

### PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (the ministry) reconsideration decision of October 31, 2012, which found that the appellant did not meet three of 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 in the opinion of a medical practitioner his impairment is likely to continue for at least two years. However, the ministry was not satisfied that the evidence establishes that he has a severe physical or mental impairment. The ministry was also not satisfied 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. As the ministry found that the appellant is not significantly restricted with DLA, it could not be determined that he requires help as defined in section 2(3)(b) of the EAPWDA.

### 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 information before the ministry at the time of reconsideration included the following:

- The appellant's application for designation as a PWD. The application included a physician's report (PR) and assessor's report (AR) both completed and signed by the appellant's physician on July 26 and July 20, 2012 respectively. The application also included a self-report signed by the appellant on July 15, 2012.
- A letter and decision summary from the ministry to the appellant, dated September 25, 2012 advising the appellant that he had been found ineligible for designation as a PWD.
- The appellant's Request for Reconsideration form signed by the appellant on October 19, 2012.
- An x-ray examination report dated January 17, 2012 describing, among other things, moderate loss of disc height at C6-7, moderate bilateral encroachment, and degenerative change at C1-2.
- A CT scan report dated February 16, 2012 describing findings related to the appellant's spine, including severe narrowing of the neural foramina at C6-7, and a possible disc herniation at the same level.
- A "to whom it may concern" note from the appellant's physician, dated October 23, 2012, stating that "[The appellant] is suffering from chronic neck pain which prohibits him from working."

The appellant is a 51 year old man who has spent most of his working career in construction. In his self-report the appellant wrote that he has osteoarthritis in his knees, hands and neck, he has a disc disorder in his neck, he has a lot of neck pain and hand pain that is worse some days more than others, and it is hard to bend his knees or to walk long distances. The appellant has little energy some days and needs a lot of sleep. He cannot do any physical work and just does "the basics" around the house.

In the PR the appellant's physician of 3 years diagnosed him with degenerative disc disease (impingement of C7 nerve roots) with onset in 1985, and osteoarthritis of hands and knees. In the health history portion of the PR form the physician described chronic daily pain in the appellant's neck that is worsened with physical activity and quick movements. Knee pain is worsened by bending/lifting/standing for more than 20 minutes or walking more than 4 blocks. The appellant has not been prescribed any medication or treatments that interfere with his ability to perform DLA. In terms of functional skills the physician assessed the appellant as being able to walk 2 to 4 blocks unaided on a flat surface, climb 5+ stairs unaided, lift 5 to 15 pounds, and remain seated for less than 1 hour. The physician indicated the appellant has no difficulty with communication and has no significant deficits with cognitive and emotional function. With respect to DLA, the physician indicated the only restricted activity is mobility outside the home, which is continuously restricted, and provided the additional comment "mild restrictions". In describing the assistance the appellant requires with DLA, the physician wrote "Needs help mowing lawn or with heavy lifting. Uses transport (car) for >4 blocks."

In the AR the physician noted that the appellant lives alone, and indicated that the appellant is independent in all aspects of all DLA, though with respect to mobility and physical ability he commented "not extended periods of time". In terms of cognitive and emotional functioning the physician indicated "no impact" in 14 out of 14 categories. Asked to describe the assistance provided to the appellant, the physician indicated that he receives help from friends for "gardening/heavy domestic duties". The physician indicated that the appellant makes "very occasional use of cane" and that he does not have an assistance animal.

At the appeal hearing the appellant stated that he likes to work but simply cannot do so now, though he hopes that his neck issues can be dealt with within the next 6 months to 2 years so that he can get back to work. He said that he needs help in the meantime. He stated that he has to use a contoured pillow to sleep but even then he wakes up in pain each morning. The appellant's last job was with a courier, but there was a significant amount of physical work involved which caused the appellant to miss more and more work over time until his physician and his family told him to get out of that field of work. In response to a question from the panel the appellant said that he can do most basic housework, but that he can't shovel snow and that he gets a friend to do the vacuuming. He does most of his own cooking, making frequent use of the microwave. He drives his own car but is cautious with respect to turning his neck. The appellant stated that his main health issue is with his neck and that he can deal with the arthritis in his hands and knees as he has been doing so for years. In response to a question from the ministry, the appellant said that his only mental issue is depression, and that he is depressed many days.

The panel admitted the appellant's testimony as evidence as it provides more detail regarding the impacts of his impairment, and constitutes oral testimony in support of information and records that were before the ministry at the time of reconsideration, in accordance with s. 22(4) of the *Employment and Assistance Act*.

The ministry relied on its reconsideration decision and submitted no new evidence.

## PART F – Reasons for Panel Decision

The issue on this 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, and that in the opinion of a prescribed professional the appellant's impairments do not directly and significantly restrict him from performing DLA either continuously or periodically for extended periods, and that as a result of those restrictions the appellant does not require help to perform DLA?

