

PART C – Decision under Appeal

The decision under appeal is the ministry's reconsideration decision dated July 19, 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 has an impairment that 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 was also not satisfied that as a result of those restrictions, in the opinion of a prescribed professional, 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

Both parties were in agreement to have observers present during the hearing.

The evidence before the ministry at reconsideration comprised:

A PWD application which included a Physician Report (PR) and an Assessor Report (AR) both dated April 12, 2012 by the appellant's treating physician since November 2011 and a Self Report (SR).

In the PR, while the prescribed professional (PP) does not use a listed diagnostic code, she diagnoses the appellant with back pain as a result of L4-L5 moderate central and right paracentral disc protrusion. The appellant, who is in his 40's, is reported to have worked as a painter but had to stop working after in January less than 4 weeks due to severe back pain. He is unable to get out of bed and is indicated as having severe back pain since 1997. The appellant has not been prescribed any medication and/or treatments that interfere with his ability to perform DLA. No aids or prostheses are required for his impairment. With respect to functional skills, the appellant can walk 1 to 2 blocks unaided on a flat surface, climb 2-5 stairs unaided, is unable to lift, and can remain seated for less than 20 minutes. The appellant has no difficulties with communication. A significant deficit with cognitive and emotional function is reported for 1 of 11 specified areas, emotional disturbance. The PP noted that the impairment directly restricts the appellant's ability to perform 1 DLA, specifically; basic housework, continuously. In additional narrative under if "Periodic" please explain, the PR notes "bending, cleaning, carrying, lifting difficulty due to severe back pain".

In the AR, the appellant is reported to have a good ability to communicate in the areas of speaking, reading, writing, and hearing. With respect to mobility and physical ability, the appellant is identified as taking significantly longer than typical for walking indoors and outdoors, climbing stairs and standing. For lifting, and carrying/holding, continuous assistance from another person or unable is noted. Comments indicate that because of disc prolapse, the appellant feels weakness of his legs, back pain and has difficulty walking and has to stop often. When asked to indicate the degree of impact on the appellant's daily functioning in 14 listed areas of cognitive and emotional functioning, the AR reported a moderate impact for 3 of 14 listed aspects (emotion, attention/concentration and memory), a minimal impact for 1 additional aspect (motivation), and no impact for the remaining 10 aspects (bodily functions, consciousness, impulse control, insight and judgement, executive, motor activity, language, psychotic symptoms, other neuropsychological problems and other emotional or mental problems). With respect to DLA: under Personal Care, the appellant is reported to independently manage 5 aspects (dressing, grooming, toileting, feeding self and regulating diet) however; he takes significantly longer than typical for bathing, transfers in/out of bed and transfers in/out of chair due to back pain; under Basic Housekeeping both aspects, laundry and basic housekeeping, require continuous assistance from another person or unable; under Shopping 3 out of 5 aspects of DLA are independently managed (reading prices and labels, making appropriate choices and paying for purchases) whereas going to and from stores takes significantly longer than typical and carrying purchases home requires continuous assistance from another person or unable due to back pain. All aspects of listed DLA under Meals, Paying Rent and Bills, Medications, Transportation, and Social Functioning are reported as independently managed. Good functioning with the appellant's immediate social network is reported though with the extended social network, the AR notes no friends or relatives and the appellant's family is estranged. Assistance is provided by community service agencies. When asked what equipment or devices the appellant routinely uses to help compensate for his impairment, a cane and walker are noted. The appellant has been a patient of this physician for approximately 3 months and has seen her 11 or more times during that period.

