

PART C – Decision under Appeal

The decision under appeal is the ministry's reconsideration decision dated January 18, 2012 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 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. The ministry also found that a prescribed professional has not confirmed that, as a result of direct and significant restrictions, the appellant requires help 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 reconsideration was a PWD application comprised of a Self-report (SR), a Physician Report (PR), and an Assessor Report (AR), additional medical documentation (operative, consult and medical imaging reports), and the Request for Reconsideration.

In the PR, completed on October 24, 2011 by the appellant's general practitioner of 8 years, the appellant is diagnosed with degenerative disc disease (DDD) cervical spine C3-C4, C5-C6 and C6-C7, bilateral foraminal stenosis C5-C6, DDD thoracic spine, osteoarthritis T spine with kyphosis, osteoarthritis thoracic and cervical spines, and chronic pain/secondary chronic depression. Chronic disabling effects on the appellant's thoracic and cervical spine have led to loss of jobs, severe depression, and financial hardship. The appellant has not been prescribed medication and/or treatment that interferes with his ability to perform DLA and does not require aids or prosthetics. With respect to functional skills, the distance the appellant can walk unaided on a flat surface is reported as "unknown". The appellant is able to climb 5+ steps unaided, lift 5 to 15 lbs, and can remain seated for 2 to 3 hours. No difficulties with communication are reported. Significant deficits with cognitive and emotional function are reported in 5 of 11 identified areas – memory, emotional disturbance, motivation, impulse control, and attention or sustained concentration relating to secondary depression. "Due to his back pain, this patient has difficulty walking, standing or sitting for prolonged periods, lifting and/or holding/carrying."

In the AR, also completed by the appellant's general practitioner, "severe functionality impairment" to his cervical and thoracic spine is identified as impacting the appellant's ability to manage DLA. The appellant is reported to have a good ability to communicate. With respect to mobility and physical ability, the appellant independently manages walking indoors, walking outdoors, and standing. Periodic assistance is required for climbing stairs, lifting, and carrying/holding. Additional narrative is provided respecting "Post surgery" but is, for the most part, illegible. No major impact on daily functioning is reported for any aspect of cognitive and emotional functioning with a moderate impact reported for 2 of 14 listed aspects – emotion and impulse control ("short fused"). No impact is reported for the remaining 12 aspects. Respecting DLA, the appellant is reported to independently manage all aspects of personal care, basic housekeeping, shopping, meals, paying rent and bills, medications, and transportation. Periodic support/supervision is required for all 5 aspects of social functioning with marginal functioning reported with immediate social networks and functioning with extended social networks reported as very disrupted ("Borderline Personality Disorder"). The physician indicates that assistance is provided by "other" but does not indicate what is meant by "other" or provide any description of the assistance.

In the SR, the appellant reports that his disability is a very bad back. He reports being able to sleep maybe 3 hours at a time and that he awakes very sore and takes 2 hours to get up and get mobile. He is unable to sit for more than 1 hour and has a very hard time walking any more than 2 blocks at a time. It is very hard to bend and reach above his head, making cleaning very painful if it takes much time. In summary, after 3 back surgeries it is very difficult to do any activity for more than 2 hours at a time including sleeping, walking, sitting, standing, yard work, and housework. He tried different work places and went back to school to obtain lighter work but is unable to do even a desk or counter job due to back pain.

The appellant further describes his impairment in the Request for Reconsideration as follows. Cooking is impacted by his inability to stand for more than 2 minutes at a time and difficulty reaching overhead. A friend provides transportation for shopping and banking. He is unable to stand in line at a bank. He has difficulty gathering laundry due to pain bending and crouching, and cannot carry the laundry up and down the stairs and then back to his apartment. He is unable to carry groceries and cannot stand or walk for long periods of time, only for two to three blocks. Due to very limited mobility a friend provides daily assistance with all of the foregoing activities.

