

PART C – Decision under Appeal

The decision under appeal is the Ministry's reconsideration decision dated February 11, 2011 which held that the appellant did not meet all of the legislative criteria required for designation as a person with disabilities (PWD) under section 2 of the *Employment and Assistance for Persons with Disabilities Act*. The ministry concluded:

- that the information does not satisfy the minister that the appellant has a severe mental or physical impairment
- that the information from a prescribed professional does not confirm that the impairment directly and significantly restricts his ability to perform daily living activities either continuously or periodically for extended periods; and
- that the information from a prescribed professional does not confirm that as a result of direct and significant restrictions, he requires assistance to perform daily living activities.

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 was comprised of:

- An application for PWD designation dated August 31, 2010 with the Physician report dated September 10, 2010
- and the assessor report dated September 10, 2010 completed by the same doctor.
- A Medical Report dated October 20, 2010 completed by the appellant's family physician.

The appellant provided to the Panel some questions and answers provided by his family physician dated February 28, 2011. The ministry had no objections to admitting this questionnaire and accompanying self report. The Panel admitted this information pursuant to section 22(4) of the EAA as evidence in support of the information before the Ministry when the decision was made.

In the Application for PWD designation, the doctor diagnoses the appellant with left foot metatarsal amputation since 1979. She describes the severity of the related impairments as the appellant needs an assistive device for ambulating. She notes the appellant is able to do most of the daily living activities (DLAs) though it takes him substantially longer than an average person. She describes the appellant as needing a special shoe with prosthesis, a cane and two forearm crutches. In functional skills, the doctor notes he can walk less than 1 block unaided, climb no steps, can lift under 15 -35 lbs. and has no limitation on time he can remain seated. The doctor notes there are no significant deficits with cognitive and emotional functioning. The appellant provides a self report on his application. He describes how he is aggravated by phantom pain in missing left toes and ankle, severe arthritis, pain and rheumatism in areas where the bones have been broken, for example, left femur, right ankle, wired right elbow, pinned pelvis and fractured skull. He notes he fatigues easily, dizziness can become an issue, he needs a rest break if heavy lifting or much walking is required, he can walk for 100 meters before requiring a crutch or cane and simple things like dressing takes an unreasonable amount of time. He notes sleep is difficult on occasion, sitting for more than half an hour becomes uncomfortable, the prostheses for his missing foot causes irritation, swelling and blisters, he needs specially made shoes or boots for the stub of the leg, he has restriction in his right arm due to a wired elbow and this prevents him straightening his arm resulting in poor reach and holding. He notes his health history with dates. He broke two ankles in 1963 in a motor vehicle accident resulting in them being pinned, a 10 month hospital stay and a 30% restriction remaining. In 1972, a skiing accident resulted in a crushed right elbow, a wired joint and a 3 month hospital stay. In 1984 a motorcycle accident resulted in a sheared off left foot at metatarsals, a head fracture and rib damage. In 1995, a permanent disability was noted by a doctor for Canadian Pension Plan. In 2009, he had a hernia operation. He notes prospective employers are leery of giving him a trial.

In the Assessor Report, the doctor notes the appellant lives alone, his ability to communicate is good and he uses an assistive device to walk indoors, outdoors, climb stairs, stand, lift, carry and hold. The doctor notes the appellant's mental or physical impairment has no impact on any aspect of his daily cognitive or emotional functioning. She states the appellant needs an assistive device and takes longer than an average person to do all his personal care, basic housekeeping and shopping except for the areas of feeding himself, regulating his diet, reading prices, making appropriate choices and paying for purchases which he can do independently. The doctor states the appellant is independent in meal planning and cooking, in paying his rent and bills, handling his medication and using transit schedules but uses an assistive device when preparing food, getting into and out of a vehicle and using public transit. There is no assistance noted as required for social functioning. The assistive devices required are noted as a cane and special footwear.

