

PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development (the ministry) dated 02 November 2012 denying the appellant designation as a person with disabilities (PWD). The ministry determined that the appellant did not meet all of the required criteria for PWD designation set out in the Employment and Assistance for Persons with Disabilities Act, section 2. Specifically the ministry determined that the information provided did not establish that the appellant has a severe mental or physical impairment that in the opinion of a prescribed professional

(i) directly and significantly restricts the person's ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and,

(ii) as a result of those restrictions, the person requires help to perform those activities.

The ministry did determine that the appellant satisfied the other 2 criteria: he has reached 18 years of age; and his impairment in the opinion of a medical practitioner is likely to continue for at least 2 years.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act (EAPWDA) – section 2
Employment and Assistance for Persons with Disabilities Regulation (EAPWDR) – section 2

PART E – Summary of Facts

The evidence before the ministry at reconsideration consisted of the following:

1. The appellant's PWD Designation Application dated 17 May 2012. The Application contained:
 - The appellant's Self Report (SR)
 - A Physician Report (PR) dated 17 July 2012 completed by the appellant's general practitioner (GP) who has known the appellant for 2 years and seen him 2-10 times over that period.
 - An Assessor Report (AR) dated 09 August 2012 completed by a social worker (SW) employed by a health authority who has known the appellant for 3 months and seen him 2-10 times over that period.
2. The appellant's Request for Reconsideration dated 10 October 2012, to which was attached a submission from the appellant's advocate, which went to argument, and a supplemental statement from the appellant.
3. A letter from the Workers' Compensation Board (WCB) to the appellant stating that the WCB had approved the installation of grab bars in the bathroom, a bed rail and non-slip strips in the tub.

In the SR, the appellant writes that he has a broken neck, with fused discs, C3-C7-T1, doctors have told him that they do not want to operate again as this could permanently damage him and he could end up in a wheelchair or dead. He lives with severe chronic pain. He is unable to lift anything over 7 pounds and nothing over his head. This makes grocery shopping and personal care difficult. His balance has been impacted and doing things like showering is difficult due to the risk of falling/slipping. Shaving is difficult because he cannot move his neck.

He writes that even doing something as simple as washing dishes can be extremely difficult because standing in the same position for more than 5 min. causes severe pain. His arm goes numb and then he needs to take a break. Doing dishes for himself and his daughter after a meal can take up to two hours to complete. Getting dressed can be frustrating and difficult for him. He is unable to wear pants that require a belt and shirts with buttons are hard for him to do up. He cannot tie his own shoes. He writes that he is unable to work due to the chronic pain. He gets irritable and this limits him socially as he gets frustrated and depressed from dealing with his chronic pain. At times he becomes verbally aggressive and most of the time this makes him stay isolated. Housework is also a big struggle as he is unable to clean the bathroom -- washing floors is very difficult.

In the PR, the GP diagnoses the appellant with cervical spinal injury, lower back pains and shoulder pains, all with onset 1995. The GP leaves blank section B, health history, where the physician is asked to indicate the severity of the medical conditions relative to the person's impairment. The GP answers "No" to the question as to whether the appellant has been prescribed any medication and/or treatments that interfere with his ability to perform DLA. The GP indicates that the appellant requires the use of a cane for his impairment. The GP indicates that the appellant's impairment is likely to continue for two years or more commenting: "Neck aches and low back pain expected to continue in spite of therapy with opiates."

With respect to functional skills, the GP reports that the appellant can walk unaided 2 to 4 blocks, can climb 5+ steps, lift 5 to 15 pounds and can remain seated for less than one hour. No difficulties with communication are indicated. The GP reports significant deficits with cognitive and emotional function in three areas: emotional disturbance, motivation and motor activity, commenting: "because of pains

he is depressed and irritable.”

As to DLA, the GP assesses the appellant actively restricted on a continuous basis with basic housework, daily shopping, and mobility outside the home. As to social functioning, no restrictions are reported. Commenting on social functioning, the GP notes: “not able to socialize well.” In terms of assistance required with DLA, the GP reports: “Daughter helps with some domestic work.”

In the AR, the SW lists the appellant's mental and physical impairments that impact his ability to manage DLA as: physical -- spinal disc injuries C3/4, C4/5, C5/6, C6/7, C7/T1 that limit mobility daily and permanently; chronic pain to varying degree; mental health: adjustment disorder, depression symptoms.

