- A copy of the appellant's high school transcript
- 4 medical letters describing the appellant's medical history procedures from 2002- 2008
- The appellant's PWD Designation Application signed by the appellant on November 24, 2009
- The ministry's rejection letter and decision summary
- Two letters of December 15, 2009: one from the appellant and one of support from his mother
- A form letter prepared by the appellant's advocate and completed by his physician of December 18, 2009
- The appellant's request for reconsideration dated December 10, 2009

The Employment and Assistance appeal hearing initially set for February 18, 2010 by teleconference was postponed at the appellant's request to be an in-person hearing held on March 26, 2010. The ministry representative was not initially present at the hearing but arrived shortly after the hearing began. At the hearing, the appellant and his advocate provided their evidence that the appellant's prescribed professional, his physician who completed both the Physician and Assessor sections of his initial application for Persons with Disabilities Designation Application, has confirmed that the appellant's condition is severe. They provided that though he was characterized on his application as being able to walk slowly and lift up to 15 pounds, his physician had characterized him as ambulating much slower than normal and requiring the assistance of devices like handrails in order to do these activities. The physician further clarified and the appellant confirmed at the hearing that he frequently trips and falls, particularly on uneven surfaces and he must rely on his mother's driving for most of his transportation needs as public transportation has proven to be generally too difficult for him. In the physician's letter of December 18, 2009, in response to the advocate's question of whether the appellant has a severe physical impairment and/or a severe mental impairment, the physician responded, "Yes. Severe impairment," citing his diagnoses, writing that it takes the appellant significantly longer to perform activities of daily living (ADL) and that he requires the assistance of his mother in completing his ADL.

Furthermore, the appellant and his advocate provided their evidence that the appellant's ADL are directly and significantly restricted continuously and periodically for extended periods by citing the information provided by his physician both in his initial application and in the letter of December 18, 2009. They referred to this letter where the appellant was characterized as only able to use a microwave for limited cooking, as requiring the assistance of others to carry groceries, do laundry and clean, as being only able to wipe tables, as taking significantly longer when walking and climbing stairs, as unable to stand and as having an inability to concentrate with impacts on his executive thinking and memory. As a result of these cognitive impairments, his physician characterized his performance as significantly affected with frequent poor grades at school.

Finally, the appellant and his advocate provided that his physician as his prescribed professional has confirmed that as a result of these direct and significant restrictions, he requires significant daily assistance from his mother and family who must be available when he bathes in case he falls and who drive him to appointments. Furthermore, his physician confirmed that he relies on orthotics, grab bars and handrails given that previous leg splints have consistently broken.

The evidence before the ministry was that the appellant had applied for the Persons with Disabilities designation on November 27, 2009. From his application and from supporting documentation including the letter of December 18, 2009, the ministry was not satisfied that there was sufficient evidence to show in what way the appellant's impairment currently severely restricted his ADL. At the hearing, the ministry representative reviewed that there was insufficient evidence that the appellant's ADL were directly and significantly restricted either continuously or periodically for extended periods and that the appellant's physician had not confirmed that as a result of direct and significant restrictions, the appellant required significant help to perform ADL or relied on the use of assistive devices. Instead, the ministry cited the appellant's physician's characterization of him as independent on many criteria in his initial application. The ministry representative could not comment on why the physician's letter of December 18, 2009 (in which more detail was provided about the appellant's impairment being characterized as severe and how ADL of cooking, shopping, housework, mobility and transportation were significantly restricted) was not seen as containing information to satisfy the minister at reconsideration when paired with information provided in his initial application describing his restrictions.

PART F – REASONS FOR PANEL DECISION

The issue in this case is the reasonableness of the ministry's decision to deny the appellant's application for the Persons with Disabilities designation on the basis that the minister was not satisfied that he has a severe mental or physical impairment, that in the opinion of a prescribed professional directly and significantly restricts his ability to perform daily living activities continuously or periodically for extended periods and as a result for those restrictions, he requires help to perform those activities.

Section 2 of the EAPWDA sets out that the minister may designate a person who has reached 18 years of age as a person with disabilities 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 of the EAPWDR sets out that daily living activities in relation to a person who has a severe physical impairment and/or a severe mental impairment means the following activities: prepare own meals, manage personal finances, shop for personal needs, use public or personal transportation facilities, perform housework, move about indoors and outdoors, perform personal hygiene and self care, manage personal medication, make decisions about personal activities, care of finances and relate to, communicate or interact with others effectively.

The ministry argues that the appellant's prescribed professional, his physician, has not confirmed that the appellant's physical and mental impairments are severe, as his initial application for PWD characterizes him as able to walk more than 4 blocks, climb more than 5 steps, lift up to 15 pounds, good ability to communicate, walk independently indoors, and having no impact on 10 aspects of cognitive and emotional functioning. Subsequent information from the physician characterizing his conditions as severe, the ministry argues, was not satisfactory. The ministry further argues that they are not satisfied that his daily living activities are directly and significantly restricted either continuously or periodically for extended periods as his physician on his initial application characterized him as independent in personal care, care of finances, medications and transportation and in some aspects of basic housekeeping, shopping, meal preparation and social functioning. Clarifications provided by the physician in a follow up letter were found to provide insufficient further information. Finally, the ministry argues that the appellant's physician has not confirmed that as a direct result of his restrictions, he requires assistance or the use of assistive devices.

