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PART C – DECISION UNDER APPEAL

(State the reconsideration decision)

The decision under appeal is the ministry's reconsideration decision dated January 22, 2010 which held that the appellant did not meet 3 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 and that his impairment is likely to continue for at least 2 years. However, the ministry was not satisfied that the appellant has a severe physical or mental impairment or that his daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods. The ministry also found that as 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

(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 evidence before the ministry at the time of the reconsideration decision included: (a) Advocate submission, 6 pages, dated January 15, 2010; (b) Letter from Registered Clinical Counsellor (RCC), 1 page, dated August 16, 2005; (c) Psychiatric Consultation Note, 3 pages, dated December 22, 2009; (d) Letter from Prescribed Professional (PP), 1 page, dated January 4, 2010; (e) Self Report, 7 pages, unknown date, received by ministry January 15, 2010; (f) 3 letters of support from family and friends, 3 pages, one dated December 9, 2009 and two dated December 19, 2009; (g) Persons with Disabilities Designation Application: (i) Applicant information, dated July 16, 2009; (ii) Physician Report (PR), dated August 27, 2009; (iii) Assessor Report (AR), dated August 27, 2009.

At the hearing the ministry stated that the appellant is diagnosed with cervical disc disease (C5-6, C6-7) and chronic back pain and that the appellant is on long term opiate analgesics for pain management. From the PR, physical functioning includes limitations to lifting 5-15 lbs, and sitting 1-2 hours. The PR reports that the appellant is able to walk 4+ blocks and climb 5+ stairs unaided. The appellant experiences severe back spasms requiring the use of a wheelchair once or twice a week. A cane is used for assistance in walking.

The ministry stated that the PP provides no listed deficits to cognitive and emotional functioning although it indicates several moderate impacts on Daily Living Activities (DLA) including emotion, attention/concentration and motor activity. Specific comments from the PP include the appellant, "has a problem with depression and concentration secondary to chronic pain and opiate analgesics".

The ministry stated that the PR states that the appellant is independent in 23/28 aspects of DLA with periodic assistance required for going to/from stores, to getting in/out of vehicle, and using public transportation, with continuous assistance noted for basic housekeeping and carrying purchases home. Social functioning is independent in 4 of 5 aspects with periodic support/supervision needed to develop and maintain relationships.

At the hearing, the advocate stated that the appellant is in continuous pain, "he wakes up in pain." The appellant suffers from severe back spasms, which put the appellant into a wheelchair at least once or twice a week, and the pain is constant even with heavy doses of pain medication (morphine 20-40 mg daily plus OxyContin). Included in the Psychiatrist's report, the appellant's, "diagnosis appears to be one of a Chronic Pain Syndrome for which (the appellant) uses opiate pain medication complicated by what I would say primarily a Cluster B Personality Disorder including Narcissistic, Antisocial and some Borderline Personality Characteristics". Marginal functioning is noted for both immediate and extended social networks.

The appellant stated in the Appeal Record that, "keeping my head straight or looking down is the only time my (sic) does not hurt. I have to be aware of my posture at all times. I have frequent muscle spasms and inflammation that engulfs my entire back like a smouldering (sic) fire. I have limited mobility and if I try to go beyond my safe range of motion the pain instantly increases a 100 times more than the constant daily pain".

Physical functioning limitations noted in the letter from the PP (dated January 4, 2010) include that the appellant is unable to sit for more than 1 hour and notes that the appellant cannot bend over to pick things up and has great difficulty managing stairs or ramps, walking on uneven ground and he states that he suffers neck and back pain with attempting to ride on a bus.

The advocate included that the PP stated (letter of January 04, 2010) that the appellant, "requires the assistance of other to manage his daily affairs. The appellant feels he has at least 3 bad days per week when he is unable to look after his basic activities of daily living. This combination of his chronic pain and ongoing disability has resulted in chronic depression which also is significantly affecting him". The advocate noted that although the appellant is noted to isolate himself, the appellant receives help from his family and some friends with regard to grocery shopping, transportation, going to appointments, basic housework and getting prescriptions refilled. The appellant noted that he currently uses a chair in the bathtub in order to bathe and that the PP has indicated that the appellant would benefit from orthotics, a supportive chair and a 'grabber'.

The panel finds that the facts of this case are not in dispute with the exception of: (a) the panel finds that the appellant is unable to sit for more than 1 hour, and that the appellant has great difficulty managing stairs or ramps.

