

PART C – Decision under Appeal

The decision under appeal is the ministry's reconsideration decision dated August 26, 2010 which held that the appellant did not meet three of the five 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 two years. However, the ministry was not satisfied that the evidence establishes he has a severe physical or mental impairment. The ministry was also not satisfied that the appellant's daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods. As the ministry found that 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 consisted of:

- 1) Person With Disabilities (PWD) Application: applicant information, 4 pages (included 1 added hand-written page), dated May 19, 2010, physician report, 7 pages, dated May 12, 2010, assessor's report, 10 pages, dated May 17, 2010;
- 2) Letter from the ministry to the appellant denying the PWD application, 3 pages, dated July 21, 2010;
- 3) Letter from the physician who completed the original application for PWD, 3 pages, dated August 10, 2010; and,
- 4) Submission by the appellant's advocate, 6 pages, dated August 12, 2010;

At the hearing, the appellant's advocate introduced a letter from the appellant's family physician regarding the appellant's impairment, 1 page, dated September 24, 2010, as well as a written submission. The ministry did not object to the admission of these documents as it was acknowledged that the letter provides evidence that is in support of the information before the ministry when the reconsideration decision was made. The written submission by the appellant's advocate was accepted as argument only and the panel reviewed the letter from the family physician and admitted it into evidence, under Section 22(4) of the Employment and Assistance Act, as being in support of the appellant's impairment.

At the hearing, the ministry relied on the reconsideration decision. The ministry pointed out that the appellant's mental impairment, diagnosed as post traumatic stress disorder (PTSD), major depression and anxiety, is "chronic but treatable" according to the physician who completed the application for PWD. The physician reports six cognitive deficits but also notes "...functional skills are not affected... cognition will improve as PTSD improves." One major impact is noted to cognitive/emotional functioning and moderate impacts are noted for a further seven categories but no narrative is provided to clarify these impacts. The additional letter dated August 10, 2010, from the physician who completed the original application, provides further narrative, noting the appellant's condition is chronic and severe. The physician also notes that the appellant's living condition is not conducive to further his recovery and the ministry pointed out that the appellant has changed living accommodations as of September 1, 2010. The ministry states that there is no diagnosis of a physically limiting medical condition yet it is indicated that the appellant takes longer to climb stairs and that continuous assistance is indicated for lifting. Further, although two moderate functional limitations are indicated (walking limited to 2-4 blocks and seating limited to 1-2 hours), there is no narrative to explain these physical limitations.

With respect to the impact on DLA, the ministry pointed out the discrepancies in the original application where all but one of the DLA (personal self care) have been indicated to be restricted in the physician's report, without further clarification, and in the assessor report the appellant is assessed as "independent" with respect to 28 out of 33 aspects of DLA. Looking to the August 10, 2010 letter provided by the physician who completed the original application, it is confirmed that the appellant is restricted continuously in meal preparation, personal self-care, financial management, and social functioning and restricted periodically, for extended periods of times, in medication management, basic housework, and shopping. However, the ministry highlighted that even though the additional letter indicates direct and significant restrictions to daily living tasks, the description provided shows a much more moderate level of impact upon ability to perform daily living tasks. The need for assistance with daily living tasks is primarily attributed to lack of motivation, interest, energy, and inattention. The ministry argues that this does not meet the legislative requirement of requiring help so that in order to perform the DLA, the person requires the significant help or supervision of another person. Although the information provided establishes that the appellant takes two to three times longer to perform activities, the ministry states that there is no indication that the appellant is unable to perform these activities. The ministry pointed out that the 'ongoing encouragement' and 'emotional support' of a spouse is not, in this situation, a requirement for significant help in order to perform these tasks. The ministry acknowledged that the recommendation for 'counselling sessions' does constitute the 'significant help' required in the legislation, but that it is limited to the social restrictions of relating to, communicating or interacting with others effectively.

