

PART C – Decision under Appeal

The decision under appeal is the August 14, 2012 reconsideration decision of the Ministry of Social Development (the "Ministry") which denied the Appellant Persons with Disabilities ("PWD") designation. The Ministry determined that the Appellant had not met all of the required criteria for PWD designation as provided for in section 2(2) of the Employment and Assistance for Persons with Disabilities Act. Specifically the Ministry was not satisfied that the Appellant has a severe mental or physical impairment that in the opinion of a prescribed professional:

- (i) directly and significantly restricts his ability to perform daily living activities either continuously or periodically for extended periods; and,
- (ii) as a result of those restrictions, he requires help to perform those activities.

The Ministry was satisfied that the Appellant has reached 18 years of age and that his impairment is likely to continue for at least 2 years.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act (the "EAPWDA") Section 2(2) and 2(3).

Employment and Assistance for Persons with Disabilities Regulation (the "EAPWDR") Section 2.

PART E – Summary of Facts

For its reconsideration decision the Ministry had the following evidence:

1. Appellant's March 1, 2012 PWD application consisting of:
 - a. Self -report.
 - b. Physician's Report (the "PR") dated February 8, 2012 and completed by a physician who indicated that the Appellant had been his patient for 5 months and that he had seen the Appellant 2-10 times in the 12 months preceding the report.
 - c. Assessor's Report (the "AR") dated March 19, 2012 and completed by the physician who completed the PR.
2. Appellant's July 27, 2012 Request for Reconsideration submitted by his advocate who provided written arguments for overturning the Ministry's original denial of PWD designation.
3. Follow-up consultation report completed by a spinal surgeon on April 27, 2011 and addressed to the Workers Compensation Board in another province. The surgeon indicated that the report was one month after the Appellant's L4-5 discectomy. The Appellant still reported occasional back pain with prolonged sitting, but did not report much leg pain. The surgeon wrote that the Appellant gets occasional numbness in his left foot with prolonged walking. The Appellant also said he can sit for 20 minutes, stand for half an hour and walk for about 20 minutes. Sleep is delayed in onset because of lower back discomfort. He takes medications as needed. The surgeon wrote that the Appellant stands without deformity and on forward bending his fingertips reach to a point just below the knees. Extension is limited. The Appellant walks without a limp and can walk on his toes and on his heels without apparent difficulty. The Appellant's straight leg raising is restricted to about 40 degrees bilaterally. The surgeon also noted that he would like the Appellant to continue with physiotherapy.
4. Medical Imaging Report – MRI scan of the Appellant's lumbar spine with augmentation dated August 11, 2011. The conclusion of the report noted no sites of spinal stenosis or direct nerve root impingement identified. Degenerative changes were noted with the L4-5 and L5-S1 intervertebral discs with small broad based posterior disc bulges present. Also noted was evidence of previous surgery at the L4-5 level.

In his self-report, the Appellant wrote that he had spinal surgery in 2011 on his L4-5 disc. He described his disability as follows: sitting tolerance about 20 minutes until in lots of pain; standing for about half an hour; and, walking without a break for about half an hour before pain is to the point he can't take it anymore. The Appellant also wrote that lifting 10 pounds or more gives him too much pain. Bending also gives him a lot of pain. The Appellant stated that he is in constant pain and has to get epidural shots every three months. His sleep is severely affected; he can't get to sleep because of the pain or it wakes him up. The Appellant stated that if he does household chores his back (muscle) spasms. This happens daily and he has to lay down for about 45 minutes with a heat pack. He wrote that bending over makes the pain a lot worse. The Appellant indicated that on a scale of 1-10, his pain level is about a "5". "Any level of activity makes it go up to a 10". He has had to go to the hospital emergency department at least 5 times in the last year. He was given a shot and prescription narcotics, and he now gets a shot a week.

The doctor, in the PR, described the Appellant's diagnosis as degenerative disc disease with an onset of 2011. The doctor indicated the severity of the Appellant's medical condition as daily discomfort in the lower back and ongoing discomfort in spite of surgery. The doctor wrote that the Appellant's discomfort impairs his daily living activities and he has been unable to work due to his back injury. The doctor also noted that the Appellant is receiving sedating pain medication that

interferes with his ability to perform daily living activities. As for remedial measures, the doctor wrote that the Appellant may benefit from seeing a pain specialist and he has participated in a rehab program.