In the SR, the appellant describes his disability as disc protrusion and states that his personal mobility is greatly restricted and makes it difficult to do almost everything. The appellant states that: he can only walk 1-2

blocks before his entire back feels like it is under pressure and he experiences a tingling sensation; he can't stand for very long before his body can't support itself; he can't sit for longer than 10 minutes before he begins to stiffen up and he can't bend from the waist, due to pain. The appellant cannot sleep on a regular mattress so he sleeps on a yoga mat on the floor and awakens very stiff every morning. He also has difficulty to grasp or hold on to objects for the first few hours of the day. The appellant adds that he has difficulty with many DLA and can't lift or carry anything heavier than 5 pounds making it difficult to grocery shop. Other DLA that are difficult for the appellant include washing floors, and laundry etc. He indicates that all aspects of housework take longer than normal because if he moves too quickly, he is in immediate discomfort.

On appeal, the appellant submitted the following:

Two (2) letters both dated July 30, 2012 from the same physician who completed the PR and AR.

The PP indicates that the appellant has been her patient since November 2011 and that he has been having chronic back pain for several years which affects his activity of daily life. In terms of standing and sitting, the appellant is reported as having difficulty due to his back pain that restricts him to sit and read a paper for less than 30 minutes and stand for less than 15 minutes. He is reported as able to walk 2 blocks, climb 2-5 steps on a good day. The PP adds that uneven terrain is very difficult for the appellant and that he has more bad days than good days and most days he cannot get out of bed due to back pain. On a good day the maximum he could lift is 5 pounds. He cannot cook due to difficulty standing. Personal hygiene takes the appellant an inordinate amount of time because; he has difficulty standing in the shower, he must hold onto a shower bar in order to prevent falling, he cannot pick up a bar of dropped soap and he takes over 30 minutes to get dressed due to back pain. It is further reported that the appellant takes a minimum of 2 hours to get to the nearest grocery store and lately receives community support to obtain his groceries. The physician states that the appellant is unable to do household chores and would benefit from "cleaning janitorial services biweekly".

At the hearing the appellant's advocate submitted the following documents:

1. A copy of a Computed Tomography (CT) scan for the appellant dated July 6, 2011 which reported this impression; "L4-5, a moderate-sized central and right disc protrusion and at L-5-S1, a moderate-, broad-based central and somewhat right disc protrusion".
2. An extended Statement for the appellant dated April 20, 2011 for 5 chiropractic visits.
3. An estimate for custom made foot orthotics for the appellant dated April 21, 2011.

The ministry had no objection for items # 1 and 2 to be accepted by the panel as they were deemed relevant to the information considered in the reconsideration decision. The ministry objected to Item # 3 because orthotics are not specific to a back problem.

At the hearing the appellant testified that his health is deteriorating. He stated that he was told by a back specialist in January 2012 to return to work (painting) which he did until February 2012, when the same back specialist told him to stop working, due to the appellant's back pain. When asked about other treatments and/or medication, the appellant stated that he had completed the allotted chiropractic visits, has also had acupuncture over several years and does not take medication for the pain as he is aware of the problems addiction can cause. When asked about the use of assistive devices, the appellant stated that he uses a shower bar that was already installed in his apartment; however, does not use any other devices.

The appellant's advocate argues that the chances for the appellant to have a full recovery are very unlikely. He adds that the appellant has spent a good number of years working as a painter and now this is no longer possible. The advocate states that the appellant cannot manage his day in a timely manner and look after his basic care without some ongoing assistance. It is argued that the appellant's mental well-being is also impacted due to loss of function and loss of being in a more productive role in society. It is suggested that

depression often manifests with long term disabling injuries and mental health is likely impacted just from living in poverty with an injured back. The advocate submits that the appellant will likely over his lifetime be dependent on some services to supplement the physical decline he now lives with each day.

The panel finds that the two letters from the appellant's physician, the copy of the appellant's CT scan and the extended Statement for the appellant's 5 chiropractic visits further describe the impact of the appellant's previously diagnosed back pain and are thus admissible under section 22(4) of the Employment and Assistance Act as being in support of the information and records before the minister at reconsideration. Additionally, the panel finds that the estimate for custom made foot orthotics for the appellant dated April 21, 2011 is admissible under section 22(4) of the Employment and Assistance Act as being in support of the information and records before the minister at reconsideration because the appellant has provided medical evidence in regard to his difficulty with walking.

