

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development's (the ministry) reconsideration decision dated December 10, 2012 which found that the appellant did not meet three of the five statutory requirements of section 2 of the *Employment and Assistance for Persons with Disabilities Act* (EAPWDA) for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that the appellant's impairment was likely to continue for at least two or more years. However, the ministry was not satisfied that:

- the evidence establishes that the appellant has a severe physical or mental impairment;
- 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; and that
- as a result of those restrictions, the appellant requires the significant help or supervision of another person, an assistive device, or the services of an assistance animal, 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 the time of the reconsideration decision consisted of:

- 1) The appellant's Request for Reconsideration dated November 29, 2012 (RFR);
- 2) Letter from a physician dated November 21, 2012 (2012 Doctor's Letter);
- 3) Letter from the Ministry to the appellant dated October 23, 2012 advising that his request for PWD designation was denied;
- 4) PWD Designation Decision Summary dated October 22, 2012;
- 5) A PWD application comprised of a Self-report (SR) signed by the appellant on September 6, 2012; a Physician Report (PR) dated August 10, 2012 completed by the appellant's general practitioner of 3 months; and an Assessor Report (AR) also dated August 10, 2012 and completed by the appellant's general practitioner. On the AR the general practitioner reports that he has seen the appellant two to ten times in the past year.

In his Notice of Appeal the appellant requested an extension until the end of January 2013 as his doctor was away on holidays.

### *Admissibility of New Information*

At the appeal hearing, the appellant provided a letter from the appellant's doctor dated February 4, 2013 (the 2013 Doctor's Letter) and the ministry did not object to this new evidence. The appellant also gave oral testimony which provided more detail with respect to the restrictions he faces and the help he receives in managing DLA. The panel has admitted the oral testimony and the 2013 Doctor's Letter into evidence as being in support of information and records that were before the ministry at the time of reconsideration, in accordance with section 22(4) of the *Employment and Assistance Act*.

The appellant's advocate also provided a letter from the appellant dated February 1, 2013 (the Letter) which did not contain new evidence and was provided as part of the appellant's submissions. The appellant's advocate clarified that in the Letter, the reference to a letter from the appellant's physician dated May 3, 2010 is not correct, and is intended to be a reference to the 2013 Doctor's Letter.

At the hearing, the appellant's advocate stated that the appellant's condition is progressive, severe, lasted at least 2 years and will continue to last at least 2 years more, that the Letter and Doctor's Letter confirm that he requires continuous assistance and that he meets the legislated criteria for PWD. The advocate also stated that the appellant's original PWD application was completed six months ago, that a lot of time has passed, the appellant's condition has deteriorated significantly, and he just got out of hospital.

The ministry relied on the reconsideration decision and submitted no new information.

### *Physical Impairment*

In the SR, the appellant states that he has lived with chronic back pain due to degenerative bone disease for the past 15 years; stomach problems causing him to vomit 8-12 times daily, broken, poor sleep, asthma and difficulty breathing which has persisted for 20 years, and that he is a borderline diabetic. He states that his physical conditions and depression are robbing him of life.

In the PR, the general practitioner reports that the appellant has had chronic low back pain since 2002 which limits the appellant from lifting or pulling/pushing objects heavier than 10 lbs; sitting longer than 20 minutes,

and has pain with walking and standing. The general practitioner reports that the appellant has chronic peptic acid disease/GERD and severe oesophagitis, and chronic depression.

Functional skills reported in the PR indicate that the appellant can walk less than 1 block, can climb 5+ steps unaided, is limited to lifting 2 to 7 kg (5 to 15 lbs), and can remain seated for less than 1 hour.

In the AR, the general practitioner reports that the appellant has difficulty with housework and yardwork. The appellant's ability to communicate in all four listed areas of speaking, reading, writing and hearing is good. The general practitioner indicates that the appellant is independent with walking indoors and outdoors, climbing stairs but avoids standing, lifting, carrying and holding. The general practitioner reports that the appellant requires continuous assistance with lifting and carrying and holding but the general practitioner does not indicate what assistance is needed.