At the hearing, the appellant stated that he does not see his physician very often, only when the pain is really bad. The physician does not see all of the appellant's troubles including the difficulty he has bending to vacuum, get dishes, or wash dishes. At an appointment, the physician has the appellant move his arms etc. but the appellant does not tell him that he can't do this or that, lest he look "stupid." In response to questioning, the appellant stated that he has told his physician about problems he, the appellant, faces including difficulties with meal preparation and has repeatedly asked to bring a friend who provides daily assistance to an appointment but that this request has been denied by the physician. The appellant stated that he has seen an arthritis specialist as well as a surgeon and has had 3 back surgeries, the first being in 1986, the second in 1990 during which plates and pins were inserted, and the most recent in 2011 which attempted to kill nerve endings with results only lasting 6 months. The appellant stated that while it is hard for him to get to the bus, which is 2 blocks away, he can get to the bus but is so sore after half an hour of walking that it is hard for him to make it back home. The appellant stated that despite getting retraining and obtaining alternative employment, he was unable to continue due to his inability to stand at the counter and that if he is "dummied" up on pain killers he cannot work with the public. The appellant also stated that the ministry has recognized that his physical impairment by designating him as a PPMB (person with persistent multiple barriers to employment) and questions why the ministry has not recognized his impairment by considering him a PWD.

At the hearing, the ministry questioned the appellant as to what information he had provided to his physician respecting DLA. The ministry acknowledged that the impact on the appellant's ability to work had been recognized with the granting of PPMB status but stated that the criteria for PWD designation were not met in view of the physician's information provided respecting the appellant's ability to perform DLA.

PART F – Reasons for Panel Decision

The issue under appeal is whether the ministry reasonably concluded that the appellant has not met the all of the eligibility criteria for designation as a PWD because it was not satisfied that the appellant had a severe physical or mental impairment that, in the opinion of a prescribed professional, directly and significantly restricts her ability to perform DLA either continuously or periodically for extended periods resulting in the need for 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 s. 2 of the EAPWDA and s. 2 of the EAPWDR which are set out below.

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;

"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).

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.

(2) For the purposes of the Act, "**prescribed professional**" means a person who is authorized under an enactment to practice the profession of

- (a) medical practitioner,
- (b) registered psychologist,
- (c) registered nurse or registered psychiatric nurse,
- (d) occupational therapist,
- (e) physical therapist,
- (f) social worker,
- (g) chiropractor, or
- (h) nurse practitioner.

Respecting the existence of a severe physical impairment, the appellant's position is that his limitations in terms of walking, standing, remaining seated, bending, and reaching demonstrate a severe physical impairment and that he is dependent upon the daily assistance of another person.

The ministry's position is that the physical functional skill limitations reported by the appellant's physician are minimal and represent an acceptable level of functioning with periodic assistance required only once the appellant has reached his functional limits of 5 or more stairs and up to 15 lbs. The ministry takes the position that the degree of impairment reported by the appellant is not supported by the physician's information and also notes that eligibility for PWD designation is not based on employability or vocational abilities.

With respect to the appellant's physical impairment, the panel finds that a medical practitioner has diagnosed the appellant with degenerative disc disease (DDD) cervical spine C3-C4, C5-C6 and C6-C7, bilateral foraminal stenosis C5-C6, DDD thoracic spine, osteoarthritis T spine with kyphosis, osteoarthritis thoracic and cervical spines, and chronic pain. The panel finds that the physical functional skills reported by the appellant's physician in the PWD application respecting climbing stairs (5+), lifting (5-15 lbs), and remaining seated (2-3 hours) identify some limitations including the maximum weight tolerated and the need for periodic assistance with both lifting/carrying and climbing stairs. Based on this evidence, the panel finds the ministry reasonable in its conclusion that periodic assistance is required above the functional limits of 5+ steps and up to 15 lbs. With respect to walking, the physician reported that both walking indoors and outdoors are managed independently but that he did not know how far the appellant can walk outdoors unaided on a flat surface. The appellant's written testimony is that he can walk to 2 to 3 blocks and his oral testimony is that with difficulty he is able to walk 2 blocks to reach the bus stop but is "so sore after half an hour of walking." The panel finds that the additional medical documentation supports the diagnosed physical medical conditions but does not describe

any impact on the appellant's functioning. The panel also finds that there is no evidence that the appellant uses any aids for his impairment. Additional information provided by the appellant is that he can only sleep 3 hours at a time, he cannot sit for long periods, has difficulty bending and reaching above his head, can only stand for 2 minutes at a time, and that it takes 2 hours to "get mobile" in the morning. The panel finds that the ministry has reasonably viewed this information as not corresponding with the physician's description of the level of limitations and restrictions and notes that the physician's narrative relates the appellant's "chronic disabling effects on his thoracic and cervical spine" to the loss of employment which is not a criteria for PWD designation. Based on these findings, the panel finds that the ministry reasonably determined that the evidence respecting the level of independent physical functional skills/mobility and physical ability did not establish a severe physical impairment under section 2(2) of the EAPWDA.