Regarding the Appellant's physical functional skills, the doctor indicated that the Appellant can walk unaided on a flat surface for 4+ blocks, climb 5+ steps unaided, lift 15-35 lbs., and remain seated for less than 1 hour. The doctor answered "no" to the question "are there any significant deficits with cognitive and emotional function". The doctor did indicate that the Appellant's impairment directly restricts his ability to periodically perform the following daily living activities: personal self-care, basic housework and daily shopping. The doctor also noted mobility outside the home as restricted, but the doctor did not indicate the level of restriction. The activities reported as not being restricted are meal preparation, management of medications, mobility inside the home, use of transportation, management of finances and social function. The doctor described the periodic restrictions and degree of restrictions as follows: "[The Appellant] develops back pain with physical exertion. Certain activities aggravate his discomfort. This occurs on a daily basis, 40% of the day. Due to his pain he cannot sit for prolonged periods of time." The doctor also wrote that the Appellant has benefited from physical assistance from others. At the end of the report, the doctor added that the Appellant suffered a back injury and had surgery for one of his discs. Since then he has ongoing discomfort impairing his daily living activities. The doctor wrote that the Appellant has participated in rehab programs and he has made little progress. The Appellant has severe back pain on a daily basis while doing housework including housework like dishes and going grocery shopping.

In the AR, the doctor indicated that the Appellant is independent walking indoors and outdoors, and climbing stairs. He takes significantly longer standing, lifting, and carrying and holding. The doctor added that the Appellant "has pain standing in one spot for more than a few minutes. He is unable to bend/twist normally. His pain is a continuous hindrance to his mobility". The doctor did not complete the section for impacts to cognitive and emotional functioning. As for assistance with daily living activities the doctor noted that the Appellant is independent in all of the report's listed aspects of personal care, shopping, meals, paying rent and bills, medications, using public transit and transit schedules/arranging transportation, and social functioning. The Appellant also has good functioning in his immediate and extended social networks. The doctor did note that the Appellant takes significantly longer with the following activities:

- Dressing and grooming "as he has pain bending forward; e.g., to put on socks."
- Transfers in/out of bed and on/off a chair "as he has to lie for a while and do stretches before getting up. This happens every day."
- Laundry and basic housekeeping as "he has pain performing these tasks."
- Carrying purchases home as "he has pain carrying groceries."
- Meal planning as "he has pain standing in one place. This is a daily occurrence."
- Getting in and out of a vehicle as "he has pain when entering and exiting a vehicle."

As for assistance provided by other people, the doctor noted that Appellant has help from family and that his sister drives him around, goes shopping for him and takes him to appointments. The doctor noted no use of any assistance devices or assistance animals.

At the hearing, the Appellant said that he recently had a nerve scan on his arm. He cannot close his hand all the way. He said he also had x-rays and a surgeon found bone fragments in his right knee. He is waiting to see a surgeon further about that. The Appellant said all of these conditions and his

back have caused stress for him. He has seen a psychiatrist for anxiety and stress. The Appellant said his doctor wanted to give him morphine for his pain, but he doesn't want to do that because he would end up just lying around. He needs to be moving for his back problem. The Appellant also said that the medications he takes now affect how he functions daily, and he was told not to drive because of the medications. He also stated that his back pain affects his daily living; for example, he has back spasms when he does the dishes and when he bends over. The Appellant said he worked all his life and was working in oil patch construction, but he can't work now because he is in severe pain. He also stated that his sister drives him around.

The Panel finds that the Appellant's testimony about his back condition and pain, the medications he takes for that condition and how his daily living activities are affected by this condition all relate to information the Ministry had at the time of reconsideration. Therefore, the Panel admits that testimony as being in support of the evidence that was before the Ministry at the time of reconsideration pursuant to section 22(4) of the Employment and Assistance Act. As for the testimony about the Appellant's arm and knee conditions, his consultation with the surgeon and his consultation with psychiatrist, the Panel finds that all of this is new information not in support of the evidence that was before the Ministry at the time of reconsideration. Therefore, the Panel does not admit this information as evidence.

The Appellant's advocate submitted oral and written arguments at the hearing.

At the hearing the Ministry referred to its reconsideration decision, stating that it relied on the information it had at the time and reaffirmed that decision.

PART F – Reasons for Panel Decision

The issue in this appeal is whether the Ministry reasonably determined that the Appellant is ineligible for PWD designation because he did not meet all of the requirements in section 2(2) of the EAPWDA, and specifically that he does not have a severe mental or physical impairment that: in the opinion of a prescribed professional directly and significantly restricts his ability to perform daily living activities either continuously or periodically for extended periods; and, also in the opinion of a prescribed professional, as a result of the restrictions, he does not require help to perform those activities.

The eligibility criteria for PWD designation are set out in the following sections of the EAPWDA:
 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 (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.

The "daily living activities" referred to in EAPWDA section 2(2)(b) are defined in the following section of the EAPWDR:

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 Panel will consider each party's position regarding the reasonableness of the Ministry's decision under the applicable PWD criteria at issue in this appeal.