The relevant legislation is as follows:

### EAPWDA:

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.

**EAPWDR section 2(1):**

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.

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**Severe Mental Impairment**

The appellant did not advance an argument with respect to severe mental impairment. He said that he is frequently depressed, but stated that his neck is the main issue.

The ministry's position, as set out in the reconsideration decision, is that the evidence does not establish that the appellant has a severe mental impairment.

*Panel Decision*

In both the PR and the AR the appellant's physician made no diagnosis of a mental impairment, and

the physician has reported no significant deficits in cognitive and emotional functioning and no difficulties with communication. Given that there is no medical evidence to indicate mental impairment, and no evidence that the appellant's periodic depression affects his ability to perform DLA, the panel finds that the ministry reasonably concluded that the appellant does not suffer from a severe mental impairment.

### **Severe Physical Impairment**

The appellant's position is that his neck pain is his main health issue, and it is sufficiently severe that he cannot work despite the fact that he enjoys working and would rather work than receive disability assistance.

The ministry's position, as expressed in its reconsideration decision, is that while it acknowledges that the appellant experiences some limitations as a result of his medical conditions the information provided does not establish a severe physical impairment.

#### *Panel Decision*

To assess the severity of an impairment one must consider the nature of the impairment and its impact on daily functioning as evidenced by functional skill limitations and the degree of independence in performing DLA. The legislation makes it clear that the determination of severity 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 analysis must fundamentally be based on evidence from a prescribed professional.

The functional skills assessments reported by the physician in the PR, and the physician's note of October 23, 2012 demonstrate that the appellant's physical impairment is sufficiently severe to preclude him from working for the foreseeable future. This is consistent with the appellant's evidence. However, the legislative analysis isn't based on impairment of a person's ability to work; it is based on impairment of a person's ability to perform DLA. In this respect the medical evidence and the appellant's evidence are again consistent – the appellant lives alone and although he is almost continuously in pain, his physical impairment is not yet to a stage that it significantly restricts his ability to perform DLA. The appellant is able to perform all but the heaviest household chores and is able to do most of his own cooking. Otherwise, the appellant is independent with respect to DLA.

The panel acknowledges that the appellant is suffering with a painful medical condition that prevents him from working, but based on the evidence that his condition is not significantly impacting his ability to perform DLA, the panel finds that the ministry reasonably concluded that the appellant does not have a severe physical impairment.

### **Restrictions to DLA**

The appellant's position is that his ability to perform DLA is directly and significantly restricted by his physical impairments, in some cases continuously and in others periodically.

The ministry's position, as set out in its reconsideration decision, is simply that the information provided does not establish that the appellant's impairments significantly restrict his DLA either continuously or periodically for extended periods.

### *Panel Decision*

The legislation – s. 2(2)(b)(i) of the EAPWDA – requires the minister to substantially assess direct and significant restrictions of DLA in consideration of the opinion of a prescribed professional, in this case the appellant's physician. This doesn't mean that other evidence shouldn't be factored in, but the legislative language makes it clear that the prescribed professional's opinion is fundamental to the ministry's determination as to whether it is "satisfied".

In the PR the physician noted that the appellant needs assistance with heavy lifting and with mowing the lawn, and that for distances of more than 4 blocks the appellant uses his car. Otherwise, in the AR, the physician indicated that the appellant is independent with respect to all DLA. The appellant's evidence was that friends help with vacuuming, yard work, and some cooking. Otherwise, even though it is painful, the appellant is able to independently perform virtually all aspects of all DLA. Based on this evidence, it cannot be said that the appellant's ability to perform DLA is significantly restricted either continuously or periodically for extended periods. Accordingly, the panel finds that the ministry was reasonable in determining that the appellant does not satisfy this legislative criterion.

### Help with DLA

The appellant's position is that he requires assistance from friends to manage DLA of housework and some meal preparation.

The ministry's position, as set out in its reconsideration decision, is that as it has not been established that DLA are significantly restricted it cannot be determined that significant help is required from other persons.

On the evidence, the appellant requires assistance from friends with respect to some aspects of two DLA – housework and meals. This cannot be described as being the "significant help or supervision of another person" as required by EAPWDA s. 2(3)(b)(ii). Neither the appellant's physician nor the appellant indicated that he requires any assistive devices other than the occasional use of a cane, and there was no indication as to how frequent the use of the cane may be. There is no evidence to indicate that the appellant requires or would benefit from an assistance animal.

The panel finds that based on the evidence the ministry reasonably determined that the appellant does not require help to perform DLA as defined by the legislation.

### *Conclusion*

The panel acknowledges that the appellant suffers from a painful medical condition. However, having reviewed and considered all of the evidence and the relevant legislation, the panel finds that the ministry's decision declaring the appellant ineligible for PWD designation was reasonably supported by the evidence and was a reasonable application of the legislation in the circumstances of the appellant, and therefore confirms the ministry's decision.