

PART C – DECISION UNDER APPEAL

(State the reconsideration decision)

The decision under appeal is the ministry's reconsideration decision dated December 30, 2009 which held that the appellant did not meet 4 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. However, the ministry was not satisfied that the appellant has a severe mental or physical impairment that a medical practitioner has confirmed is likely to continue for at least 2 years that, in the opinion of a prescribed professional, directly and significantly restricts the appellant's ability to perform daily living activities (DLA) either continuously or periodically for extended periods. The ministry also found that a prescribed professional has not confirmed that, as a result of direct and significant restrictions, the appellant requires help 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

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 ministry was not in attendance at the hearing. After confirming that the ministry was notified, the hearing proceeded under section 86(b) of the Employment and Assistance Regulation.

The evidence before the ministry at the time of reconsideration was comprised of a PWD application (Self-report (SR), Physician Report (PR), and Assessor Report (AR)), a December 7, 2009 letter from the appellant's physician, and a December 8, 2009 letter from the appellant.

In the SR, the appellant reports that he has had several episodes of diarrhea, abdominal cramps, nausea, fever, extreme fatigue and general exhaustion over the past 3 years which were diagnosed as Crohn's disease in June 2009. A three week episode in March 2009 resulted in an infected abscess and the subsequent development of a fistula. The appellant reports that his current main affliction is the extra-intestinal manifestation of severe rheumatoid arthritis which affects his right ankle, both knees and wrists, his right elbow, upper back, shoulders, and especially his neck; he has had a dull head ache for the past 4 months. He reports that his condition gets worse in the evening, resulting in difficulty getting to the washroom 3 times nightly and stiffness in the morning that can take hours to work out to the point he can be somewhat functional. He reports that he has lost 60% of his strength and that, if it takes 20 minutes to perform a task, he requires another 20 minutes to rest and recover.

In the PR dated August 19, 2009, the appellant is diagnosed with Crohn's disease and ankylosing spondylitis. In March 2009, the appellant's GI symptoms required an in-hospital assessment. Since then, bowel symptoms have become progressively worse and have been complicated by bleeding in the bowel and a rectal abscess which required hospitalization; a draining fistula subsequently developed. In May 2009, "quite debilitating" back and limb pain onset resulting in an inability to roll over at night. The physician indicated 'no' with a question mark in response to the question whether the impairment is likely to continue for 2 or more years and writes that it is difficult to predict, that the appellant has already shown improvement with medication and, that although both medical conditions can be life-threatening and cause long term disability, the physician is somewhat optimistic at this point for good disease control. Regarding Functional Skills, the appellant is able to walk 2-4 blocks unaided on a flat surface, climb 5+ steps unaided, lift 5-15 lbs, and has no limitations remaining seated; no difficulties with communication or significant deficits with cognitive and emotional function are indicated. The physician notes a 4-day hospitalization and that a biopsy indicated a high degree of inflammation in the appellant's body.

In the AR, completed by the same physician, significant pain and weakness in the appellant's back, neck, and shoulders are listed as the impairments that impact the ability to manage DLA. The appellant's Ability to Communicate is reported as good for all aspects. Regarding Mobility and Physical Ability, the appellant is independent walking indoors, and standing; walking outdoors ("takes longer due to back and joint pain"), climbing stairs, lifting ("can't lift much but no one to assist"), and carrying/holding take significantly longer. Regarding DLA, the appellant is reported to be independent with all aspects of personal care with narrative that the appellant uses a shower but would have trouble with a tub and that movement in bed can be quite difficult. Basic housekeeping takes significantly longer – "can't lift much + bending over is very difficult" and "has to rest lots". The appellant is independent with 4 aspects of shopping while the remaining 1 aspect, carrying purchases, takes significantly longer – "takes more trips to carry his groceries". The appellant is independent with all aspects of meals, paying rent and bills, and medications. Regarding transportation, the appellant takes significantly longer with the only applicable aspect - getting in and out of a vehicle. Assistance

is provided by friends – no information is provided where asked to indicate help required but not available. The appellant is under the care of a gastroenterologist and will be seeing a rheumatologist.

In a December 7, 2009 letter, the appellant's current physician [the physician who completed the PWD application has since retired] confirms the above diagnoses, recurrent painful fistulas, and inflammatory joint pain and writes that, while it is hoped that in time the appellant's condition "will come under control with medications, as of now it is unreasonable to expect him to work on a regular basis".