The ministry stood by its reconsideration decision.

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 his 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.

Severity of Impairment

Physical Impairment

With respect to the existence of a severe physical impairment, the appellant's position is that he is in pain most of the time due to his disc protrusion which impairs his ability to manage daily activities and that his health is deteriorating. The appellant states that: he can only walk 1-2 blocks before his entire back feels like it is under pressure and he experiences a tingling sensation; he can't stand for very long before his body can't support itself; he can't sit for longer than 10 minutes before he begins to stiffen up and he can't bend from the waist, due to pain. The appellant cannot sleep on a regular mattress so he sleeps on a yoga mat on the floor and awakens very stiff every morning. He also has difficulty to grasp or hold on to objects for the first few hours of the day.

The ministry's position is that the information contained in the SR, PR and AR indicates that the appellant's physical functional skills are somewhat limited as he is able to perform DLA with additional time at a slower pace. While it is reported that the appellant can walk 1-2 blocks, climb 2-5 steps, remain seated for less than 20 minutes and cannot lift, it is also outlined that he can perform the following activities independently, however they take significantly longer to perform: walking indoors, outdoors, climbing stairs and standing. Additionally, the ministry notes that the appellant requires continuous assistance with lifting and carrying/holding in one particular aspect of DLA, the ability to do housework. The ministry also makes note that "severe pain does not conclude a severe impairment" and that the appellant has not trialed or attempted

remedial treatment for his disc protrusion. Therefore, the ministry could not establish a severe physical impairment based on these descriptions.

With respect to the appellant's physical impairment, the panel finds that the medical practitioner has diagnosed the appellant with severe back pain. In terms of the impact that these medical conditions have on the appellant's ability to function, the panel finds that the evidence establishes that despite chronic back pain, the appellant is able to maintain a reasonable level of physical function. In particular, the appellant manages albeit at a slower pace than typical and according to his testimony without the use of assistive devices; walking indoors and outdoors, climbing stairs and standing. With regard to lifting, and carrying/holding, the panel finds that the appellant's PP indicates that he does require continuous assistance from another person or is unable which the panel has viewed in conjunction with the appellant's evidence that he can lift up to 5 pounds on a good day. Additionally, the panel finds that the reported functioning in terms of the distance the appellant can walk, steps he can climb, and time he can remain seated (which is not disputed by the appellant's own evidence, including that provided on appeal) was reasonably viewed by the ministry as not establishing a severe physical impairment. The most recent medical evidence from the physician's July 30, 2012 letters confirms that the appellant suffers from chronic back pain without providing any new information respecting any impact on mobility/physical ability other than he cannot cook due to his difficulty standing. The panel further notes that there is no medical evidence from the appellant's back specialist. In view of the above noted evidence respecting the appellant's level of independent physical functioning, the panel finds that the ministry reasonably determined that a severe physical impairment was not established under section 2(2) of the EAPWDA.

Mental Impairment

With respect to a severe mental impairment, the appellant's position is that the appellant's mental well being is also impacted due to loss of function and loss of being in a more productive role in society. It is suggested by the appellant's advocate that depression often manifests with long term disabling injuries and mental health is likely impacted just from living in poverty with an injured back.

The ministry's position is that while the appellant's physician has reported a significant deficit with cognitive and emotional function for 1 of 11 specified areas, emotional disturbance; he has not been diagnosed with a mental condition. Also, the ministry notes that the cognitive and emotional functioning sections are only to be completed if the appellant has been identified with a mental impairment or brain injury. Therefore, the ministry could not conclude that the appellant has a severe mental impairment.