In the Medical Report, the appellant's family doctor diagnoses the appellant with traumatic amputation, mid tarsal left foot, a hernia and arm restriction. He notes the foot injury resulted in mid foot amputation and associated deformity and the appellant cannot walk more than 20 meters and he also has decreased range of motion in his right arm. He notes the appellant was in hospital for the hernia repair in 2009 that he has chronic pain as a result of his problems, has resultant arthritis and fatigues easily. The treatment is care of the amputation stump, foot care and special shoe, pain medication to help with multiple joint pain; the appellant is not able to work. As prognosis, the doctor notes this is a permanent disability.

In the questionnaire dated February 28, 2011, the appellant's family doctor commented that the impact of the appellant's medical conditions on his daily functioning constituted a severe impairment, that the appellant was restricted in DLAs on an ongoing basis, that he required significant ongoing assistance from assistive devices and/or other people as a direct result of his impairment and that he agreed with the appellant's self report which was attached. In his self report, the appellant described his disabilities, noted he had to use two crutches, custom made orthopedic shoes, bathroom grab bars and shower chair, raised toilet seat and accessible housing with no stairs. He noted he can only walk a maximum of one block unaided at a slow pace, stand for a maximum of 5 minutes unaided, 10-15 minutes with crutches, and takes 2

hours to put on clothing and is at risk of falling when bathing. He notes he must have help to do laundry, basic housekeeping and shopping or he cannot do it and needs assistance in getting in/out of vehicles and special devices to operate a motor vehicle.

In his Reasons for Reconsideration, the appellant notes his most recent accident fall in September 30, 2010 resulted in reduced mobility so he must use two forearm crutches. He notes he has a severe impairment which restricts and even stops his ability to do DLAs, he requires significant assistance from family, friends, groups and volunteers and he requires financial help with prostheses, crutches and nutritional supplements. He notes he has severe inflammatory arthritis and difficulty with concentration and focus.

In his appeal to the Tribunal, the appellant states that it was unreasonable to deny him PWD designation based on the facts of his case. In the hearing, the appellant's advocate reviewed the appellant's medical history and noted the problems that he had with the process of applying for PWD. His family doctor was away for an extended period, the appellant was almost 65 years old and had to apply before his birthday to be eligible for PWD. As a result, he had to work with a doctor who did not know him, did not interview him and completed the first medical report and assessor report very reluctantly. His family doctor completed the subsequent report and the updated questionnaire which was provided in the hearing. He pointed out through his advocate that he knew he did not qualify for assistance payments but he was concerned about eligibility for medical benefits due to the ongoing cost of meeting his health needs. His advocate reviewed the medical reports with the Panel and submitted that it was unreasonable to deny the appellant the designation of PWD as the weight of the medical evidence indicated that he met all the criteria.

The ministry relies on the medical information and the information in the reconsideration decision and summary. The ministry questioned the appellant on his work history and it was established that the appellant had not been able to work since August 2009 after he had the hernia operation. His company tried to accommodate but he became more reliant on crutches and they considered him no longer suitable for the delivery job. He has applied for Canada Pension Plan Disability and his application is still under consideration.

The Panel finds as fact that the appellant has the medical conditions and restrictions as described in the medical information provided by the first doctor on the PWD application and assessment and in the medical information provided by the family doctor, the updated questionnaire and self reports. The Panel did not find inconsistencies in the reports and/or in the self reports but found that each report gave further support and information on the appellant's medical conditions and restrictions.

PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry reasonably concluded that the appellant is not eligible for PWD designation as he did not meet all of the legislative criteria required for the designation, namely that he did not meet the following three legislative criteria:

- that the information does not satisfy the minister that the appellant has a severe physical or mental impairment
- The information from a 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
- his prescribed professional does not confirm that as a result of direct and significant restrictions, he requires help to perform daily living activities.

Section 2 of the EAPWDA sets out the requirements to qualify for PWD designation:

2 (1) In this section:

"assistive device" means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform;

"daily living activity" has the prescribed meaning;

"health professional" repealed

"prescribed professional" has the prescribed meaning;

(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

(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.