The appellant explained that his mental impairment began with symptoms that started approximately 12 to 13 years ago, although he only recently began sessions with a psychiatrist who has prescribed various medications to help him cope. The appellant was a political activist in another country and faced constant threats to his safety until he was eventually imprisoned in that country for a one-year period. Although he knows that he does not face these threats while living in Canada, the appellant stated that he still feels nervous and anxious and expects people to harm him. With the medications that he's been prescribed, the appellant explained that although he can now get to sleep, which was a problem before, he now experiences extreme lack of energy and sleeps each day until noon. The appellant stated that he had to forego his medications the evening before the hearing, for example, in order to be sufficiently alert to attend. The appellant also stated that he has no memory and is always losing his things and he relies completely on his wife. The appellant's wife does the cleaning, shopping, caring for their children, and banking and, in the appellant's words, without her he "...wouldn't be able to put his shirt on". The appellant stated that he has lost interest in everything and has thought about harming himself because he feels so hopeless about their situation. He cannot sleep in the same room as his wife or his children because he dreams about his past experiences and will wake up fighting, punching and hitting and is afraid he may accidentally harm his family. When his young children are making noise in their home, the appellant expressed frustration because he cannot tolerate these sounds even though he knows that they are just being children. To illustrate his sensitivity to sounds, the appellant recounted an incident when he was driving with his family in the car and the person in the vehicle behind them honked the horn and it caused the appellant to panic and to drive straight into the intersection, which blocked the cars in the opposite direction, created a volatile situation with the other drivers, and caused the appellant's back to "freeze up". The appellant explained that the physical limitations he experiences are as a result of his nervousness which causes pains in his legs and in his back as well as headaches, for which he takes Tylenol 3. The appellant confirmed that his family has moved from a one bedroom apartment to a three-bedroom unit in subsidized housing as of September 1, 2010, but the appellant stated that he has already experienced conflicts in his dealings with the property manager and, in the appellant's words, although he can change locations "...problems have a way of finding me."

The appellant's advocate highlighted the psychiatrist's confirmation that the appellant suffers not only from post traumatic stress disorder (PTSD), but also from post traumatic major depression and post traumatic generalized anxiety. The manifestation comes in the form of recent nightmares, insomnia, increased vigilance, over-reacting to sounds and noises, depressed mood, lack of motivation, concentration, and lack of energy. The advocate explained that the August 10, 2010 letter from the physician who completed the original application was shown to the appellant's family physician, who has seen the appellant regularly for a longer period of time, and the family physician confirmed the information and stressed the appellant's "severe" memory problems due to the side effects from his medication. The advocate pointed to the original application whereby the psychiatrist confirms that the appellant will need medications and therapy indefinitely, and that there are a number of significant deficits confirmed in cognitive and emotional function. This is backed up by the assessor report which sets out a major impact in the area of emotion (excessive or inappropriate anxiety, depression), and moderate impacts in consciousness (orientation, alert/drowsy, confusion), impulse control (inability to stop doing something or failing to resist doing something), executive (planning, organizing, sequencing, abstract thinking, problem solving, calculations), memory (can learn new information and recall that information), motivation (lack of initiative, loss of interest), motor activity (increased or decreased goal-oriented activity, co-ordination, lack of movement, agitation, ritualistic or repetitive actions, bizarre behaviours, extreme tension), and psychotic symptoms (delusions, hallucinations, disorganized thinking). Minimal impacts are indicated in the areas of insight and judgement (poor awareness of self and health conditions, grandiosity, unsafe behaviour), attention/concentration (distractible, unable to maintain concentration, poor short term memory), language (expression or comprehension problems), and other neuropsychological problems (visual/spatial problems; psychomotor problems, learning disabilities). In the area of social functioning as well, the advocate pointed out, the appellant requires periodic support or supervision in 4 out of 5 areas.