Severe Impairment

In its reconsideration decision the Ministry noted that the doctor indicated that the Appellant does not have any significant deficits in his cognitive and emotional functioning, nor does his impairment impact his cognitive and emotional functioning. The Appellant did not provide any information or submit any arguments about a mental impairment. The Panel finds that there is no evidence of any mental health conditions or of any impacts to cognitive or emotional functioning. Therefore, the Panel finds that the Ministry reasonably determined that the evidence did not establish a severe mental impairment.

The Ministry also was not satisfied that the information provided established a severe physical

impairment. In its reconsideration decision, the Ministry reviewed the information in the PR and the AR, as well as the MRI report and letter from the spinal surgeon. The Ministry noted that the doctor reported that the Appellant has daily discomfort in his lower back, impairing his ability to manage daily living activities. The Ministry also reviewed the doctor's assessment of the Appellant's physical functioning and mobility; for example, the ability to walk 4+ blocks unaided, climb 5+ stairs unaided, independently walk indoors and outdoors, and taking significantly longer to stand, lift, carry and hold. In its decision, the Ministry also noted that although the doctor reported that the Appellant's pain was a continuous hindrance to his mobility, it was not clear if this hindrance is significant because the Appellant can walk and climb stairs independently. The doctor also indicated that the Appellant does not need any prostheses, equipment or assistive devices for the impairments. The Ministry reviewed the AR and found that the doctor indicated that the Appellant can independently manage the majority of his daily living activities. Therefore, the Ministry determined that the evidence did not establish a severe physical impairment. The Ministry did acknowledge that the Appellant may experience limitations because of his medical conditions.

The Appellant's position is that the evidence establishes that he has a severe physical impairment. He referred to the PR and AR, particularly various statements from the doctor; for example, that he has pain standing in one spot for more than a few minutes and that he is unable to bend/twist normally. The Appellant also pointed to the doctor's report that indicated standing, carrying and holding take significantly longer. He argued that his back pain severely limits his physical functioning and activities such as dressing, grooming, and basic housekeeping take significantly longer. He gets back spasms when doing the dishes. The Appellant also argued that his functionality is impaired on a daily basis as indicated in the evidence from the doctor, and specifically the statements that his discomfort impairs his activities of daily living, that he has severe back pain on a daily basis and that his pain is a continuous hindrance to his mobility. All these restrictions he submitted are evidence of a severe physical impairment.

The Appellant's advocate argued that section 8 of the *Interpretation Act* requires that information should be considered in the Appellant's favor if there is any question about the weight to be given such information. She also submitted that there are those who attempt to work through their pain, despite the fact that they should be getting assistance.

The Panel finds that the Ministry did consider the doctor's narratives and other reports about the Appellant's impairments; for example, the reports that the Appellant can walk 4+ blocks, climb 5+ stairs, and lift 15-35 lbs. Also, even though the doctor's narrative indicated severe back pain with physical exertion on a daily basis and pain as a continuous hindrance to the Appellant's mobility, the doctor nevertheless reported in the AR that the Appellant is independent in all aspects of mobility, although taking significantly longer with standing, lifting, carrying and holding. The doctor also reported that the Appellant is independent in other aspects of daily living activities requiring physical effort, such as dressing, bathing, and transfers in/out of beds and chairs, although taking significantly longer with some activities. The Appellant in his self-report stated that his sitting tolerance is about 20 minutes, standing about half an hour and, walking without a break about half an hour. The Appellant also wrote that lifting 10 pounds or more and bending give him a lot of pain. In his self-report, the Appellant stated that he is in constant pain and has to get epidural shots every three months. When he does dishes, he gets back spasms. The Appellant indicated that on a scale of 1-10, his pain level is about a "5", though rising to a "10" with physical exertion. The Appellant also submitted that the

medications he takes affect his daily functioning, and he should not drive anymore. Other than his sister's help with driving around, the Appellant provided no other information about help he needs or gets. The Panel finds that the Appellant's evidence about his physical limitations is generally consistent with that from the doctor. Also, the Ministry did acknowledge that the Appellant experiences limitations; however, it was not satisfied that all of the information established a severe impairment. The Panel finds that the Ministry did consider the evidence and based on the evidence, it reasonably determined that the Appellant does not have a severe physical impairment.