ATTACH EXTRA PAGES IF NECESSARY

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 is ineligible for PWD as he does not have a severe physical or mental impairment, and that his daily living activities (DLA) are, in the opinion of a prescribed professional, not directly and significantly restricted either continuously or periodically for extended periods and as a result of those restrictions, 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.

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, in the opinion of the prescribed professional, 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 facilities, 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 ministry's position is that the evidence does not establish that the appellant has a severe physical or mental impairment that in the opinion of a prescribed professional significantly restricts DLA or necessitates help with DLA.

The appellant's position is that the evidence establishes that the appellant does have a severe impairment that does significantly and continuously restrict his ability to perform DLA and that he relies on the assistance of some others and on an assistive device, and that he could use the help of another person and additional assistive devices to complete DLA.

Regarding the existence of a severe physical impairment, the panel finds that the diagnosis of cervical disc disease (C5-6, C6-7) and chronic back pain is confirmed and that the appellant is on long term opiate analgesics for pain management due to continuous pain is confirmed by the PP. The PP notes that the appellant experiences severe back spasms requiring the use of a wheelchair once up to 3 times a week and uses a cane everyday for walking. The appellant's prescribed medications (morphine 20-40 mg daily plus OxyContin), "are required long term and their use severely restricts his level of function" (letter from PP, dated January 4, 2010). Physical functioning is listed as being able to walk 4+ blocks, has great difficulty climbing stairs and sit less than 1 hour. In totality, the panel finds that there is sufficient documentary evidence from the prescribed professional to confirm that the appellant's physical impairment is severe. Therefore, the panel finds that the ministry did not reasonably conclude that the evidence does not establish a severe physical impairment and that the legislative requirement of section 2(2) of the EAPWDA has been met.

Respecting the existence of a severe mental impairment, the evidence provided by the PP in the PR does identify a mental impairment of depression arising from the long term use and interference of daily functioning of the opiate analgesic. Impacts are listed in the areas of emotion, attention/concentration and motor activity. The Psychiatric report indicates the diagnosis appears to be one of a Chronic Pain Syndrome for which (the appellant) uses opiate pain medication complicated by what the Psychiatrist would say is primarily a Cluster B Personality Disorder including Narcissistic, Antisocial and some Borderline Personality Characteristics. The panel acknowledges the depression and the diagnosis of the Psychiatrist, but as there is a lack of PP documentary evidence as to the severity of the mental impairments, and as no severe mental deficits are indicated in the AR, the panel finds that the ministry reasonably determined that there is not sufficient evidence to establish the existence of a severe mental impairment.

Regarding the appellant's ability to manage DLA, the panel relied on the combined evidence of the AR, and on the PP letter of January 4, 2010, which states the appellant has, "significant neck and lower back pain which requires long term opiate medication and severely restricts his level of function". The PP confirms that the appellant has, "up to 3 bad days per week when he is unable to look after his basic activities of daily living, the appellant frequently requires the assistance of other to manage his daily affairs". The PP lists that the appellant is independent in 23/28 aspects of DLA with periodic assistance required for going to/from stores, to get in/out of vehicle, using public transportation and continuous assistance noted for basic housekeeping and carrying purchases home. Social functioning is independent in 4 of 5 aspects with periodic support/supervision to develop and maintain relationships. Also listed are several moderate impacts on Daily Living Activities (DLA) including emotion, attention/concentration and motor activity. In totality, the panel finds that the evidence from all PP's does establish that the appellant is significantly restricted in DLAs. The panel determined that the PP's documentary evidence does establish a direct and significant restriction of the appellant to complete DLA. Therefore the panel finds that the ministry did not reasonably conclude that the evidence does not establish a direct and significant restriction, in the opinion of a prescribed professional, of the appellant's ability to perform DLA as required by section 2(2)(b)(i) of the EAPWDA.

In determining whether the ministry reasonably concluded that the appellant does not require help with DLA, the panel finds the evidence of a prescribed professional establishes that the appellant is significantly restricted with DLA (letter of January 4, 2010). The PP also confirms that the appellant frequently requires the assistance of others to manage his daily affairs. The PP confirms the continuous use of a cane, periodic assistance of a wheelchair and notes that the appellant would benefit from orthotics, supportive chair and a 'grabber'. The appellant advises that he currently uses a chair in the bathtub in order to bathe. The panel finds that the appellant's need for help has been established. As such, the panel finds that the evidence does establish a direct and significant restriction to DLA, and that the ministry was not reasonable in its determination that the requirement for help to perform the DLA under section 2(2)(b)(ii) of the EAPWDA had not been met.

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