In the appellant's December 8, 2009 letter, he writes that Crohn's disease prevents him from engaging in social and recreational activities and that, when not in remission, he suffers from diarrhea, abdominal cramping, nausea, vomiting, weight loss, fever, chills and extreme fatigue; additionally, he suffers from bloating/gas, joint pain and fistulas. The appellant reports, in his letter, 5 debilitating fistula attacks since June 2009 with the fistula taking about 10 days to appear, ripen and explode which is followed by 5 days of draining and healing. The appellant writes that a fistula flare up results in pain with every movement and leaves him unable to sit at all. Respecting the functional skills assessment in the PR, the appellant writes that he "could do those things but I'd be much better off if I didn't have to" and that when his "fistula is acting up [he] is incapable of doing anything other than laying down and whimpering and then gasping and groaning when I need to get up". The appellant writes that ankylosing spondylitis results in "many sore spots" including an "elbow so sore that you can't lift your arm". The appellant writes that "although I do not require significant help or supervision of another person I am certainly very grateful when I get it".

Subsequent to reconsideration, the appellant submitted an additional physician's letter dated January 22, 2009 in which his physician recaps what she refers to as "intermittent disability" including prolonged bouts of diarrhea in June 2007 ("essentially housebound"), June 2008, and March 2009 and a rectal abscess resulting in a fistula and anal seepage from April–May 2009. Additionally, joint pain beginning in May 2007, knee swelling in July–August 2008 requiring joint aspiration, and further joint problems June–August 2009 resulted in a diagnosis of spondyloarthritis. The appellant requires narcotic analgesia for joint pain and the fistula. The physician writes that "although symptoms have abated somewhat with methotrexate they continue to wax and wane" and that while she is "hopeful that treatment may at some point enable [the appellant] to return to his usual employment" she cannot predict with certainty whether the appellant will be employable in the next 2 years.

At the hearing, the appellant described a typical day stating that he awakes at 8 am with overnight stiffness, toilets and has a sitz bath, and prepares a cup of tea and washes his dishes. Two hours later, the appellant takes pain medication and has a high protein smoothie, toilets and bathes again, and either lies down or sits and reads, though it is difficult to concentrate. At noon he repeats his toileting routine and by 6 pm his day is over as he is exhausted. At 5 am the appellant repeats his toileting routine and takes pain medication. On his worst days, the appellant has stabbing pain and only gets up when necessary, 6 times a day, to toilet and bathe and have a smoothie; on these days the appellant is unable to make it to the washroom and uses an makeshift commode and eats nothing but the smoothie. The appellant reports that a good day is when his fistula breaks, though this requires frequent bathing and changing of drainage padding; on these days, his appetite returns and he is able to visit friends. The appellant stated that he has had 4 fistula attacks in January 2009. The appellant also stated that he has skin rashes and boils resulting from medication. Respecting DLA, the appellant stated that it takes him 20 minutes to dress and that he is able to drive using a donut cushion. The appellant receives help from friends and family who prepare meals for him, sometimes prepare a bath for him, chop his firewood, and do laundry once weekly. He reports that he is no longer able to garden, seek pain relief in a hot tub (due to skin rashes), or enjoy the company of friends over meals. He feels that his voice has not been heard and that his submissions have not been adequately considered.

[REDACTED]

At the hearing, the appellant's advocate read from her written submission. Referencing dictionary definitions of terms used in the legislation, the advocate argued that all legislative criteria for designation as a PWD have been met. Citing *Hudson v. Employment and Assistance Appeal Tribunal, 2009*, the advocate argued that there is no statutory requirement that more than 2 DLA be restricted, that all evidence, including the narrative, of the prescribed professionals should be considered in a broad manner, that significant weight must be placed on the appellant's evidence unless there is a legitimate reason not to do so, and that the legislation must be interpreted with a benevolent purpose in mind with any ambiguity being resolved in favour of the appellant. Citing evidence of the appellant and his physicians in the appeal record, as well as internet information respecting Crohn's disease, the advocate argued that it has been established that the appellant has a life-long disease which is severe as it leaves him bed or house bound for a considerable time and restricts his ability to manage personal care, meals, housework and mobility resulting in a need for help. Included in the written submission are excerpts from *Hudson*, the textbook Dreidger on the Construction of Statutes, and the Interpretation Act.

The panel admitted the evidence submitted after reconsideration of the appellant, his physician, and his advocate under section 22(4) of the Employment and Assistance Act as being in support of the information and records before the ministry at reconsideration.

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 does not have a severe physical or mental impairment that, in the opinion of a medical practitioner, is likely to continue for at least 2 years, which, in the opinion of a prescribed professional, directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods necessitating help to perform DLA. The ministry determined that the age requirement had been met.

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 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, 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 appellant's position is that he is eligible for designation as a PWD because his own evidence and the evidence of his physicians establishes that he has a severe impairment which will last more than 2 years that significantly restricts his ability to perform DLA when experiencing frequent flare-ups of his medical conditions resulting in the need for help.

The ministry's position, based on the appeal record, is that the evidence does not establish the existence of a severe physical or mental impairment likely to continue for at least 2 years that, in the opinion of a prescribed professional, significantly restricts DLA or necessitates help with DLA.