The panel notes that while the appellant's physician has not diagnosed the appellant with a severe mental impairment or a brain injury, in the PR she has reported a significant deficit with cognitive and emotional function for 1 of 11 specified areas, emotional disturbance. In the AR under cognitive and emotional functioning a moderate impact for 3 of 14 listed aspects (emotion, attention/concentration and memory), a minimal impact for 1 additional aspect (motivation), and no impact for the remaining 10 aspects were reported. The panel notes that this information was provided despite the direction that it is not required unless the appellant has an identified mental impairment, including brain injury. Additionally, the physician reports that the appellant has no difficulties with communication and that the appellant independently makes appropriate shopping choices, manages his finances and medications independently and has good social functioning with his immediate social network. For these reasons, the panel finds that the ministry has reasonably determined

that a severe mental impairment was not established under section 2(2) of the EAPWDA.

Restrictions in the ability to perform DLA

Regarding the degree of restriction with DLA, the appellant's position is that his health is deteriorating and the severe pain caused by his disc protrusion restricts his ability to perform DLA. The appellant argues that his personal mobility is greatly restricted and makes it difficult to do almost everything. The appellant states that he can't lift or carry anything heavier than 5 pounds, making it difficult to grocery shop. Other DLA that are difficult for the appellant include washing floors, laundry, dressing and his personal hygiene, which takes him an inordinate amount of time. The appellant indicates that all aspects of housework take longer than normal because if he moves too quickly, he is in immediate discomfort; therefore, as confirmed by his physician, he is unable to perform household chores.

The ministry's position is that the evidence of the prescribed professional does not demonstrate that a severe mental or physical impairment significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods. The ministry relies on the evidence of the PP in the PWD application that the only continuous restriction is to basic housework where "bending, cleaning, carrying and lifting" are difficult due to back pain. In the AR, the same physician indicates that the appellant requires continuous assistance with laundry, basic housework and carrying purchases home. The ministry also notes that bathing, transfers in and out of bed and on and off a chair and going to and from stores take significantly longer to perform. However, the appellant is independent with the remaining 21 DLA which all require bending, standing, cleaning and carrying/lifting.

The panel notes that the most recent evidence from the appellant's physician in the July 30, 2012 letters reports that the appellant is unable to cook due to difficulty standing; that dressing himself takes over 30 minutes and he is unable to do household chores due to back pain. The panel finds that this evidence contrasts with that found in the PWD application which indicates that the appellant is independent with all aspects of DLA under Personal Care (noting that bathing and transfers on/off chair take significantly longer than typical) and under Meals which includes cooking. With respect to the reference to the appellant being unable to do housework, the panel finds that this is consistent with both the PWD application and the appellant's testimony. The panel also finds that the ministry reasonably viewed it as insufficient to establish significant restrictions with those DLA because of the additional information respecting the appellant's physical functional abilities including the ability to walk 2-4 blocks and lift up to 5lbs. The evidence must be considered as a whole and in context. Given the degree of independence with DLA and mobility/physical ability together with the physical and communication functional abilities reported by the physician in the PWD application and reiterated in her letters dated July 30, 2012, the panel finds the ministry was reasonable in not being satisfied 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 section 2(2)(b)(i) of the EAPWDA.

Help to perform DLA

Regarding the need for help with DLA, the appellant argues that he requires help with most DLA and would benefit from a cleaning, janitorial service biweekly. The appellant's advocate states that the appellant cannot manage his day in a timely manner and look after his basic care without some ongoing assistance.

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, section 2(2) of the EAPWDA requires that the minister be satisfied that, in the opinion of a prescribed professional, a person needs help with DLA as a result of direct and significant restrictions in the ability to perform DLA that are either continuous or periodic for extended periods. Pursuant to section 2 of the EAPWDR, help is defined as a person requiring an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

While the panel finds that the evidence of the prescribed professional establishes that the appellant requires some assistance from the community with his DLA, the panel also finds that the ministry reasonably determined that, as direct and significant restrictions in the appellant's ability to perform DLA have not been established, it cannot be determined that help is required to perform DLA as a result of direct and significant restrictions as is required by 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.