

APPEAL #

PART C – DECISION UNDER APPEAL

(State the reconsideration decision)

The decision under appeal is the Ministry's reconsideration decision dated March 29, 2011 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. The Ministry was not satisfied that the appellant has a severe physical or mental impairment or that the Appellant's impairment significantly restricts his ability to perform daily living activities (DLA). The Ministry also found that the Appellant did not require assistance to perform DLA as a result of significant restrictions.

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 reconsideration was a PWD application, signed October 14, 2010, including description of disability by the Appellant, a Physician Report (PR) completed by the appellant's physician dated November 2, 2010, an assessor's report (AR) dated October 14, 2010, a request for reconsideration dated February 22, 2011, a letter from an advocate dated March 14, 2011, a form filled out by a social worker dated March 4, 2011 and a form completed by a psychiatrist dated March 3, 2011.

The Appellant described his disability as being weak, unwell, recently diagnosed with HIV and severely depressed.

In the PR, dated November 2, 2010, the Appellant is diagnosed as HIV positive. The physician reports that the Appellant is newly diagnosed with HIV, and suffers from anxiety, depression and mental fatigue. He reports that the Appellant will be on medication indefinitely, but the treatment has not yet started. The physician reported that the Appellant had not been yet prescribed any medication or treatment that interfered with DLA, that he would require the medication/treatment for life, that he did not require any prostheses or aids for his impairment and that the impairment was likely to continue for two or more years.

Regarding functional skills, the PR states that the Appellant can walk 4+ blocks unaided on a flat surface, can climb 5+ steps unaided, had no limitations on lifting or remaining seated. No difficulties with communication are noted. A significant deficit with 2 of 11 specified aspects of cognitive and emotional function is indicated (emotional disturbance and motor activity.)

The physician reports that 1 of 10 DLA was restricted (social functioning) and that it was not known if 2 other DLA were restricted (basic housework and mobility outside the home). The other 7 DLA were not restricted. The physician indicated the impact on social functioning was continuous, and explained that due to extreme anxiety and depression, the Appellant was not coping and his social function was interrupted. The physician stated that the Appellant needed emotional and social support to get through this phase of his chronic condition. The physician's additional comment was that the Appellant will need to go on medication within a year or so, and stay on medication indefinitely, and would need social and emotional support to be adherent to the medication regimen.

The physician states that he has seen the Appellant once during the 12 months before the date on which the PR was prepared. He does not state that the Appellant is his patient.

In the AR, dated October 14, 2010, the assessor describes the Appellant's mental or physical impairments that impact his ability to manage DLA as severe depression due to HIV diagnosis and physically unwell due to symptoms related to HIV.

In the AR, the Appellant's ability to communicate is reported to be good. The AR states that he requires no assistance from another person to walk indoors, for lifting and for carrying and holding.

A major impact is noted for three aspects of cognitive and emotional functioning, that is bodily functions, not eating or sleeping, emotion, and motivation. The assessor indicated that there was a moderate impact on four aspects of cognitive and emotional functioning, attention/concentration, executive, memory and psychotic symptoms (disorganized thinking). The assessor reported a minimal impact on insight and judgment, and no impact on the remaining five aspects of cognitive and emotional functioning.

Regarding DLA, the assessor reported that the Appellant was independent with regard to 8 aspects of personal care, although noting that the Appellant had no motivation for self care due to illness and absolutely no appetite. The assessor noted that the Appellant was independent with regard to 2 aspects of basic housekeeping, but did not complete the section regarding shopping. The Assessor reported that it takes the Appellant significantly longer than typical to plan meals, prepare food and cook, but that the Appellant was independent with regard to food storage, and all aspects of paying rent and bills, medications and transportation. The assessor wrote that the Appellant was independent with regard to appropriate social decisions, was able to develop and maintain relationships and interacted appropriately with others, but said he required continuous support/supervision to deal appropriately with unexpected demands and periodic support/supervision to secure assistance from others.

The assessor said that the mental impairment impacts the Appellant's relationship with his immediate social network and extended social network in that there was very disrupted functioning.

The assessor said that the Appellant required on-going monitoring re: mental functioning in addition to medical follow up, and psychosocial support to assist with resources available to him given his diagnosis. The assessor wrote that the Appellant received help from family, health authority professionals and community service agencies.

The assessor reported that the Appellant did not require the use of assistive devices or animals.

The assessor states that she had known the Appellant for one day, and that this is her first contact with the Appellant.

The letter from the advocate, dated March 14, 2011, states that additional information from the Appellant's psychiatrist and social worker confirms that in their opinion, the Appellant does have severe medical conditions, experiences direct and significant restrictions and requires assistance.

The 2 page form signed by the social worker and dated March 4, 2011 is not organized the same way as the assessor report form but covers much of the same information. It contains a number of statements with boxes to be checked off. Some of the statements appear to apply to the Appellant but have not been checked off by the social worker. The last line of the form states, "I have checked the applicable boxes where I confirm that he is directly and significantly restricted in his ability to perform his daily living activities and requires significant help to perform the activities as noted above." To be sure that the evidence relied on is only what the social worker intended to give, the panel finds that the social worker meant to endorse only the boxes that she checked off.