(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.

(4) The minister may rescind a designation under subsection (2).

Section 2 of the EAPWDR defines DLA in relation to persons who have a severe physical or mental impairment.

2 (1) For the purposes of the Act and this regulation, "daily living activities",

(a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:

- (i) prepare own meals;*
 - (ii) manage personal finances;*
 - (iii) shop for personal needs;*
 - (iv) use public or personal transportation facilities;*
 - (v) perform housework to maintain the person's place of residence in acceptable sanitary condition;*
 - (vi) move about indoors and outdoors;*
 - (vii) perform personal hygiene and self care;*
 - (viii) manage personal medication, and*
- (b) in relation to a person who has a severe mental impairment, includes the following activities:*
- (i) make decisions about personal activities, care or finances;*
 - (ii) relate to, communicate or interact with others effectively.*

The ministry acknowledges that the appellant is over 18 years of age, that the doctor confirms that his conditions are likely to continue for at least two years. However, the ministry found in the reconsideration decision that the information does not satisfy the minister that the appellant has a severe mental or physical impairment and the information from the prescribed professional does not confirm that the appellant's mental or physical impairment directly and significantly restricts his ability to perform his DLAs and that he needs significant help to perform his DLAs.

The appellant and his advocate contend that he meets the criteria for PWD designation because the medical information establishes that he has a severe physical impairment which directly and significantly restricts his ability to perform DLAs and that he requires significant assistance from assistive devices and other persons to perform his DLAs.

In the ministry's analysis, the ministry notes that the assessor report states that the appellant requires an assistive device(s) for most functional skills but indicates that he manages most DLAs independently. The Panel finds this statement inconsistent with the medical information and notes that the doctor in the assessor report never states the appellant does most DLAs "independently", rather she states he can do them but notes that he uses an assistive device and takes longer to do all DLAs that require physical functioning such as personal care, laundry, housekeeping, going to stores, food preparation and using a vehicle or transit. The only areas where he is noted as independent are those requiring mental skills only such as meal planning, paying rent and bills, handling medication and using transit schedules. In the Service Canada Medical Report, his family doctor notes he has mid-foot amputation and associated deformity, a markedly reduced range of motion of his right arm (he is right handed), chronic pain, resultant arthritis and fatigues easily and that in his opinion, this is a permanent disability. Although this report did not comment on restrictions in the appellant's DLAs as it was for another purpose, the same family physician completed the questionnaire which addressed restriction in DLAs. The family doctor noted that in his opinion in considering the impact of his medical conditions on his DLAs, the appellant has a severe impairment. Therefore the Panel concludes that the ministry's decision that the appellant does not have a severe mental or physical impairment is unreasonable based on the combined medical information.

Both doctors note continuous restrictions in the appellant's ability to do all DLAs that require physical functioning and that the appellant needs the assistive devices of a special shoe and cane, later clarified as elbow crutches. In the updated questionnaire, the family doctor answered "Yes" to the question, "Is your patient restricted in activities of daily living on an ongoing basis", and "Yes" to the question, "Does your patient require significant ongoing assistance from assistive devices and/or other people as a direct result of his impairment". The Panel also finds the appellant's oral evidence credible that he receives significant assistance from his fiancée, brother and sister, that he required two hours to dress for the hearing and that he could not function without his assistive devices. Therefore the Panel concluded that the ministry's decision that the medical information 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 does not confirm that as a result

of direct and significant restrictions, he requires help to perform daily living activities is unreasonable based on the medical evidence.

The Panel concluded that it was unreasonable for the Ministry to find that the appellant does not meet the legislative criteria for PWD designation as required by *EAPWDA*, section 2. The Panel finds that the Reconsideration Decision is not reasonably supported by the evidence and rescinds the Reconsideration Decision. The ministry's decision is overturned in favour of the appellant.