

### PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (the ministry) reconsideration decision of November 2, 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 the appellant's impairment is likely to continue for at least two 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; or that
- the appellant requires the significant help or supervision of another person, an assistive device, or the services of an assistance animal.

### 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 16, 2012. The application also included a self-report signed by the appellant on July 18, 2012.
- A letter and decision summary from the ministry to the appellant, dated August 30, 2012 advising the appellant that he had been found ineligible for designation as a PWD.
- A "to whom this may concern" note from the appellant's physician, dated October 24, 2012, stating that "This is to confirm that [the appellant] has pneumonia."

### *Diagnoses*

The appellant has been diagnosed by his physician with chronic obstructive pulmonary disease (COPD), degenerative disc disease, epilepsy, and depression.

### *Oral Testimony at Hearing*

At the appeal hearing the appellant sought to introduce oral evidence related to ankle pain and a possible, though unconfirmed, heart condition.

### *Admissibility*

The ministry took no position on admissibility of the new information. As these are potential new diagnoses that were not before the minister at the time of reconsideration, and as there is no supporting evidence or information from a prescribed professional related to these diagnoses, and in consideration of the restrictions imposed on admissibility of new evidence by s. 22(4) of the *Employment and Assistance Act*, the panel has decided not to admit this evidence. The balance of the appellant's testimony was admissible as being in support of the information and records that were before the minister at the time of reconsideration.

The appellant's advocate did submit a 2 ½ page document which the panel accepted as written argument.

The ministry relied on its reconsideration decision and did not submit any new evidence.

### *Mental Impairment*

- In both the PR and AR the physician has diagnosed the appellant with depression, which affects the appellant's memory, decreases his ability to concentrate, and causes difficulties with social interaction.

- In section B.4 of the AR the physician noted the appellant's depression caused a moderate impact on 2 of 14 categories of cognitive and emotional functioning, minimal impact on a further 5 of 14 categories, and no impact to 7 of 14 categories.
- In the PR the physician identified the appellant has having significant deficits in 3 out of 11 categories of cognitive and emotional function, but having no difficulties with communication.
- In the AR the physician described the appellant as fully independent with respect to the two DLA in EAPWDR s. 2(1)(b) that are specifically relevant to a person with a severe mental impairment – (i) decision-making with respect to activities, self-care, or finances, and (ii) social relations, communication, and interaction with others. The appellant manages his own finances, medications, and self-care, and is shown as being independent in 5 out of 5 aspects of social functioning.

### *Physical Impairment*

- The physician diagnosed the appellant with COPD, degenerative disc disease, epilepsy, and – more recently - pneumonia. The physician commented in the PR that “shortness of breath and pain interfere with all of his [DLA].”
- Functionally the physician noted in the PR that the appellant can walk unaided for 1 to 2 blocks, climb more than 5 stairs, lift 15 to 35 pounds, and can remain seated for less than 1 hour.
- In his self-report the appellant wrote that he can't walk more than 6 blocks without pain.
- At the appeal hearing the appellant said that he is out of breath after walking 2 blocks and has to stop to rest.
- At the appeal hearing the appellant acknowledged that his epilepsy is controlled by medication and that he has not had a seizure in approximately 2 years.

### *DLA*

- In the AR the physician noted that the appellant needs periodic assistance with lifting/carrying/holding, which impacts his ability to do his laundry, other basic housekeeping and shopping (carrying purchases home). Otherwise he indicated the appellant is independent with all other aspects of all other DLA.
- At the appeal hearing the appellant said that he can't do laundry because he has to walk to the laundromat which he can't do because of difficulty carrying the laundry, though in his self-report he had said that carrying his laundry was “difficult” rather than not possible. He also said that he had difficulty shopping because of his inability to carry his purchases. In response to a question from the ministry as to whether he had tried using a wheeled hamper or cart for carrying laundry, the appellant said that he didn't know such things were available.
- The appellant stated that he can't lift a pot from the stove for fear of dropping it on himself, so he is limited in his ability to cook for himself. In response to questions from the panel he acknowledged that he does prepare most of his own meals, even if he has to resort to making a sandwich.

### *Need for Help*

- In the AR the physician noted that the appellant needs periodic assistance with

lifting/carrying/holding.

- The appellant's evidence is that he receives periodic assistance from his niece or friends with respect to mowing his lawn, house cleaning, and the occasional meal.