The social worker describes the Appellant's mental or physical impairments that impact his ability to manage DLA as severe HIV, depression, anxiety disorder, panic attacks, constant back and neck pain and severe headaches. The social worker writes that the combination of these conditions severely and continuously impacts the Appellant's ability to perform his daily living activities.

The social worker describes the Appellant needing assistance with one out of 4 aspects of communication, that is writing, in that he needs help with completing forms or writing letters due to lack of concentration and confusion.

The social worker did not check off any boxes relating to mobility and physical ability. She wrote that she only knew the Appellant in a clinical setting and that her observations were limited by this.

The social worker notes what appears to be a major impact on 5 aspects of cognitive and emotional functioning, that is bodily functions, (not sleeping), emotion (fear, anxiety, depression and panic attacks), attention/concentration, consciousness (confusion) and executive (impaired cognitive function).

The social worker wrote that the Appellant required support and supervision from family and friends with regard to 2 aspects of DLA relating to social functioning, that is, making appropriate social decisions and dealing appropriately with unexpected demands. The social worker reported that the Appellant needed support for coping with pain management. The social worker did not state that the mental impairment impacts the Appellant's relationship with his immediate or extended social network. The social worker wrote that the Appellant required support for coping with pain management, and that he received support and supervision from family and friends.

The social worker did not address whether the Appellant required assistive devices or animals.

The social worker's form does not say how often or for how long she had met with the Appellant.

The psychiatrist signed a form, dated March 3, 2011, that is similar to the one signed by the social worker, but it is 3 pages in length and contains some different information. Again, it consists of a series of statements with boxes to be checked off. The psychiatrist checked off all the boxes.

The psychiatrist describes the Appellant's mental or physical impairments that impact his ability to manage DLA as severe HIV, depression, anxiety disorder, panic attacks, constant back and neck pain and severe headaches. He writes that the combination of these conditions severely and continuously impacts the Appellant's ability to perform his daily living activities, that these conditions will likely continue for at least two years, and that as a result of these conditions, the Appellant is directly, significantly and continuously restricted in his ability to do his daily living activities.

As to functional skills, the psychiatrist states that the Appellant's basic mobility is restricted as a result of chronic fatigue, whole body pain and depression, that he has trouble with bending, and is unable to lift or carry more than 20 pounds. The psychiatrist does not comment on whether the Appellant requires assistance relating to climbing stairs or but there is a reference to

restrictions on sitting and standing. He noted that the Appellant tires easily and can only perform activities for short periods of time.

The psychiatrist describes the Appellant needing assistance with communication, in that he needs help with completing forms or writing letters due to lack of concentration and confusion and has difficulty reading instructions and directions.

The psychiatrist notes significant deficits in 4 aspects of cognitive and emotional functioning, that is, emotional disturbance (fear, anxiety, depression and panic attacks), attention/concentration, motivation and memory. He indicates some deficits in executive and impulse control.

The psychiatrist reported continuous restrictions on DLA, that is personal care, meal preparation, basic housework, shopping, use of transportation, mobility within and outside the house, activities and social functioning. The psychiatrist noted that the Appellant gets continuous help from family with meal preparation, housework, and shopping, and support from family and friends with social functioning. The psychiatrist noted that the Appellant received help from family and friends to make appropriate social decisions, develop/maintain relationships, interact appropriately with others, deal appropriately with unexpected demands, secure assistance from others, and build a social network.

The psychiatrist indicated that the Appellant's condition and symptoms varied from day to day and as a result his need for assistance varies, but that he experienced bad days 80% of the time.

The psychiatrist did not address whether the Appellant required assistive devices or animals.

The psychiatrist's form did not state how often he had met with the Appellant or for how long. The letter from the advocate dated March 14, 2011 states that the psychiatrist had been seeing the Appellant on a regular basis.

As the appeal was in writing, there were no oral submissions. Neither party disputed the truth of the evidence of the physician, the assessor, the psychiatrist or the social worker. Neither party argued that any of the evidence lacked credibility or should be disregarded. No explanation was provided by either party about the discrepancy in the observations of the witnesses. No new evidence was presented at the appeal.

The panel found that the evidence, taken as a whole, established that the Appellant satisfied the age and duration criteria in the legislation. The panel found that the Appellant suffered from a severe impairment (physical symptoms of HIV and emotional and cognitive deficits as a result of depression) that directly and significantly restricted his daily living activities (personal care, meal preparation, basic housework, shopping, use of transportation, mobility within and outside the house, and social functioning) and that he required continuous assistance from family and friends with DLA (meal preparation, housework, shopping and social functioning) as a result of significant restrictions.

PART F – REASONS FOR PANEL DECISION

(State the reasons for the panel decision)

The issue in this appeal is whether the Ministry reasonably concluded that the Appellant does not have a severe physical or mental impairment and that his DLA are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods, and that the Appellant does not require help to perform DLA. The Ministry determined that the age requirement had been met and that the Appellant has an impairment that will last for 2 years.