Restrictions to Daily Living Activities

The Ministry reviewed the doctor's reports and found that the doctor indicated that the Appellant is not restricted in his ability to manage the majority of his daily living activities, although some tasks take significantly longer to complete. The Ministry noted that the doctor did report that the Appellant is periodically restricted with personal self-care, basic housework and daily shopping. The doctor also reported that the Appellant develops back pain with physical exertion and certain activities aggravate his discomfort on a daily basis, 40% of the day. The Ministry also noted that the doctor reported that the Appellant has ongoing discomfort that impairs his daily living activities and he has severe pain on a daily basis while doing housework. The doctor did not indicate that the Appellant requires periodic or continuous assistance to manage any of his daily living activities. The doctor also did not indicate that the Appellant requires the use of an assistance device to help compensate for his impairment. The Ministry acknowledged that the Appellant's impairment impacts his ability to manage his daily living activities. However, overall the Ministry found that it does not have strong evidence from the doctor to establish that the Appellant's impairments significantly restrict his ability to manage his daily living activities, continuously or periodically for extended periods.

The Appellant's position is that the doctor reported periodic restrictions to self-care, basic housework and daily shopping, and added that certain activities aggravate his discomfort. The doctor also wrote that this occurs on a daily basis, 40% of the day and that the Appellant has benefitted from physical assistance from others. The Appellant also submitted that the doctor reported that 7 activities take significantly longer and the physician would know what the word "significant" means. The Appellant argued that the fact that a physician does not specifically note the length of time it takes to perform an activity should not in any way diminish the word significant. The Appellant also pointed out that in the explain/describe columns of the reports, the doctor provided further clarification, such as that he has pain bending forward and pain standing in one place, a daily occurrence. The Appellant also pointed out that the doctor wrote that the Appellant has "daily discomfort in his lower back and ongoing discomfort in spite of surgery" and that his "discomfort impairs his activities of daily living". The Appellant argued that these statements must not be discounted simply because there are no numerical values attached to them. The Appellant's position is that the doctor's report of daily discomfort impacting daily living activities more than satisfies the extended periods of time criteria.

The Appellant argued that it is important to look at the application as a whole, particularly reviewing statements made by the physician/assessor in conjunction with where checkmarks are located. He pointed to the statement from the physician that he has benefitted from physical assistance from others and argued that this statement alone is an indication that he requires assistance to manage daily living activities.

Section 2(2)(b) of the EAPWDA requires the opinion of a prescribed professional to satisfy the

requirements in section 2(2)(b)(i) and (ii). The Appellant's doctor is the prescribed professional in this case and the Panel notes that the Ministry did consider that doctor's reports in its reconsideration decision. Specifically the Ministry found that based on the reports the Appellant is not restricted in his ability to manage the majority of his daily living activities. The Ministry noted that in the PR the doctor reported that the Appellant is periodically restricted in the following activities: personal self-care, basic housework and daily shopping, explaining that the Appellant develops back pain with physical exertion and certain activities aggravate his discomfort on a daily basis, 40% of the day. The Ministry also considered the doctor's statement that the Appellant has ongoing discomfort that impairs his daily living activities and that he has severe pain on a daily basis while doing housework. Also that the Appellant benefitted from physical assistance. However, in the AR, the doctor indicated that the Appellant independently manages all the listed daily living activities, except for basic housekeeping. The doctor did note that some of activities take significantly longer. The doctor also did not indicate that the Appellant requires the use of an assistance device or assistance animal. Therefore based on all of the evidence, the Panel finds that the Ministry reasonably determined that, in the opinion of a prescribed professional, the Appellant's impairments do not directly and significantly restrict his ability to perform daily living activities either continuously or periodically for extended periods.

Help with Daily Living Activities

The Ministry decided that because it determined that the Appellant's daily living activities are not significantly restricted by a severe impairment it could not determine that significant help is required from other persons. The Ministry also noted that the doctor indicated that the Appellant did not require any aids, devices or equipment to help compensate for his impairments. The Appellant also does not require the services of an assistance animal.

The Appellant pointed to the evidence from the doctor that he has benefitted from physical assistance from others. The Appellant argued that this statement alone is an indication that he requires assistance in order to manage daily living activities. The doctor also reported that the Appellant receives help from his family, including his sister who drives him around and takes him shopping.

The Panel notes that the doctor reported that the Appellant is independent in the majority of the listed daily living activities in the AR. Other than the note that the Appellant has benefitted from physical assistance and that the Appellant's sister helps with driving him around, shopping and going to appointments, the doctor provided no other information about the frequency or extent of help the Appellant needs. The doctor also indicated that the Appellant did not require any assistive devices or an assistance animal. Therefore, based on all of the evidence and the applicable enactments, and given the Panel's finding above that the Ministry's determination that the Appellant's daily living activities are not directly and significantly restricted was reasonable, the Panel further finds that the Ministry's determination that the Appellant does not meet the requirements of section 2(2)(b)(ii) of the EAPWDA was also reasonable.

The Panel finds that the Ministry's reconsideration decision was reasonably supported by the evidence and was a reasonable application of the applicable enactments in the Appellant's circumstances. Therefore, the Panel confirms that decision.