The appellant argues that in considering his initial application and the clarifying information from his physician in the letter, his physical and mental impairment is predicted to last more than 2 years and was characterized as severe by his physician. Furthermore, he is characterized as walking 3-4 times more slowly with poor balance leading to frequent falls, can only climb stairs aided by handrails and can only lift objects transiently. His physician described that his cognitive difficulties severely affect his ability to concentrate and his performance is significantly affected. With respect to daily living

activities, the appellant argues that he was characterized overall by his physician as having a severe impairment that affects all aspects of his daily living activities, taking him much longer than normal and requiring the assistance of others. His physician clarified in her letter that his level of activity is significantly reduced as a direct result of his impairment in cooking where he can only use a microwave, shopping, where he requires the assistance of others to carry bags, housework, where he can only wipe a table, mobility where he fatigues quickly and moves 3 times slower than normal and transportation where his mother must drive him as public transit is too difficult with his mobility issues. Finally, the appellant argues that his physician has confirmed that he must use orthotics, grab bars and hand rails as assistive devices and relies on significant assistance from members of his family including driving and being nearby when he is bathing with a stool in the shower.

The majority of the panel reasons from the evidence before it that the appellant's physical and mental impairment has been characterized by his physician as severe and has been described by her as significantly restricting his daily living activities. As a direct result of his impairment, his daily living activities of personal care, meal preparation, housekeeping and transportation are directly and significantly restricted continuously and, in some situations like bathing, periodically for extended periods, though he still has some ability to participate in these with assistance. His physician has stated that he requires the use of handrails to maintain balance and often falls without these and has also confirmed his requirement for orthotics. His physician confirmed that he requires the significant assistance of his mother and family in order to conduct activities of daily living.

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

The dissenting view was articulated as:

I found that there was much contradictory evidence presented and in my opinion, the evidence does not, on balance, confirm that the appellant meets three of the five criteria for PWD designation. I cannot conclude that the appellant has either a severe physical or mental impairment. I am not satisfied that a prescribed professional has confirmed that a severe impairment directly and significantly restricts the appellant's ability to perform his daily living activities either continuously or periodically for extended periods. In addition I cannot conclude that, as a result of direct and significant restrictions, the appellant requires an assistive device or the significant help or supervision of another person to perform his daily living activities.

With regard to the criteria of severe impairment, I noted that the appellant's physician in replying to the advocate's letter confirmed "Yes. Severe impairment (from cerebral palsy and ADHD)"; however, I also noted that this is contradicted by other evidence from the physician and from the appellant himself. Specifically I noted the physician's comments in the PWD application:

"...physical impairment makes it not possible for him to be employed in any type of physical/labour work"

"...cognitive difficulties from ADHD severely affect his ability to concentrate & perform jobs that require complex thinking / problem solving"

As these comments do not rule out employment in non-physical labour which does not involve complex thinking or problem solving, it appears that the appellant is capable of performing non-physical/labour, non complex tasks. I consider this as evidence that the appellant's impairment is not severe. Additionally I noted the physician's assessment which indicates that there is no impact on the

appellant's cognitive and emotional functioning with the exception of attention/concentration which is noted being major impacted and insight/judgment and attention/concentration which are noted as being moderately impacted. This also does not rule out the ability to perform non-physical/labour, non complex tasks.

The appellant provided oral evidence that he had difficulty with fine motor control; however, he also confirmed that he had provided a neat, hand written, two-page description of his disability in his PWD application. In the application he stated that he had "a minor case of cerebral palsy" and that "the main things that hold me back on a job are: my legs are weak...I can't stand for an extended period of time." As the appellant only rules himself out from employment that involves standing for an extended period of time, I consider this evidence that the impairment is not severe. I also considered the evidence on the ability to perform ADL, as noted below, as evidence that the impairment is not severe.

In summary, while there is some evidence that the appellant's impairment is severe, the evidence to the contrary is such that I am not satisfied that the impairment is severe.

With regard to the appellant's ability to perform daily living activities, I note the physician's comments in the advocate's letter:

- "All aspects of ADLs are affected (cooking, cleaning, shopping)."
- "...he frequently requires assistance from mom in most aspects of life."
- "Without help, he's unable to do certain chores. He needs much more time to accomplish ADLs."

I also noted that the physician's comments in the PWD application:

- "His basic functions of daily living require frequent assistance..."

In the advocate's letter to the physician, the physician answers "Yes" to the question "Overall, do his health restrictions restrict his ability to perform a number of daily living activities either continuously or periodically for extended periods?" but he does not specify whether the restrictions are continuous or periodic. The use of the word frequent(ly) is evidence that the appellant's ability to perform ADL is not continuously restricted. Additionally, I can find no evidence describing the frequency or duration of the restriction so I cannot conclude that the physician has confirmed that ability to perform ADL is restricted for extended periods. In addition the physician indicated in the assessor's report that:

- the appellant requires continuous assistance only for basic housekeeping
- the appellant requires periodic assistance only for food preparation and cooking

I consider this as evidence that there are no restrictions either continuously or periodically for the vast majority of DLAs and as such the appellant's impairment cannot be considered as severe.

With respect to the impact of the restrictions, I noted the evidence that the appellant requires orthotics and the appellant's representative opines that this satisfies the legislative definition of an assistive device; however, I found no evidence that the appellant would be unable to perform ADL without orthotics as required by the definition. It appears only that the orthotics may make it easier or more comfortable for the appellant in his daily activities. I also cannot conclude that the appellant requires the significant help of another person to perform ADL as the physician has indicated in the assessment that the appellant requires periodic assistance only for food preparation and cooking.

In summary, while there is some evidence that the appellant meets the legislative criteria, there is too much contradictory evidence to allow me to conclude that the appellant meets all the criteria.