With respect to the impact on DLA, the appellant's advocate stressed that a mental health impairment afflicts a person differently than a physical impairment, and the psychiatrist who is treating the appellant has confirmed that the appellant is significantly restricted in his daily functioning by his medical condition. More specifically, the physician reports that the appellant is restricted continuously in meal preparation (low motivation and focus, lack of appetite), personal self care (lack of motivation to get out bed or to get dressed, bathe, groom, only takes showers once a week), financial management (poor organizational planning and calculation skills, poor memory, lack of motivation and energy, easily overwhelmed), social functioning (decreased interest, difficulty trusting others, anxious around strangers, reacts inappropriately when he feels he is being followed, tends to socially isolate and withdraw, very anxious and nervous), and is restricted periodically for extended periods of time with medication management (poor memory and inattention, needs reminders), basic housework (chronic fatigue and low energy levels, lack of motivation, decreased interest), shopping (decreased interest, only goes when absolutely necessary, chronic fatigue, lack of motivation, anxious in public places). The appellant's advocate stressed that both the psychiatrist and the appellant's family physician have confirmed that the appellant requires significant ongoing help from another person to perform DLA as a result of his impairment. The form of this help and supervision is ongoing encouragement, emotional support from his wife and regular therapeutic counselling sessions. It is also confirmed by the physicians that the appellant is significantly dependent on the continuous assistance from his wife to go about most of his DLA, including reminders, grocery shopping, housework, financial management and budgeting, meal preparation, and personal self care.

PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry reasonably concluded that the appellant does not have a severe mental or physical impairment and that his daily living activities (DLA) are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods and that, as a result of those restrictions, it could not be determined that the appellant 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 person 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. The impairment must also, in the opinion of a prescribed professional, directly and significantly restrict the person's ability to perform daily living activities (DLA) either continuously or periodically for extended periods, as set out in Section 2(2)(b)(i). As a result of those restrictions, the person must require help to perform DLA, pursuant to Section 2(2)(b)(ii). Section 2(3)(b) sets out that a person requires help in relation to DLA if, in order to perform it, 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: prepare own meals, manage personal finances, shop for personal needs, use public or personal transportation facilities, perform housework to maintain the person's place of residence in acceptable sanitary condition, move about indoors and outdoors, perform personal hygiene and self care, and manage personal medication. In relation to a person who has a severe mental impairment, there are two additional activities, being: making decisions about personal activities, care or finances, and relating to, communicating or interacting with others effectively.

The ministry's position is that although the appellant meets criterion 1 and 3, in that he has reached the age of 18 and his impairments are likely, in the opinion of a medical practitioner, to continue for at least 2 years, the evidence does not establish that he has met criterion 2, 4 and 5. In particular, the ministry argues that the evidence does not show that the appellant has a severe mental or physical impairment and the prescribed professional did not confirm that the appellant's physical or mental impairment directly and significantly restricts his ability to perform DLA either continuously or periodically for extended periods so that he requires the significant help or supervision of another person to perform these activities.

The appellant's position is that the evidence establishes that he suffers from a severe mental impairment as a result of post traumatic stress disorder (PTSD), post traumatic major depression and post traumatic generalized anxiety. The advocate acknowledged that there is no evidence of a severe physical impairment and that this is not at issue. The advocate stated that the original application and the subsequent letter from the same physician describe different versions of the impact of the appellant's impairment, but argued that more weight should be placed on the latter letter, confirmed by the family physician, as it was produced as a result of an interactive interview of the physician whereas it seemed that the original application had been completed somewhat hastily. The appellant's advocate argued that the additional evidence, the information in the original application which has been subsequently supported, and the appellant's own testimony are sufficient to establish the legislative criteria for PWD designation. The advocate stated that a prescribed professional along with the appellant have provided sufficient evidence that the appellant's severe mental impairment directly and significantly restrict his ability to perform many DLA, for which he requires the significant help and supervision of another person, specifically his wife and mental health professionals.

