

PART C – DECISION UNDER APPEAL

(State the reconsideration decision)

On March 26, 2010 the Ministry decided that the Appellant was not eligible for the Persons with Disabilities (PWD) designation as the Appellant does not meet all of the criteria set out in ss. 2(2) and (3) of the EAPWDA. Specifically the Ministry was not satisfied that the Appellant has a severe physical or mental impairment; the Appellant's prescribed professional does not confirm that his impairment directly and significantly restricts his ability to perform daily living activities either continuously or periodically for extended periods; and, that the Appellant's prescribed professional does not confirm that as a result of direct and significant restrictions, he requires help to perform daily living activities.

PART D – RELEVANT LEGISLATION

(State the relevant Legislation considered)

Employment and Assistance for Persons with Disabilities Act (EAPWDA) sections 2 (2) and (3).
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 evidence before the Ministry was contained in the PWD Designation Application and consisted of a Self Report (SR) dated September 1, 2009; a Physician's Report (PR) dated September 14, 2009; and an Assessor's Report (AR) completed by the Appellant's physician and dated September 14, 2009.

In the SR the Appellant describes his disability as follows:

- I have Fetal Alcohol Syndrome, Noonan's Disease and Bipolar;
- I struggle with managing money;
- I struggle with keeping my attention on anything too long;
- I struggle with keeping a job;
- I have struggled with addiction most of my adult life;
- I am now in recovery for the sixth time;
- I never pay bills; I barely pay rent;
- I have attention deficit, memory deficits, hyper ? and poor judgment;
- People tell me I am immature.

In the PR the Appellant's physician states that the appellant suffers from the following:

- Fetal Alcohol Syndrome since birth;
- Depression/Anxiety since 1995
- Alcohol and drug dependence; the date of onset is unknown.

The Appellant's physician describes the severity of his medical conditions as follows:

"This patient has fetal alcohol syndrome with depression/ anxiety and alcohol/drug addictions. He is presently living in a treatment home and after 1 year will move to a recovery group home. He is immature, poor concentration, difficulty concentrating and has not learned how to look after himself."

The Appellant's physician reports no difficulties with functional skills except remaining seated is restricted to less than one hour. As well, he reports that the Plaintiff has cognitive difficulties with communication described as *"Fetal Alcohol syndrome makes it difficult to communicate ideas properly."*

ATTACH EXTRA PAGES IF NECESSARY

The Appellant's physician reports that the Appellant suffers from significant deficits with cognitive and emotional function with deficits evident in the following areas:

- Executive
- Language
- Emotional
- Motivation
- Attention

The Appellant's physician reports in the PR that the Appellant's impairment restricts the following daily living activities:

- Management of medications
- Basic housework
- Management of finances
- Social functioning – *“Patient cannot interact well-immature, makes friends but loses them quickly”*

The Appellant's physician describes the assistance the Appellant needs as *“Patient needs help from another person to manage medications, finances.”*

In the AR the Appellant's physician notes that the Appellant currently lives at a Treatment Centre. He describes the Appellant's impairment as a Cognitive Impairment. He reports that the Appellant's ability to communicate is good for speaking and hearing and poor for reading and writing. He reports that the Appellant is independent in all six areas of mobility and physical ability. He reports that the Appellant's Cognitive Impairment has the following effect on his daily functioning:

- Major impact – Attention/Concentration; Executive;
- Moderate impact – Bodily Functions; Emotion; Insight and judgment;
- Minimal Impact – Impulse control; Memory; Motivation; Language;
- No impact – Consciousness; Motor activity; Psychotic symptoms; Other neuropsychological; Other emotional or mental problems.

Of the 28 categories of daily living activities the Appellant's physician reports that he is independent in 16(all 8 categories of personal care; laundry; basic housekeeping; going to and from stores; reading prices and labels; carrying purchases home; and all 3 categories of transportation); that he requires periodic assistance in 10 (shopping – making appropriate choices and paying for purchases; meals – meal planning, food preparation, cooking and safe storage of food; banking; medications – filling/refilling prescriptions; taking as directed; safe handling and storage); and that he requires continuous assistance with 2 categories – budgeting and paying rent and bills.

The Appellant's physician reports that the Appellant's social functioning requires periodic support/supervision in 4 of 5 categories and continuous support/supervision in the fifth. He describes the Appellant as having marginal functioning in both his immediate social network and extended social network. The Appellant's physician notes *“Requires help may need to move into*

group home after recovery house.”