In the 2012 Doctor's Letter the general practitioner states that the appellant has chronic low back pain due to degenerative disk disease, chronic peptic acid disease which has recently been found to include achalasia which makes it difficult for him to swallow, chronic obstructive pulmonary disease (COPD), and degenerative disk in his neck which has led to significant left arm radiculopathy. The general practitioner states that due to all of these factors, the appellant is unable to work, unlikely that he will be able to return to work in the future, is undergoing treatment for the radiculopathy and is awaiting further investigation of the achalsia.

In the RFR, the appellant states that he can no longer do the smallest of chores, that his left arm no longer works and he cannot lift anything. The appellant states that he cannot walk, (except to his vehicle). He states that he is in pain, cannot breathe or eat solid food, and does not sleep more than 1-2 hours at a time.

In the Letter, the appellant states that he meets the requirements of section 2 of the EAPWDA for PWD. He refers to the 2013 Doctor's Letter that states that he has a condition that is progressive and severe.

In the 2013 Doctor's Letter, the general practitioner states that the appellant has asthma, chronic peptic ulcer, chronic depression, chronic back pain due to compression fracture, chronic fatigue and that his condition is progressive and will not improve over time.

At the hearing, the appellant stated that he cannot push or perform any activities like shoveling, vacuuming, carrying, that he cannot walk without assistance and that he just got out of the hospital, where they found six holes in his stomach and cut out part of his esophagus. The appellant states that he has not been able to eat whole foods for six months but that since his recent surgery he is able to keep liquids down but is not sure if he will ever be able to eat solid foods again. He stated that he cannot sit for more than 15 minutes at a time due to back pain. He also stated that he takes medications for pain, stomach condition, blood pressure and anxiety.

The appellant's advocate stated that the original PWD application was completed six months ago and the appellant has deteriorated significantly since that time.

The ministry representative stated that she hears the new information of the appellant and his advocate, but that the reconsideration decision is based on the original PWD application.

### ***Mental Impairment***

In the SR, the appellant states that he lives with depression and hopelessness and poor sleep. He states that he has no life, and that he cannot work or enjoy activities or interests. He also states that he feels overwhelmed and hopeless and gives up, and that he feels just he is just "*taking up space*". The appellant states that his depression is robbing him of life.

In the PR, significant deficits of 1 of 12 listed aspects of cognitive and emotional function are reported

(emotional disturbance).

In the AR, for section 4, cognitive and emotional functioning, where asked to complete for an applicant with an identified mental impairment or brain injury, the general practitioner reports that 1 of the 14 listed items is majorly impacted (emotion), 1 item is moderately impacted (motivation) and 1 item is minimally impacted (insight and judgment). The AR indicates that there is no impact to the remaining 11 of 14 items (bodily functions, consciousness, impulse control, attention/concentration, executive, motor activity, language, psychotic symptoms, other neuropsychological problems and other emotional or mental problems).

In the 2012 Doctor's Letter the general practitioner states that the appellant has chronic depression for which no medication has been helpful.

In the RFR, the appellant states that he is seeing a mental health worker for depression.

In the Letter, the appellant states that his impairment is progressive and severe and refers to the 2013 Doctor's Letter.

In the 2013 Doctor's Letter, the general practitioner states that the appellant has progressive medical conditions including chronic depression, and that his conditions will not improve over time.

At the hearing, the appellant stated that his depression is debilitating. He stated that he wished he had more information at the beginning of this application process and understood what details were required for the PWD application.

The ministry representative stated that she hears the new information of the appellant and his advocate regarding his deterioration, but that the ministry position is based on the original PWD application.

### **DLA**

In the AR, the general practitioner reports that the appellant is independent with the following tasks: grooming, toileting, feeding self, regulating diet, transfers (in/out of bed), transfers (on/off of chair), reading prices and labels, making appropriate choices, paying for purchases, meal planning, safe storage of food, banking, budgeting, paying rent and bills, filing/refilling medications, taking medications as directed, safe handling and storage of medications, getting in and out of a vehicle and using transit schedules/making appropriate transportation arrangements.

On the AR, the evidence of the prescribed professional, the appellant's general practitioner, indicates that the appellant requires periodic assistance with dressing, bathing, laundry, going to and from stores, food preparation, cooking, using public transit, appropriate social decision and developing/maintaining relationships and continuous assistance with basic housekeeping and carrying purchases home.