ATTACH EXTRA PAGES IF NECESSARY

Regarding the existence of a severe mental impairment, the panel finds that the evidence of a medical practitioner confirms post traumatic stress disorder (PTSD), post traumatic major depression and post traumatic generalized anxiety and that his conditions are "chronic" and "severe". In the original application, the physician reported that there are many significant deficits with cognitive and emotional function and these deficits were all reflected in the more specific impacts to daily functioning. The only area of cognitive and emotional functioning with no impact on daily functioning was bodily functions (eg. eating problems, toileting problems, poor hygiene, sleep disturbance), but the subsequent letter from the same physician states that the appellant has experienced both loss of appetite and insomnia as part of his medical condition. The appellant has stated that he also experiences physical symptoms as a result of his mental impairment, in the form of leg and back pain and headaches, which often require medications to alleviate. The August 10, 2010 letter from the physician confirms the appellant's medical conditions have led to a number of symptoms, namely "major" sleep and emotional disturbance, mood swings, migraines, "chronic" fatigue, low energy levels, no appetite, "profound" lack of motivation, low self-esteem, increased sensitivity to stress, and decreased interest in developing and maintaining relationships in both immediate and extended social networks. The physician also reports that the appellant has experienced "very poor" memory and has difficulty concentrating and focusing on tasks, and that he has a "very bleak" outlook on life and the future and suffers overwhelming feelings of hopelessness and despair. Although the psychiatrist indicated in the original application that the conditions are "treatable", there was also a comment that there is a "probability of relapse" and that the appellant will need to remain on the medications and continue with treatment "indefinitely". Although the ministry was optimistic that a change in living accommodation would help resolve the appellant's medical conditions, the appellant's testimony is that, at least to this point, there has not been an improvement. The panel finds the evidence of the appellant seen together with that of the psychiatrist and the appellant's family physician as sufficient to support the finding of a severe mental impairment. Therefore, the panel finds that the ministry's decision, which concluded that the evidence does not establish a severe mental impairment, was unreasonable.

In terms of the appellant's ability to manage daily living activities (DLA), the panel has relied on the evidence of the prescribed professionals' assessments included in the August 10, 2010 letter and submitted at the hearing as being more current and complete than the information provided in the PWD application, and placed more weight on this evidence where it is inconsistent with the previous information. Whereas the physician's opinion in the PWD application is that the appellant is assessed as "independent" with respect to 28 out of 33 aspects of DLA, the subsequent letter from the physicians in conjunction with the appellant's oral testimony modify many of these assessments. The description provided by the physician and the appellant shows a much higher level of impact upon ability to perform daily living tasks as the appellant has indicated that, without his wife's supervision and assistance, he would not do anything. With her assistance, although the appellant is able to perform some DLA, it still takes him to three times longer to perform these activities. The August 10, 2010 letter and the appellant's evidence indicate that the 'ongoing encouragement', 'emotional support' and supervision of the appellant's spouse, along with the counselling sessions and anti-depressant medications provided by a mental health professional, are essential to the appellant's ability to remain in the family home at a minimal level of functioning. Overall, the panel finds that the evidence establishes that the appellant's severe mental impairment has directly and significantly restricted the appellant's ability to perform DLA, as specifically required by the legislation. Therefore, the panel finds that the ministry's decision, which concluded that the evidence of a prescribed professional does not establish a direct and significant restriction on the appellant's ability to perform DLA, as required by Section 2(2)(b)(i) of the EAPWDA, was unreasonable.

In determining whether the ministry reasonably concluded that the appellant does not require the significant help or supervision of another person, the panel relies on the information from the prescribed professionals and the appellant that he receives help primarily from his wife, as they have no other family in Canada, and the medications prescribed by his psychiatrist as well as the counselling sessions. The degree of help and assistance establishes continuous help for meal preparation, personal self care (dressing, grooming, bathing, feeding self, regulate diet, getting out of bed) financial management, lifting, and social functioning (appropriate social decisions, able to develop and maintain relationships, interact appropriately with others, able to deal

appropriately with unexpected demands, and able to secure assistance from others). Periodic help is required for extended periods of time for medication management (filling/refilling prescriptions, taking as directed, safe handling & storage), basic housekeeping, and shopping. As the panel finds that the evidence establishes that the appellant requires help in relation to many DLA and that he requires and receives the significant help of another person, the panel finds that the ministry's decision, which concluded that the requirement for significant help or supervision to perform DLA under Section 2(2)(b)(ii) of the EAPWDA was not met, was unreasonable.

The panel finds that the ministry's reconsideration decision was not reasonably supported by the evidence and rescinds the decision. Therefore, the ministry's decision is overturned in favour of the appellant.