In terms of ability to communicate, the SW assesses the appellant's speaking and hearing as good and reading and writing as poor, commenting that he has limited literacy skills and ability to hold a pen/pencil periodically difficult. She comments that the appellant has grade 4 completion.

As to mobility and physical ability, the SW reports the appellant uses an assistive device for walking indoors (cane/handrail), walking outdoors (cane) and climbing stairs (handrail). Standing is independent (time-limited) and lifting and carrying and holding are reported as continuous assistance from another person or unable for anything greater than 6.9 pounds, with maintaining/grip time-limited.

With respect to cognitive and emotional functioning, the SW assesses a moderate impact in six areas: bodily functions, emotion, attention/concentration, motivation, motor activity and other emotional or mental problems. A minimal impact is assessed in five areas impulse control, executive, memory, language, and other neuropsychological problems (query ADHD, ADD). The SW comments that the appellant only shaves 1x/week with difficulty bathing and washing hair due to spinal injury -- limited mobility has impact on self-esteem/mental health. She adds: “Mild/moderate symptoms of anxiety: excessive worry, psychomotor agitation, poor focus/concentration at times.” and “Ability to sustain focus/concentration/memory limited at times. Depressive symptoms-- loss of pressure, interest, and energy↓, s/t memory, poor appetite, difficulty sleeping. Periodic mild hostility, verbal but denies would act upon.”

Regarding assistance required to manage DLA, the SW provides the following assessments (her comments in parentheses):

Personal care: independent in all aspects except requiring periodic assistance for grooming and bathing (cannot lift arms over head -- i.e. brushing hair painful, shaving -- cannot tip head back -- painful).

Basic housekeeping: independent for laundry and requiring periodic assistance for basic housekeeping.

Shopping: independent for going to and from stores, making appropriate choices, and paying for purchases. Requiring periodic assistance for reading prices and labels (limited literacy) and carrying purchases home (>6.9 lbs requires assistance).

Meals: independent for meal planning, cooking and safe storage of food; requires periodic assistance for food preparation (chopping).

Paying rent and bills: requiring periodic assistance for banking (more complex or intricate mathematics/limited literacy skills).

Medications: independent in all aspects.

Transportation: independent in all aspects (with caution for getting in and out of vehicle).

The SW repeats that carrying groceries over 6.9 lbs. requires assistance. Walking for extended periods increases pain and decreases overall ability to function on independent activities of daily living.

In terms of social functioning, the SW assesses the appellant independent in the five listed areas: appropriate social decisions, able to develop and maintain relationships, interacting appropriately with others, able to deal appropriately with unexpected demands and able to secure assistance from others. The SW assesses the appellant having good social functioning with his immediate social network (barely meets criteria for good functioning: client struggles daily to meet/maintain positive relations). She reports marginal functioning with extended social networks (client's energies primarily focused on meeting basic needs – food, housing, etc.)

The SW reports that the appellant uses a cane to walk – periodic.

Under additional information, the SW writes:

“[The appellant] has permanent injury to spine that effects/limits his mobility on daily basis and causes chronic varying degree of pain. Physical disability impacts [appellant's] mental health mood. He is unable to return to f/t work and describes several stressors: finance, physical, limited literacy, housing, single parent: all impacting his ability to function as the above require his mental/physical energy [on an] ongoing basis”

In his supplementary statement at reconsideration, the appellant indicates that this was prepared by his advocate after a telephone conversation. Someone read it to him and any part that was not accurate has been fixed.

The appellant states that he has had five surgeries to try to address his condition, after each of which he had physiotherapy to try to help him function, particularly his head and neck. It was not helpful in dealing with his pain on a long-term basis. He also went to a pain clinic but they just told him that he is stuck with pain for the rest of his life.

He gets a lot of help from other people who help him because of his disability. He moved to [City] to be closer to his parents. Although they are old they try to help him out, doing his laundry for him for instance, because he can't handle it on his own. His daughter helps him with the dishes, because she knows what his limitations are. He has difficulty standing for any length of time. If he does the dishes, he has to take breaks all the time to relieve the pain from standing. That's why it takes him two hours just to do the dishes for two people. His daughter also helps him with his foot care because he cannot bend to clip his own toenails. He also gets help from people doing housekeeping. Someone else washes the floors and vacuums and wipes down the counters all the time because he can't do it due to his condition.

He goes shopping with anyone he can because he needs help shopping. He needs help reaching and grabbing. Because of the numbness he has in his hands due to his spinal cord injury, he drops things when he shops -- obviously this is a problem.