Regarding the criterion of section 2(2)(a) of the EAPWDA, the ministry determined that neither of the appellant's physicians has confirmed that the impairment resulting from the appellant's conditions is likely to continue for at least 2 years. The panel finds that the evidence of the physician who completed the PWD application is that, although the appellant experienced worsening symptoms after his diagnosis in March 2009, as of the time when the PWD application was completed in August 2009, the "appellant has already shown improvement with medication" and the physician was optimistic about good disease control. Additionally, the evidence of the appellant's current physician, in the letters of December 7, 2009 and January 22, 2009, indicates that the appellant's symptoms have abated somewhat, though they continue to "wax and wane", and that, while the appellant is unable to work on a regular basis at this time, the physician hopes that in time the appellant's condition "will come under control with medications". The panel finds that the evidence

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of both physicians reflects some improvement in the management of symptoms, since commencing treatment last year of medical conditions that appear to have gone undiagnosed for a number of years, and a belief that there is potential for continued improvement to the point of good disease control and a return to physically intensive work. Based on this evidence, the panel finds that the ministry reasonably determined that a medical practitioner has not confirmed that the appellant's impairment resulting from his medical conditions is likely to continue for at least 2 years.

Regarding the existence of a severe mental impairment, the panel finds that as there is no diagnosis of a mental impairment and as there are no reported deficits with cognitive and emotional function, the ministry reasonably concluded that a severe mental impairment has not been established under section 2(2) of the EAPWDA.

Regarding the existence of a severe physical impairment, the panel finds that the evidence of the appellant's physicians establishes bouts of significant intestinal and rectal symptoms (diarrhea, vomiting, weakness, abscess, and fistula) since March 2009 as well as "quite debilitating" back and limb pain resulting from Crohn's disease and associated ankylosing spondylitis. While the evidence in the PWD application respecting functional skills and mobility and physical ability reflects, what may reasonably be viewed as, moderate limitations and overall independence, the panel finds that, in light of the physician's evidence respecting the degree and recurrent nature of symptoms experienced to date and the evidence of the appellant respecting the frequency of exacerbated symptoms due to fistula attacks experienced since his diagnosis in March 2009, the ministry did not reasonably determine that a severe physical impairment has not been established under section 2(2) of the EAPWDA.

Regarding the degree to which the appellant's DLA are restricted, the panel notes that the legislation specifically requires that the requisite restriction be in the opinion of a prescribed professional. The panel finds that the evidence in the AR establishes that the appellant is independent with personal care, though the use of a shower, due to difficulties with a tub, and difficulties with movement in bed are indicated. Independence is also reported for all aspects of meals, paying rent and bills, and medications as well as for 4 of 5 aspects of shopping. Restrictions indicated by a prescribed professional are that basic housekeeping ("has to rest lots", "can't lift much", and "bending over is very difficult"), 1 aspect of shopping, carrying purchases home (more trips are required to carry groceries), and 1 aspect of transportation, getting in and out of a vehicle, take significantly longer, though how much longer is not indicated. No information specifically addressing the appellant's ability to perform DLA was provided in the additional physician's letters as the physician's comments, including that "heavy physical labour exacerbates pain from both the joints and fistula", appear to relate to the appellant's ability to resume to his former employment rather than DLA which are not reasonably considered heavy physical labour. The panel finds that the evidence in the AR respecting basic housekeeping is sufficiently detailed to establish a direct and significant degree of restriction which may be reasonably viewed as continuous as the activity is performed frequently. However, the only other restrictions indicated by a prescribed professional are that getting in and out of a vehicle takes an unknown amount of extra time and that the appellant is limited in the amount of groceries he can carry (5-15 lb limit indicated in the PR). Additionally, the prescribed professional indicates that the appellant is independently able to manage the remaining 22 of 26 applicable aspects of DLA. Therefore, as the evidence in the AR establishes that the appellant is independently able to manage the overwhelming majority of all aspects of DLA, the panel finds that the ministry reasonably concluded that, in the opinion of a prescribed professional, the appellant is not directly and significantly restricted either continuously or periodically for extended periods in his ability to perform DLA as required under section 2(2)(b)(i) of the EAPWDA.

The panel also finds that, as a direct and significant restriction with DLA has not been established, as a prescribed professional reports that the appellant independently performs the vast majority of all aspects of

DLA without the need for either periodic or continuous assistance, other than the comment that the appellant "can't lift much but has no one to assist" and, as the prescribed professional has not indicated that help is required but not available, the ministry reasonably determined that the evidence does not establish that, in the opinion of a prescribed professional, the significant help or supervision of another person, use of an assistive device or assistance animal is required to perform DLA as required under section 2(2)(b)(ii) of the EAPWDA.

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