The criteria for being designated as a person with disabilities (PWD) are set out in the EAPWDA, sections 2(2) and 2(3):

2(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act 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 (B.C. Reg. 196/2007)
 - (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.

2(3) For the purposes of subsection (2),

- (a) a person who has a severe mental impairment includes a person with a mental disorder, and
- (b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires
 - (i) an assistive device,
 - (ii) the significant help or supervision of another person, or
 - (iii) 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.

ATTACH EXTRA PAGES IF NECESSARY

The Appellant's position is that he is eligible for designation as a PWD because the report of his physician shows that he has met the age requirement, his physical and mental impairment is severe, and will continue for two years, and directly and significantly restricts his ability to perform DLA, some continuously and some periodically for extended periods, and as a result of the restrictions on his ability to perform daily living activities, he requires help to perform those activities.

The Ministry concedes that the Appellant has satisfied the age criterion and the requirement that his condition will last for 2 years. The Ministry's position is that the prescribed professional's evidence does not establish that the Appellant has a severe physical or mental impairment, nor that his impairment significantly restricts his ability to perform DLA, either continuously or periodically for extended periods, nor that as a result of direct and significant restrictions, the Appellant needs help to perform DLA.

The PR identified that the Appellant's condition causes major impact for 2 aspects of cognitive and emotional functioning, that is, emotional disturbance (depression, anxiety) and motor activity. The PR did not identify any impact with regard to the other 9 aspects of cognitive and emotional functioning. The AR reported that the impairment of cognitive and emotional functioning had a major impact on bodily functioning, specifically not eating or sleeping, emotion and motivation. The AR also reported a moderate impact on attention/concentration, executive, memory and psychotic symptoms, and a minimal impact on insight and judgment. No impact was noted by the assessor preparing the AR with regard to the other 5 aspects of daily functioning.

The report of the psychiatrist notes significant deficits in 4 aspects of cognitive and emotional functioning, that is, emotional disturbance (fear, anxiety, depression and panic attacks), attention/concentration, motivation and memory. He indicates some deficits in executive and impulse control. On the first and second pages of her form, the social worker notes what appears to be a major impact on 5 aspects of cognitive and emotional functioning, that is bodily functions, (not eating or sleeping and toileting problems), emotion (fear, anxiety, depression and panic attacks), attention/concentration, motivation, insight and judgment. She noted that the Appellant was directly and significantly restricted in 2 aspects of DLA relating to social functioning.

The panel finds that the evidence as a whole supports the existence of a severe mental impairment. The evidence in the PR and AR dates to October and November of 2010, and the physician and the assessor had limited time to assess the Appellant. The evidence of the social worker and the psychiatrist was more recent and was based on a greater degree of contact with the Appellant. The Ministry's conclusion that the Appellant does not have a severe mental impairment was not reasonable.

Neither the PR nor the AR addresses physical impairment in much detail.

The more recent evidence of the social worker describes the Appellant's physical impairments as severe HIV, constant back and neck pain and severe headaches. She reports that the combination of these conditions severely and continuously impacts the Appellant's ability to perform DLA. The psychiatrist describes the Appellant's physical impairments as severe HIV, constant back and neck pain and severe headaches. He reports that the combination of these

conditions severely and continuously impacts the Appellant's ability to do his daily living activities.

The psychiatrist's evidence, which is more recent than that of the physician and based on regular contact with the Appellant, describes limitations on the Appellant's functional skills, as a result of which the Appellant is directly, significantly and continuously restricted in 5 categories of DLA, that is personal care, meal preparation, basic housework, shopping, use of transportation and mobility within and outside the house. The psychiatrist noted that the Appellant gets continuous help from family with 3 categories of DLA, that is , meal preparation, and housework, and shopping

The panel finds that the evidence as a whole establishes limitations to physical functioning which are reasonably viewed as indicative of a severe physical impairment. Therefore, the panel finds that the Ministry's determination that the Appellant did not have a severe physical impairment was unreasonable.

Regarding the degree to which the Appellant's DLA are restricted, the panel finds that the evidence of a prescribed professional indicates that the Appellant is not able to independently manage a significant number of DLA. The psychiatrist's report establishes that the Appellant is continuously restricted with the physical aspects of personal care, meal preparation, basic housework, shopping, use of transportation and mobility within and outside the house. The psychiatrist noted that the Appellant gets continuous help from family with 3 categories of DLA, that is, meal preparation, housework, and shopping.

The evidence as a whole indicates that the Appellant is directly and significantly restricted, either continuously or periodically, for extended periods of time in his ability to perform DLAs. Therefore the panel finds that the Ministry did not reasonably conclude that the appellant is not directly and significantly restricted either continuously or periodically for extended periods in his ability to perform DLA as required under s. 2(2)(b)(i) of the EAPWDA.

The panel also finds that, as a direct and significant restriction with DLA has been established, and as a prescribed professional has indicated the need for help with DLA, the Ministry did not reasonably determine 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 not reasonably supported by the evidence and rescinds the Ministry's reconsideration decision. Therefore the Ministry's decision is overturned in favour of the Appellant.