With respect to his mental impairment, the general practitioner reports that the appellant requires periodic assistance with appropriate social decisions and ability to develop and maintain relationships but is independent with interacting with others, dealing appropriately with unexpected demands and securing assistance from others. The general practitioner also reports that the appellant has marginal functioning with respect to his relationships with his immediate social network and extended social networks.

In the 2012 Doctor's Letter, the general practitioner does not report regarding any difficulties with DLA's.

In the RFR, the appellant states that he can no longer do small chores, he cannot walk (except to and from vehicles), shop, cook, bathe, clean, or do his laundry.

In the Letter the appellant states that he needs continuous assistance with all DLA, specifically: personal self care, meal preparation, basic housework, daily shopping, mobility inside and outside the home, use of transportation and management of medications. The appellant states that the 2013 Doctor's Letter confirms that his disability significantly and directly affects his ability to perform all DLA, that all DLA's take significantly longer and that he cannot manage DLA to a reasonable degree within a reasonable time frame.

In the 2013 Doctor's Letter, the general practitioner states that the appellant's disability significantly and directly restricts his ability to perform all DLA in a timely normal fashion and that the appellant's conditions cause all activities to take significantly longer.

At the hearing, the appellant stated that he is unable to do anything. He cannot push, pull, carry items, vacuum, shovel or walk without assistance. He has trouble eating, breathing and has significant pain and difficulty sleeping. He has difficulty driving as he cannot sit for more than 15 minutes at a time.

### ***Need for Help***

In the AR, the general practitioner states that the appellant needs to see a mental health worker on a regular basis and requires help from friends. The general practitioner does not provide any indication of the amount of assistance and does not indicate that the appellant requires help of an assistance animal.

In the RFR, the appellant states that he needs his neighbor to do shopping, laundry and cleaning. He also states that he cannot bathe and his landlord has installed a shower bar.

In the Letter, the appellant states that he needs significant assistance from family and friends.

In the 2013 Doctor's Letter, the general practitioner states that the appellant needs assistance with basic housework.

At the hearing, the appellant stated that his neighbor helps him by taking him out to get groceries and cleans for him. He stated that as he cannot eat whole foods he needs Ensure or Boost but cannot afford to buy those items. He also stated that he cannot walk without a cane, rails or a person to lean on.

## PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry's decision to deny the appellant designation as a PWD was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. In particular, was the ministry reasonable in determining that the appellant:

- does not have a severe physical or mental impairment;
- that the appellant's DLA's are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and that
- as a result of those restrictions, the appellant does not require the significant help or supervision of another person, an assistive device, or the services of an assistance animal, to perform DLA.

The criteria for being designated as a person with disabilities (PWD) are set out in Section 2 of the EAPWDA as follows:

### Persons with disabilities

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).

Section 2(1)(a) of the EAPWDR defines DLA for a person who has a severe physical or mental impairment as follows:

### Definitions for Act

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.

**Severe physical impairment:**

The appellant argues that he has chronic, severe back pain, stomach problems, trouble breathing and has a severe physical impairment that is only getting worse. In the RFR, the appellant states that he can no longer do the smallest of chores, that his left arm no longer works and he cannot lift anything. The appellant states that he cannot walk, (except to his vehicle). He states that he is in pain, cannot breathe or eat solid food, and does not sleep more than 1-2 hours at a time.

The appellant, through his advocate, argues that the ministry did not properly consider all of the evidence. The advocate also argues that the appellant's condition has deteriorated significantly, that he has a severe physical impairment, and that he meets the legislated criteria for PWD designation.

The ministry argues that the functional skills limitations described by the general practitioner are more in keeping with a moderate degree of impairment, not a severe physical impairment and that the evidence does not establish that the appellant has a severe physical impairment.

*Panel Decision*

The legislation clearly provides that the determination of severity of impairment is at the discretion of the minister, taking into account all of the evidence including that of the appellant. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a prescribed professional respecting the nature of the impairment and its impact on daily functioning.

The panel finds that a medical practitioner, the appellant's general practitioner, has diagnosed the appellant with chronic low back pain, chronic peptic acid disease including achalasia, chronic obstructive pulmonary disease (COPD), and degenerative disk with significant left arm radiculopathy and is undergoing treatment and waiting further investigation. The panel also finds that the functional limitations noted in the PR and AR are consistent with each other and indicate that at the time the PWD application was completed, the appellant's functional limitations were in the moderate range rather than severe.

