

PART C – DECISION UNDER APPEAL

(State the reconsideration decision)

The decision under appeal is the ministry's reconsideration decision dated January 30, 2008 which held that the appellant was not eligible for the designation Person with Disabilities because:

- He does not have severe mental or physical impairment,
- His impairment does not significantly restrict his ability to perform daily living activities, and
- He does not require the significant help or supervision of another person to perform daily living activities which are restricted by his impairment.

PART D – RELEVANT LEGISLATION

(State the relevant Legislation considered)

Employment and Assistance for Persons with Disabilities Act, Section 2 ["EAPWDA"]

Employment and Assistance for Persons with Disabilities Regulation, Section 2 ["EAPWDR"]

PART E – SUMMARY OF FACTS

The evidence before the ministry from the physician's report was that the appellant, in June 2004, suffered a crush injury including right wrist fracture, right rib fracture, right scapular fracture, neck and back injuries and is left with chronic regional pain syndrome. He explained that the appellant experiences chronic pain in his right upper limb, decreased range of motion in his right shoulder, numbness and tingling in his right wrist, swelling and decreased strength of his right wrist, shortness of breath and chest pain. He also noted that back pain limits sitting and lifting. In addition, the physician indicated that the appellant has significant deficits with cognitive and emotional functioning related to depression, loss of motivation and attention or sustained concentration. In the assessor's report, the physician noted that depression and lack of motivation have a major impact on the appellant's ability to perform daily living activities (DLA) and that he requires continuous supervision to maintain relationships. He further indicated that the appellant requires periodic assistance with laundry, basic housekeeping, going to and from stores and carrying purchases home and that he is independent in all other DLA. There is no indication of the frequency or duration of help required.

At the hearing, the appellant submitted a "To Whom it May Concern" letter from his physician dated February 15, 2008 as well as a letter from his mother also dated February 15th, 2008. Both letters were accepted as evidence because they were in support of and clarified the evidence which was before the ministry at the time of reconsideration. The physician's letter provides further detail and clarification about the appellant's physical and emotional impairments. In that letter he states, "the combination of severe chronic pain from right wrist, shoulder and chest injuries and rib cage injuries, chronic shortness of breath and depression (with suicidality) constitutes a severe impairment." The letter includes that the appellant is restricted in using his right hand for gripping, writing and all DLA and is severely restricted in lifting more than 5 pounds, sitting more than one hour, using stairs, walking and sleeping. He confirms that the appellant's personal care takes 3 times longer than normal and that he is restricted in the DLA of cooking, cleaning, laundry, shopping and using transit. The letter explains that depression and the side effects of numerous pain medications restrict the appellant in the areas of concentration, short term memory, organizational abilities and task completion.

In a candid and forthright manner, the appellant provided oral testimony that when he was first examined by the physician to complete the report for his application for person with disabilities, he underplayed his difficulty performing DLA, not wanting to admit how much help he needs and is getting from his mother and a close family friend he calls "aunt". He also misunderstood what was meant by help in that he thought the help had to come from a nurse or some other professional. He said that before his accident in 2004 he was always independent and is having a hard time accepting his current limitations. He cited the fact that he worked at Canadian Tire for one month starting in November 2007 as evidence that he wants and tries to be independent and resists accepting his impairments. He said he missed several days because he was in too much pain to work and was let go after one month because he was physically unable to do the job.

After the reconsideration decision was handed down, the appellant returned to his physician for a further examination and assessment. This time, he was more honest and accurate with the physician and the physician recorded the result of that assessment in his letter of February 15, 2008. The appellant also said that his condition has deteriorated significantly since the original application. He reported that he makes his own breakfast of cereal and toast but is unable to lift or hold pots safely and therefore cannot cook anything. His mother or aunt prepare all his dinners and do all his laundry and housekeeping. They also provide emotional support and remind him of appointments. He cannot use public transit because of poor balance and problems sitting and carrying purchases. His mother and aunt drive him to the shops and carry his groceries. He explained that he recently moved and is now very close to a 711 store. He can now give his mother and aunt a break by being able to pick up the odd thing he needs. Although he can get in and out of bed alone, because of pain, it takes him a very long time as does showering, even with the help of safety bars.

PART F – REASONS FOR PANEL DECISION

(State the reasons for the panel decision)

The issue in this case is the reasonableness of the ministry's denial of the person with disabilities status. The EAPWDA, section 2 stipulates 5 eligibility requirements to be designated a person with disabilities:

1. the appellant must have reached the age of 18,
2. the minister must be satisfied that the person has a severe physical or mental impairment,
3. in the opinion of a medical practitioner the impairment will continue for at least two years,
4. the impairment must directly and significantly restrict the person's ability to perform daily living activities, either continuously or periodically for extended periods, and
5. as a result of those restrictions, the person requires significant help or supervision from another person, an assistive device or an assistance animal.

There is no dispute that the appellant meets criteria 1 and 3; he is over 18 years of age and in the opinion of his medical practitioner his impairment will continue for at least two years. The ministry's position is that at the time of reconsideration, the physician and assessor reports did not establish that the appellant meets criteria 2, 4 or 5. That is, the ministry was not satisfied the appellant has a severe physical or mental impairment which directly and significantly restricts his ability to perform daily living activities, either continuously or periodically for extended periods, and that as a result of those restrictions, he requires significant help or supervision from another person, an assistive device or an assistance animal. At the hearing, the ministry presented a thorough review of the information available to the reconsideration officer pointing out gaps and lack of detail or explanation needed to relay the full extent and frequency of the appellant's impairments and the effect on his ability to perform DLA.

The panel agrees that, given the gaps and lack of detail, it was reasonable for the ministry, at that time, to come to the conclusion it did. In coming to a different conclusion, the panel relied heavily on the physician's February 15, 2008 letter which filled in the gaps and provided a more precise account of the appellant's physical and mental impairments. The letter indicated that the combination of the appellant's physical and emotional conditions constitute severe impairment. He also made it clear that as a result of the appellant's severe impairment, the appellant is significantly restricted in his ability to perform DLA, either continuously or periodically for extended periods, and that as a result of those restrictions, the appellant requires significant help or supervision from another person.

The panel therefore concludes that the appellant does meet the 5 criteria to be designated a person with disabilities and that the reconsideration decision was not a reasonable application of the Employment and Assistance for Person's with Disabilities Act or the Employment and Assistance for Person's with Disabilities Regulation. The reconsideration decision is hereby rescinded.