He refers to the equipment paid for by the WCB. Even with the bed assist, it takes him 5 minutes to get out of bed in the morning, much longer than it did before his injuries and much longer than it would take most people his age.

His limitations affect him in other ways. He does not bake or anything like that because it requires too much standing. He can only hold the phone to his ear for a limited amount of time, limiting how long

he can talk on the phone. Fishing is his passion, but he can't walk where it is not level anymore to go fishing. He has a limited ability to read. He can't read words over six letters and has troubles with some of the shorter words too.

In his Notice of Appeal dated 19 November 2012 the appellant writes that he has a severe disability that significantly affects his ability to do daily living activities. Because of the difficulties he has, he needs other people to help him.

At the hearing, in answer to questions, the appellant stated that:

- He lives with his 11-year-old daughter.
- He needed to find a new doctor, his current GP, because it became too expensive for him to travel to his former physician some distance away, who had been treating him for about 10 years. His current GP does not yet have all his medical records and was reluctant to sign on to anything about which he did not have hands-on knowledge about him.
- He reviewed an extensive list of medications that he takes exclusively for his pain management.
- He takes his cane with him at all times when he goes outside, using it about four times per week when his back goes out. When this happens he has to take a rest for at least 20 min.
- He uses the bed assist to pull himself out of bed. Depending on his back pain, this is necessary about twice a week.
- His daughter helps him with his shopping. He has to lean on a shopping cart to get around the store, his daughter will pull goods off the shelf and put them into the cart for him and store employees will help with heavier items (cases of pop) as well as carrying purchases to, and putting them into, his car.
- He cannot reach for things over his head. His home is organized so that everything is placed at eye level or below.
- He cannot do his laundry; his parents or uncle come over to do this for him.
- He has to put on his shirts over his head, already buttoned except for the top. His inability to do up buttons is due to the numbness in his hand as well as left arm sometimes feeling "useless." Because of pain caused by bending and his hand numbness, he cannot tie his shoe-laces. He uses an extended shoe-horn to put his shoes on already laced up.
- The WCB provides him with a personal care allowance of \$111/month and he uses this for someone to come in twice a month to do his housekeeping -- vacuuming, washing floors, etc.

The appellant also read from a letter from the WCB dated 31 August 2011 which listed a number of activities he was restricted from doing.

With the exception noted below, the panel finds that the new information provided by the appellant at the hearing is in support of the information and records that were before the ministry at the time of reconsideration, clarifying many aspects of the comments in the PR, AR and SR regarding the appellant's health condition and the help he gets for DLA. In particular, the appellant's testimony about the WCB allowance clarifies his reference at reconsideration that he gets help from people doing housekeeping and the SW's assessment of periodic help from others for basic housekeeping. The panel therefore admits the new information as evidence pursuant to section 22(4) of the Employment and Assistance Act. The panel does not admit as evidence the letter partially read out to the hearing from the WCB, as the overall context of the quoted passage was not clear.

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 the requirements in section 2 of the EAPWDA.

Specifically the Ministry determined that the information provided did not establish 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 did determine that he met the 2 other criteria in EAPWDA section 2(2) set out below.

The following section of the EAPWDA applies to this appeal:

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 following section of the EAPWDR applies to this appeal:

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.

Severity of impairment

In the discussion below concerning the information provided regarding the severity of the appellant's impairments, the panel has drawn upon the ministry's definition of "impairment," as set out in Section A of the PR. This definition consists of "cause" and "impact" components: "impairment is a loss or abnormality of psychological, anatomical or physiological structure or function [the cause] causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration [impact]." The cause is usually set out as a disease, condition, and syndrome or even by a symptom (e.g. pain). A severe impairment requires the identified cause to have a severe impact. The assessment of severity is therefore based on of the impact on daily functioning, in such areas as functional skill limitations, cognitive and emotional deficits, restrictions on the ability to manage DLA and assistance required.

The legislation provides that the determination of the severity of impairment is at the discretion of the minister. The reasonable application of this discretion involves taking into account all the evidence, including that of the appellant. However, the starting point must be medical evidence, with the legislation requiring that a medical practitioner identify the impairment and confirm that the impairment will continue for at least two years.