At the hearing the Appellant submitted a medical report from a specialist, a Neuropsychologist, dated June 3, 2010 (the Neuropsychology Report). This new evidence was admitted as evidence in support of the information and records before the Ministry on Reconsideration pursuant to section 22(4) of the EAA.

In the Neuropsychology Report the Appellant's Specialist reported the following:

- The patient has a history of polysubstance abuse, fetal alcohol syndrome and multiple head injuries.
- Overall estimates of intellectual ability derived from the WAIS-IV place abilities currently within the Extremely Low range for his age.
- Academic abilities (WRAT 3), single-word reading and spelling abilities were Average.
- Arithmetic ability (mechanical computation) and comprehension of written material (WJ-III) were well below Average
- Memory and learning in the verbal domain (RVALT) was moderately impaired for his age.
- Recognition memory was moderate to severely impaired for his age.
- Copying of a complex geometric design was severely impaired for his age.
- Immediate and delayed recall of the design was severely impaired.
- Abstract reasoning, problem solving, concept attainment or formation and mental flexibility (WCST) were severely impaired for his age with significant perseveration noted.
- Self report of personality and emotional functioning (PAI) shows that the Appellant tends to portray himself in an especially negative or pathological manner – could be deliberate distortion, malingering or a “cry for help”.

The opinion of the Appellant's Specialist is as follows:

- The Appellant demonstrated significant deficits across most assessed cognitive domains.
- The Appellant presents with significant and diffuse higher order cognitive deficits and limitations
- The Appellant will require guidance and support with managing his day to day function and higher level decision making demands (e.g. financial, legal etc.)
- The Appellant will have significant difficulty managing cognitive demands around appropriate social and vocational roles.
- Poor acquisition and recall of new information will to some degree interfere with his ability to recall verbal instructions and information.
- The Appellant is not competitively employable.

The Appellant's Specialist recommends the following assistance for the Appellant:

- Given demonstrated cognitive dysfunction it is recommended that if the Appellant is required to participate in higher level decision-making, that he have assistance and/or guidance from entrusted persons to ensure that he takes into account all important aspects of a situation to make an informed decision

- It is essential that the Appellant use compensatory strategies to manage cognitive deficits. These include only doing one task at a time; having information slowed down or repeated; being organized and avoiding last minute decision making; using lists, day timer, notebook and/or bulletin board at home
- Referral to named community organizations to explore all available resources with which to accommodate the Appellant's needs and to develop and implement a structured, consistent daily schedule
- Ongoing support and assistance with substance abuse and emotional issues including individual support and monitoring with possible referral for life skills training, social skills training etc. through named community organizations. Individuals working with the Appellant must present all information to him at a level he is able to understand.

The Appellant's advocate also gave evidence as a person who has witnessed the Appellant's struggles with daily living activities. He gave evidence of the following (all of which the Appellant confirmed):

- That the Appellant cannot live on his own but needs someone with him to tell him what to do each day;
- That the Appellant cannot prepare meals or follow a recipe without a person helping him. The Appellant cannot make "Kraft Dinner".
- The Appellant cannot manage money, he spends it all at once or gives it away to people.
- The Appellant cannot manage his medications and someone else has to give them to him to take e.g. his girlfriend gives him his sleeping pill each night otherwise he would take them during the day.
- The Appellant cannot make and attend medical appointments on his own.
- The Appellant cannot just make lists or write things down as he is not able to set up and use systems like that without help from another person

Both the Appellant and his advocate agreed with the restrictions to daily living activities set out in the PR and AR. The evidence of the Appellant and his advocate was admitted as evidence in support of the information and records before the Ministry on Reconsideration pursuant to section 22(4) of the EAA.

PART F – REASONS FOR PANEL DECISION

The Panel must decide whether the Ministry's decision to deny PWD status to the Appellant was reasonable. The Ministry was not satisfied that the Appellant has a severe physical or mental impairment; that the Appellant's prescribed professional does not confirm that his impairment directly and significantly restricts his ability to perform daily living activities either continuously or periodically for extended periods; and, that the Appellant's prescribed professional does not confirm that as a result of direct and significant restrictions, he requires help to perform daily living activities.

The EAPWDA, s. 2 sets out 5 criteria which must be met for PWD designation:

1. The Appellant must have reached the age of 18;
2. The Minister must be satisfied that the person has a severe mental or physical impairment;
3. In the opinion of a medical practitioner, the impairment will continue for at least 2 years;
4. In the opinion of a prescribed professional, the impairment must directly and significantly restrict the persons' ability to perform daily living activities, either continuously or periodically for extended periods; and
5. As a result of the restriction in activities, the person requires help to perform those activities. "Help" is defined in s. 2(3)(b) of the EAPWDA as an assistive device, the significant help or supervision of another person or the services of an assistance animal.