Although the 2012 Doctor's Letter indicates that the appellant is unable to work and the appellant states, in the SR, that he cannot work, the panel notes that employability is not a criterion for designation as PWD.

The panel notes that the appellant's oral testimony, the Letter and the 2013 Doctor's Letter all indicate that the appellant's condition has deteriorated in the six months since the original PWD application was filed.

However, while the appellant argues that his physical impairment is severe, the 2013 Doctor's Letter only states that the appellant has a progressive medical condition and does not state that the appellant has a

severe physical impairment. In addition, although the 2013 Doctor's Letter states that the appellant's disability significantly and directly restricts his ability to perform all daily living activities in a timely normal fashion, and that activities take significantly longer, the general practitioner does not provide any further information to indicate how much longer any of the DLA's take. The general practitioner also states that the appellant requires assistance with basic housework but does not provide any details of how much assistance or how often it is required.

The panel finds that the 2013 Doctor's Letter, even when considered with the evidence before the ministry at the time of reconsideration, does not provide sufficient information to determine that the appellant has a severe physical impairment and the panel concludes that the ministry reasonably determined that the appellant's level of independent physical functioning does not establish that the appellant has a severe physical impairment under section 2(2) of the EAPWDA.

Therefore, the panel finds that the ministry's decision, which concluded that the evidence does not establish a severe physical impairment under section 2(2) of the EAPWDA, was reasonable.

#### **Severity of mental impairment:**

The appellant's position is that he has chronic depression that is disabling. The appellant's advocate argues that a severe mental impairment is established by reading all of the evidence together, giving adequate weight to the SR and RFR and taking into account the 2013 Doctor's Letter. The advocate also argues that a lot of time has passed since the PWD application and that the appellant's condition has deteriorated significantly.

The ministry argues that while the evidence of the general practitioner reports that the appellant suffers from several disabling medical conditions, and is unable to return to work. The ministry states that the PWD application is not intended to assess employability or vocational abilities and employability is not a criterion for designation as a PWD. The ministry states that the evidence does not establish that the appellant has a severe mental impairment. The ministry also relies on the evidence that the general practitioner reports no, nominal or moderate impact on daily functioning for 13 of 14 listed areas of cognitive and emotional functioning.

#### *Panel Decision*

The panel finds that the evidence of the general practitioner confirms that the appellant has chronic depression but the PR and AR confirm that the impacts to the appellant's mental status are mainly minimal. Although the general practitioner reports that the appellant has marginal functioning with respect to his relationships with his immediate and extended social network, the AR indicates that the appellant is independent with interacting appropriately with others. In addition, the PR indicates that the only significant deficit with cognitive and emotional function is emotional disturbance. In the AR, the general practitioner reports that the appellant's ability to communicate is good in all areas. While the general practitioner indicates some major impact to the appellant's emotion and moderate impact to motivation, there is only minimal impact to insight and judgment and no impact to the remaining cognitive and emotional functioning areas.

Therefore, the panel finds that the ministry's decision, which concluded that the evidence does not establish a severe mental impairment under section 2(2) of the EAPWDA, was reasonable.

#### **Restrictions in the ability to perform DLA**

The appellant's position is that his physical and mental impairments directly and significantly restrict his ability to perform all DLA to the point that he requires continuous assistance, a number of assistive devices, and the ongoing assistance of his friend with shopping, meals, and transportation to and from shopping.



The ministry's position is that the evidence of the prescribed professional establishes that although the appellant requires continuous assistance with basic housekeeping and carrying purchases home, periodic assistance with dressing, bathing, laundry, going to/from stores, food preparation, cooking and using public transit, the medical evidence indicates that the majority of the appellant's DLA's are independent. The ministry's position is that the AR does not indicate that the appellant takes significantly longer to perform DLA's, there is no information on how often or the duration of the assistance provided and there is not enough evidence to establish that the appellant's impairments significantly restrict his ability to manage DLA's, continuously or periodically for extended periods.

The ministry notes that in the RFR the appellant states that he can no longer do the smallest chores, walk farther than his vehicle, shop, cook or bath, and that he needs his neighbor to do his shopping, laundry and cleaning but that the appellant's evidence is not consistent with the AR which indicates that periodic assistance is required with going to/from stores, laundry, cooking and bathing.