## 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 argued that the impacts to cognitive and emotional functioning identified by the physician must be viewed cumulatively so that even though none of the impacts individually are "major", they collectively evidence a severe impairment.

The ministry's position is that the evidence does not establish that the appellant has a severe mental impairment. In the ministry's view, the legislation requires the impairment to be "severe", and cumulatively weighing "minimal" and "moderate" impacts does not equal a "severe" 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 fundamental basis for the analysis is the evidence from a prescribed professional.

Though the physician commented "difficulties with social interaction" in section B.4 of the AR, neither he nor the appellant have provided any evidence with respect to what these difficulties may be or how frequently they occur. The panel prefers the more detailed evidence from the social functioning section of the AR which does not indicate any difficulties with social functioning. The appellant did not provide any evidence as to how his depression limits his ability to perform DLA.

Since the evidence indicates that the appellant's mental impairment does not translate to significant difficulties in functional skills or in performing DLA, the panel finds that the ministry was reasonable in concluding that the appellant does not have a severe mental impairment.

**Severe Physical Impairment**

The appellant's position is that the appellant's COPD – which causes shortness of breath – and pain from his back affect all his DLA and together must constitute a severe physical impairment. The appellant has difficulty walking which also is a key element in all DLA. Finally the appellant argued that his pneumonia has reduced his abilities even further in the time since the PR, AR and self-report were submitted.

The ministry's position is that while it acknowledges that the appellant experiences some limitations as a result of his medical conditions, the appellant's functional skill limitations are more in keeping with a moderate degree of impairment, and the information provided does not establish a severe physical impairment.

*Panel Decision*

When asked about the inconsistency between the physician's evidence that the appellant can lift up to 35 pounds and the appellant's testimony that he is afraid to lift a pot from the stove, the appellant stated that his ability to perform DLA has been further limited by pneumonia since the PR and AR were completed, and that pneumonia is a chronic condition for him as he has had it approximately 6 times in his life – twice before he was 6 years old. On questioning by the panel the appellant acknowledged that prior to the present onset he last had pneumonia about 15 years ago. Section 2(2)(a) of the EAPWDA requires that a physical impairment has to be confirmed by the opinion of a medical practitioner as being likely to continue for at least 2 years. Since there is no medical evidence that the appellant's pneumonia is likely to continue for at least 2 years, its impacts on the appellant's current ability to perform DLA must be considered as not being relevant to the severity analysis. Accordingly, where the appellant's testimony differs from that in the AR, PR or self-report, and that difference can reasonably be attributed to the appellant's current diagnosis of pneumonia,

the panel has given more weight to the earlier evidence.

Since the evidence indicates that the appellant's physical impairments do not severely limit his functional skills, and do not prevent him from performing virtually all aspects of all DLA independently, the panel finds that the ministry reasonably concluded that the appellant does not suffer from 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*

In the PR the physician commented that shortness of breath and pain interfere with all the appellant's DLA. He has not, however, provided any detail in the AR as to what extent these conditions restrict most DLA. In the PR he indicated the appellant can lift up to 35 pounds, but in the AR he wrote that the appellant "can't lift or carry, depends on his hands." There is no indication as to how often this need for help arises or for how long. The difficulty with lifting and carrying translates into impacts on 3 DLA: basic housekeeping (including laundry), shopping (carrying purchases home), and, according to the appellant's oral evidence, cooking (lifting hot pots). There is no evidence that the appellant cannot use a wheeled cart for transporting purchases or laundry. Even if he cannot use such a cart, in the panel's view the restrictions to some aspects of only 3 DLA does not constitute a direct and significant restriction to the appellant's ability to perform DLA. Accordingly, the panel finds that the ministry reasonably concluded that the appellant has not satisfied the legislative criterion in section 2(2)(b)(i) of the EAPWDA.

### **Help with DLA**

The appellant's position is simply that the appellant requires the significant help or supervision of another person to perform DLA.

The ministry's position is that since it has not been established that DLA are significantly restricted, it cannot be determined that help is required.

On the evidence, the appellant receives periodic assistance from his niece or friends with respect to mowing his lawn, house cleaning, and the occasional meal. This limited degree of assistance cannot be said to constitute the "significant help or supervision of another person" as required by s. 2(3)(b)(ii) of the legislation. Based on the evidence that the appellant often loses his balance and falls in the shower, he likely could benefit from the use of a grab bar in the shower. Otherwise, there is no evidence that the appellant uses any assistive devices or that he requires or would benefit from



having 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*

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.