The Appellant argues that the evidence of his physician and his specialist, both of whom are prescribed professionals, shows that he has a severe mental impairment. The Appellant agrees that he does not have a severe physical impairment. The Appellant argues that his cognitive impairments have resulted in him losing jobs; becoming a drug and alcohol addict; not being able to manage his finances; being homeless for periods in his life; never having lived on his own; being unable to manage his own medications; not being able to cook or follow a recipe; not being able to get to medical appointments on his own.

The Ministry argues that the evidence in the PR and AR does not sufficiently describe the severity of the Appellant's mental impairment.

The panel finds that the evidence in the Neuropsychology Report, when added to the evidence in the PR and AR, shows that the Appellant suffers a cognitive impairment that places him in the Extremely Low range of intelligence for his age with significant deficits across most assessed cognitive domains. The Appellant's physician attributes his cognitive impairment to fetal alcohol syndrome together with anxiety, depression and drug and alcohol dependence. The Specialist notes the fetal alcohol syndrome, polysubstance abuse and a history of multiple concussions. No single cause of the Appellant's cognitive impairment is identified but the panel is satisfied that the Appellant has a severe cognitive impairment. It therefore is not reasonable for the Ministry to find that the Appellant does not suffer from a severe mental impairment. The Appellant meets criterion 2.

ATTACH EXTRA PAGES IF NECESSARY

The Appellant argues that as a result of his severe mental impairment his ability to perform certain daily living activities is directly and significantly restricted. The evidence of the Appellant's physician in the PR is that he is restricted (periodically or continuously) in 12 of 28 activities all of which involve thinking or decision making. The Appellant agrees that he is physically capable of performing all 28 daily living activities. The evidence of the Appellant's specialist, to the effect that he suffers from extremely low intelligence and significant deficits in most cognitive domains, supports the evidence of the Appellant's physician.

The Ministry argues that the evidence of the Appellant's physician does not sufficiently describe the degree of restriction for each activity and therefore cannot conclude that the activities are significantly restricted.

The panel finds that the evidence of the Appellant's physician in the PR and AR, as supported by the findings of the Appellant's specialist, and by the evidence of the Appellant and his Advocate, is that the daily living activities noted as restricted by the Appellant's physician are restricted to the point that the Appellant cannot perform them at all without assistance. He cannot go shopping and choose what food to buy; he cannot manage his money to pay for purchases; he cannot cook, plan meals or store food safely; he cannot do his own banking, make and stick to a budget or pay rent and bills; he cannot fill his own prescriptions, take his medication as directed or store his medications. In the PR the Appellant's physician states "[Appellant] has not learned to look after himself." Therefore it is not reasonable for the Ministry to find that, in the opinion of the proscribed professional, the Appellant's mental impairment does not directly and significantly restrict his ability to perform daily living activities, either continuously or periodically for extended periods. The Appellant meets criterion 4.

The Appellant argues that he requires the significant help or supervision of another person in order to perform the restricted activities of daily living. He currently receives help from his drug and alcohol sponsor with whom he lives; his girlfriend and his brother. Prior to living with his sponsor he lived in two treatment centers. In the future the Appellant would like to share an apartment with his girlfriend.

The Ministry argues that the evidence does not sufficiently describe the type and amount of assistance required. As well, the evidence discloses that the Appellant may learn to perform some of the activities currently restricted.

The panel finds that the evidence shows that the Appellant is not able to perform the restricted activities at all unless he is helped by another person. That makes the degree of help "significant". In the PR the Appellant's physician notes that he was living in a treatment home at the time and would be moving to a recovery group home. He noted "*Patient needs help from another person to manage medications, finances*". In the AR he noted "*Requires help may need to move into group home after recovery house*". The specialist notes "*[Appellant] will require guidance and support with managing his day to day function and higher level decision making demands (e.g. financial, legal etc.)... Given demonstrated cognitive dysfunction... it is recommended that if the patient is required to participate in higher level decision-making that he have assistance and/or guidance (from entrusted persons, etc.) to ensure that he takes into account all important aspects of a situation to make an informed decision.*" Therefore it was not reasonable for the Ministry to find that the Appellant does not require help to perform the restricted activities. The Appellant meets criterion 5.

APPEAL #

The panel finds that the Ministry's decision to deny the PWD designation was not reasonably supported by the evidence and rescinds the Ministry's decision. Therefore the Ministry's decision is overturned in favour of the Appellant.