Physical impairment

In terms of physical functioning, the ministry in the reconsideration decision reviewed the diagnoses of the GP of cervical spinal injury, lower back pain and shoulder pain, noting that no impairment related to these conditions is described by the GP, while the SW describes physical impairment as spinal disc injuries C3/4, C4/5, C5/6, C6/7, C7/T1 that limit mobility daily and permanently; chronic pain to varying degree. The ministry reviewed the physical skill limitations reported by the GP (able to walk 2-4 blocks, etc.) The ministry noted that the appellant is able to do most aspects of mobility and physical abilities with continuous help to lift/carry/hold greater than 6.9 pounds and to lift overhead. A cane is used periodically to ambulate and a handrail is used to climb stairs. The ministry concluded that the functional skill limitations are not significantly restricted aside from lifting. The ministry therefore was not satisfied that the information provided is evidence of a severe physical impairment.

The position of the appellant, as argued by his advocate at the hearing, is that, while the GP has not described the severity of the appellant's impairments in section B of the PR, the evidence elsewhere in the record clearly demonstrates a severe physical impairment. The "big picture" provided by both the GP and the SW is that the appellant's cervical spinal injury and back and shoulder pain significantly restrict his ability to perform DLA. She also points to the SW's comment that the appellant has a permanent injury to his spine that effects/limits his mobility on a daily basis and causes chronic varying degrees of pain; this further substantiates a severe impact on daily functioning and demonstrates the severity of the appellant's impairment.

The panel considers it unfortunate that the GP did not complete section B of the PR, as this is where the ministry would look to other information concerning severity of impacts on daily functioning of the appellant's conditions. The panel also notes that the questions in the PR relating to physical functional skills (walking, climbing stairs, lifting and remaining seated) do not cover all the physical

skill limitations arising from the appellant's conditions. In addition to being limited to being able to walk 2-4 blocks and lifting < 6.9 lbs, he has a standing tolerance of 5 minutes, has difficulty bending over, cannot reach and lift anything above eye level and has a loss of manual dexterity due to numbness in his hands. While these additional functional skill limitations are described by the appellant and not specifically confirmed by either the GP or the SW, the panel considers they are consistent with the diagnoses and restrictions described by the two professionals. In addition to, and as a result of these functional skills limitations, the GP reports that the appellant is actively restricted on a continuous basis with respect to basic housework, daily shopping and mobility outside the home (see below), all of which indicates a severe impact by the appellant's medical conditions on his daily functioning. Taking all of this into account, the panel finds that the ministry was not reasonable in determining that a severe physical impairment had not been established.

Severity of mental impairment

In the reconsideration decision, the ministry noted that while the GP does not diagnose a severe mental health condition, he does indicate deficits to cognitive and emotional functioning in the areas of emotional disturbance, motivation and motor activity which he describes as "because of his pain he is depressed and irritable." Also continuous restrictions to social functioning are described as "not able to socialize well." The ministry also noted that the SW reports that impacts on daily functioning are mostly minimal to moderate and many impacts are related to pain (not to an identified mental impairment or brain injury) and there is no need for support or supervision with social functioning. The ministry concluded that the narrative is not supportive of a severe mental health condition that significantly limits the appellant's ability to function either continuously or periodically for extended periods. For these reasons the ministry determined that it was not satisfied that the information provided is evidence of a severe mental impairment.

The appellant's advocate, both in her submission at reconsideration and at the hearing, did not present any argument with respect to mental impairment. As the GP has not listed any mental health conditions as an impairment, and for the reasons given by the ministry, the panel finds that the ministry reasonably determined that a severe mental impairment had not been established.

Whether ability to perform DLA is significantly restricted

With respect to whether the information provided establishes that, in the opinion of a prescribed professional, the impairment directly and significantly restricts DLA either continuously or periodically for extended periods, the ministry noted that a severe impairment had not been established. The ministry reviewed the evidence relating to the appellant's ability to perform DLA, noting that the GP reported continuous restrictions to basic housework, daily shopping and mobility outside the home and restriction to social functioning is described as the inability to socialize well. The ministry also noted that the SW reports that many activities are performed independently or require periodic help such as to lift arms overhead to brush hair; she states that shaving is difficult, help is needed to carry groceries over 6.9 pounds and to chop food. Due to limited literacy, reading prices is effected as well as more complex or intricate mathematics. The SW also indicated that the appellant is independently able to perform all aspects of social functioning. The ministry stated that while it is clear that the appellant's functional limitations affect his ability to perform some DLA, overall the majority of DLA are performed independently or require little help from others. As such the ministry found that the

information from the prescribed professionals does not establish that impairment significantly restricts DLA either continuously or periodically for extended periods

The position of the appellant, as set out in his advocate's submission at reconsideration and at the hearing, is that the appellant's GP reported that the appellant's impairment directly and continuously restricts his ability to perform basic housework, daily shopping and his ability to be mobile outside of his home. The SW agrees, although she stated it in somewhat different terms. With respect to these three DLA, she makes the following points:

- Basic housekeeping: the SW indicated that the appellant needs significant help some of the time.
- Daily shopping: the SW noted that the appellant is in need of significant help due to his limited literacy as well as his limitations around carrying purchases home. The appellant himself has provided some additional details about his difficulties with shopping and his need for help. Since there is no reason for the ministry to ignore these additional details provided by the appellant, they should be given significant weight (citing *Hudson*). Both the GP and SW address the appellant's limitations as to lifting; obviously lifting is a part of shopping and thus lifting limitations affect a person's ability to shop.
- Mobility outside the home: the SW reported that the appellant relies on a cane, that his limited mobility is sufficiently significant to affect his esteem and mental health and that walking outdoors increases his pain and decreases his ability to perform DLA generally.

The advocate argues that the "big picture" provided by both these professionals is that the appellant's impairments significantly restrict his ability to perform these DLA on a continuous basis.

The panel will consider the restrictions to the appellant's ability to perform those DLA identified by the advocate, using the list of DLA set out in section 2 (1)(a) of the EAPWDR:

Shop for personal needs: the GP has identified this DLA as being actively restricted on a continuous basis. The SW assesses periodic assistance required and that carrying over 6.9 lbs requires assistance. The appellant adds that he cannot lift anything over eye level off a shelf and for that he requires the help of his daughter or store employee. While shopping, he needs to use a cart to lean on to get around the store. He needs the help of his daughter or a store employee to carry purchases to his car.

Perform housework to maintain the person's place of residence in acceptable sanitary condition: the GP has identified this DLA as being actively restricted on a continuous basis. The SW assesses periodic assistance required for basic housekeeping. The appellant explained at reconsideration that his daughter washes the dishes because of his limited standing tolerance and that someone else washes the floors and vacuums and wipes down the counters all the time because he can't do it due to his condition. At the hearing, the appellant's testimony was that the "someone else" was paid to do this work twice a month through a monthly allowance paid to the appellant for this purpose by the WCB. This indicates to the panel that the WCB considers the appellant restricted in his ability to manage this DLA on an ongoing basis

Move about indoors and outdoors: the GP has assessed the appellant's mobility outside the home as actively restricted on a continuous basis, with his ability to walk unaided limited to 2 to 4 blocks. The SW reports that he uses a cane periodically. The appellant has explained that he carries the cane with him at all times when outdoors, and has to resort to using it about four times a week when he is overwhelmed by back pain. Evidence of the extent to which he is restricted in moving about indoors is shown by the WCB finding that the appellant requires grab bars in the bathroom and the bed assist and paying for their installation.

The panel notes that the appellant is also restricted in the DLA of *perform personal hygiene and self care*, requiring the help of his daughter for foot care and the use of an extended shoehorn to put his shoes on.

Based on the foregoing, it is difficult for the panel to consider these restrictions to DLA as being anything other than significant and continuous. And as the restrictions to 3 DLA were, in the opinion of a prescribed professional, actively restricted on a continuous basis, as substantiated by the SW regarding the need for help, the panel finds that the ministry was not reasonable in determining that the information provided did not establish that this criterion had not been met.

Whether help is required to perform DLA

The position of the ministry 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. No assistive devices are required.

The position of the appellant is of the evidence shows that he requires help to manage his significantly restricted DLA. This includes the help from his daughter shopping, washing dishes and even clipping his toenails. Other help is provided for housekeeping through the WCB allowance. Others also provide help, such as his parents doing his laundry. He requires assistive devices, such as a cane and grab bars in the bathroom, to compensate for his impairment.

The evidence is that the appellant's ability to perform DLA is significantly restricted on a continuous basis. For the significantly restricted DLA the panel finds that the need for help has been demonstrated: due to his lifting and mobility restrictions, through WCB for someone to maintain his home in a clean and sanitary condition; due to his mobility and upper body limitations, he requires assistance for shopping; and for mobility he needs the use of a cane for outdoors and WCB-funded grab bars in the bathroom indoors. Therefore, the panel finds that the ministry was not reasonable in determining that the information provided did not establish that this criterion had not been met.

Conclusion

Having reviewed and considered all of the evidence and the relevant legislation, the panel finds that the ministry's decision that the appellant was not eligible for PWD designation was not reasonably supported by the evidence. The panel therefore rescinds the ministry's decision in favour of the appellant.