Respecting the existence of a severe mental impairment, the ministry's position is that as the appellant's depression has mostly no impact on daily functioning with only 2 moderate impacts identified, the ministry cannot determine a severe mental impairment. The appellant has not taken a position with respect to the existence of a severe mental impairment.

The panel finds that a medical practitioner has diagnosed the appellant with secondary chronic depression and borderline personality disorder and that the appellant's depression results in a number of significant deficits to cognitive and emotional function. However, the physician reports no major impact on daily functioning arising from these deficits. While the appellant is reported to have only marginal functioning with immediate social networks and very disrupted functioning with extended social networks, with the latter identified as relating to borderline personality disorder, only periodic support/supervision is required for social functioning. Additionally, the appellant does not describe any impact on his functioning due to a mental impairment and neither the appellant nor his physician report any difficulties in the appellant's ability to make decisions about personal activities, care, or finances. For these reasons, the panel finds that the ministry reasonably determined that without significant restrictions to, or impacts upon, the appellant's cognitive functioning, a severe mental impairment cannot be determined under section 2(2) of the EAPWDA.

Regarding the degree of restriction with DLA, the appellant relies on his own evidence and that of his friend who provides daily assistance and works in the health care profession as a medical office assistant. The appellant argues that their evidence establishes that the appellant is restricted to the point of requiring daily assistance with cooking, banking, transportation, housekeeping, shopping, mobilizing outdoors, and meal preparation. The appellant also argues that his physician is unaware of the actual degree of restriction with DLA that the appellant faces. The ministry's position is that the appellant is able to perform all of his DLA independently and that the described social functioning activities do not correspond with a severe mental impairment or significant impacts to the appellant's cognitive and emotional functioning and therefore, the ministry cannot determine that the appellant's DLA are directly and significantly restricted.

The legislation requires that the minister be satisfied that, as a result of a severe physical or mental impairment, a person be directly restricted in the ability to perform DLA and that the restriction must be "significant" and either continuously or periodically for extended periods. Additionally, the legislation requires that the minister be satisfied that the requisite degree of restriction is in the opinion of a prescribed professional. The panel notes that the term "prescribed professional" as defined in s. 2 of the EAPWDR does not include medical office assistants.

The panel finds that a prescribed professional, the appellant's general practitioner, reports that the appellant independently moves about indoors and outdoors and has no restrictions for the DLA personal self care, basic housekeeping, shopping, meals, paying rent and bills, medications, and transportation. The only DLA for which the physician indicates a restriction is social functioning: the appellant requires periodic support/supervision with all 5 listed areas and has marginal functioning with immediate social networks and very disrupted

functioning with extended social networks, the latter identified as relating to borderline personality disorder. The panel finds that the ministry reasonably considered the restrictions with the DLA social functioning in conjunction with the physician's information that the appellant's mental impairments do not have a major impact on daily cognitive and emotional functioning and concluded that the appellant's ability to perform all other DLA independently and the described social functioning activities do not correspond with a severe mental impairment. Therefore, the panel finds that the ministry reasonably determined that it has not been established that in the opinion of a prescribed professional the appellant is directly and significantly restricted in his ability to perform DLA either continuously or periodically for extended periods under 2(2)(b)(i) of the EAPWDA.

Regarding the need for help with DLA, the appellant argues that he requires the daily assistance of another person with most of his DLA. The ministry argues that it has not been established that DLA are significantly restricted and therefore, it cannot be determined that significant help is required from other persons.

Regarding the need for help with DLA, the legislation requires that the need for assistance must arise from direct and significant restrictions in the ability to perform DLA that are either continuous or periodic for extended periods in the opinion of a prescribed professional. Therefore, the panel finds that the ministry reasonably determined that as it has not been established that DLA are directly and significantly restricted, it cannot be determined that help is required under section 2(2)(b)(ii) of the EAPWDA.

The panel finds that the ministry's decision was reasonably supported by the evidence and confirms the decision.