#### *Panel Decision*

The legislation requires that a severe impairment directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods. The term "directly" means that there must be a causal link between the severe impairment and the restriction. The direct restriction must also be significant – it must be more than trifling and more than merely an inconvenience. Finally, there is a component related to time or duration. The direct and significant restriction may be either continuous or periodic. If it is periodic it must be for an extended time. Inherently, an analysis of periodicity must also include consideration of the frequency. All other things being equal, a restriction that only arises once a year is less likely to be significant than one which occurs several times a week. While the legislation must be interpreted in a large and liberal manner, there still must be sufficient evidence on each of the legislative criteria to reasonably satisfy the ministry that they have been met.

In the AR, the general practitioner indicated that the appellant's impairment directly restricts 6 of the 10 prescribed DLA (*prepare own meals, shop for personal needs, use public transportation, perform housework, perform self care, and communicate or interact with others effectively*). The general practitioners indicates that these restrictions are periodic with the exception of housekeeping and shopping (carrying purchases home), which are continuous.

The general practitioner indicated that the appellant is unrestricted in 4 of the remaining 10 prescribed DLA (*managing of finances, moving about indoors and outdoors, managing personal medication, and making decisions about personal activities, care of finances*).

The majority of the listed tasks for all other DLA are managed independently, including grooming, toileting, feeding self, meal planning, banking, budgeting, getting in and out of a vehicle and interacting with others. In addition, while the general practitioner indicates that the appellant requires periodic assistance with using public transportation, the appellant's evidence was that he obtains rides from a neighbor and does not use public transportation.

The panel notes that the appellant's oral testimony, the Letter and the 2013 Doctor's Letter all indicate that the appellant's condition has deteriorated in the six months since the original PWD application was filed. While the appellant's evidence is that his DLA's are much more restricted than before, the 2013 Doctor's Letter does not reflect the degree of changes reported by the appellant. It may be that the general practitioner is aware of the appellant's restrictions and is able to confirm them but the medical evidence provided is not sufficient to establish that there is a direct and significant restriction of the appellant's ability to perform DLA. The fact that the general practitioner states that the appellant's disability significantly and directly restricts his ability to perform all daily living activities is not, on its own, sufficient evidence. In particular, the general practitioner has not provided any information as to how much longer the DLA take to demonstrate the change since the

original PWD was submitted or to indicate the extent and frequency of the periodic restrictions.

In addition, while the 2013 Doctor's Letter states that the appellant requires assistance with basic housework, he has not provided any further information as to how much assistance or how often assistance is needed with basic housework. The panel concludes that the ministry was reasonable in finding that the appellant's impairment does not significantly restrict his ability to perform DLA, either continuously or periodically for extended periods.

Therefore, the panel finds that the ministry's decision that the noted restrictions in the appellant's ability to perform some aspects of some DLA did not constitute a direct and significant restriction of the appellant's ability to perform DLA in the opinion of a prescribed professional thereby not satisfying the legislative criteria of section 2(2)(b)(i) of the EAPWDA, was reasonable.

### **Help with DLA**

The appellant argues that he cannot perform any housework alone and needs significant assistance with all DLA's. The appellant's position is that he requires continuous help with all DLA. In particular, he requires help from his neighbor with shopping, bathing, cooking, cleaning and all housework, and getting to/from stores.

The ministry's position is that as it has not been established that DLA's are significantly restricted, it cannot be determined that significant help is required from other persons, and no assistive devices are required.

Section 2(2)(b)(ii) of the EAPWDA requires that, as a result of direct and significant restrictions in the ability to perform DLA, a person requires help to perform those activities. Help is defined in subsection (3) as the requirement for 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 a prescribed professional establishes that the appellant requires some assistance with tasks of some 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 the appellant requires help to perform DLA as a result of those restrictions.

### **Conclusion**

Having reviewed and considered all of the evidence and relevant legislation, the panel finds that the ministry's reconsideration which determined that the appellant was not eligible for PWD designation was reasonably supported by the evidence and a reasonable application of the applicable legislation in the circumstances of the appellant, and therefore confirms the decision.