

## PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development (“the ministry”) dated November 13, 2012 which held that the appellant did not meet 3 of the 5 statutory requirements of section 2 of the Employment and Assistance for Persons with Disabilities Act for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that a medical practitioner has confirmed that the appellant has an impairment that is likely to continue for at least 2 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, in the opinion of a prescribed professional, the appellant requires help, as it is defined in the legislation, 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 reconsideration included the following.

- A PWD application comprised of: a Self-report (SR) completed by the appellant and dated June 5, 2012; a Physician Report (PR) dated June 6, 2012 completed by a general practitioner who had met the appellant once at the time of completing the PR; and, an Assessor Report (AR) dated June 13, 2012 and completed by the same general practitioner.
- A Request for Reconsideration signed by the appellant on October 1, 2012.

### *Diagnoses*

The appellant has been diagnosed by a general practitioner with chronic anxiety, chronic pain syndrome (left hip/leg and back), and previous problem with excessive alcohol intake.

### *Additional Evidence on Appeal*

On appeal, the appellant submitted the results of November 20, 2012 electro diagnostic testing and written testimony dated December 9, 2012 in which he provides further description of his medical condition. As the new evidence relates to medical conditions diagnosed in the PWD application the panel determined that it was in support of the information and records before the ministry at reconsideration and thus admissible in accordance with section 22(4) of the Employment and Assistance Act.

### *Physical Impairment*

- In the PR the general practitioner reports that, as a result of a fall that resulted in no apparent fractures, the appellant has chronic pain in his back and left hip, which together with his anxiety has left him unable to work for the last 2-3 years. In the AR, the physician also notes neck pain.
- Functional skills are reported in the PR as the ability to walk 1 to 2 blocks unaided on a flat surface, climb 5+ steps unaided, lift under 5 lbs, and remain seated for less than 1 hour.
- In the AR, the appellant is reported as independent with all listed aspects of mobility and physical ability – walking indoors and outdoors, climbing stairs, standing, lifting, and carrying and holding.
- In his written submissions, the appellant reports that his sleep is limited to 2-5 hours a night due to hip and back pain and that the pain has been ongoing for decades but has been intolerable for the last 5 years leaving him unable to work.
- The appellant reports having a bone growth in his left hip and nerve damage in both legs which is worse in the left leg leaving that leg numb and that he has had a number of falls and now requires a cane to walk to prevent falls.
- The “interpretations and conclusions” of the electro diagnostic testing (motor and sensory nerve conduction and needle EMG examination) are: 1. Early axon loss sensory motor polyneuropathy in the left leg. 2. Poor voluntary effort with needle examination. Minimal acute denervation left EDB (extensor digitorum brevis) which I do not consider significant.
- The appellant states that his physician has not provided all of the available information, that past medical records are forthcoming, and that an MRI scan is scheduled for March 2013.

*Mental Impairment*

- In the PR, the appellant is reported to have had severe anxiety for decades and to drink up to 3 hours daily, more on weekends.
- The general practitioner reports a good ability to communicate.
- In the PR, a significant deficit with 1 of 11 listed aspects of cognitive and emotional function, emotional disturbance, is reported and in the AR, both emotion and bodily functions are reported to have a major impact on daily functioning. A moderate impact is indicated for attention/concentration with the remaining 11 listed aspects reported as having either minimal or no impact on daily functioning. The physician notes that the appellant usually sleeps poorly with an average of 4 hours of sporadic sleep and that chronic fatigue leads to poor concentration.
- The general practitioner indicates that the appellant independently manages all 5 listed aspects of social functioning and has good functioning with immediate social networks but that he has marginal functioning with extended social networks and tends to avoid mixing with strangers or crowds.
- The appellant reports that he sees a psychiatric nurse and that anxiety medication sometimes helps but that some days he can hardly walk out the door.

*DLA*

- The general practitioner reports that the appellant independently manages all listed tasks for the DLA mobilizing indoors and outdoors, personal care, basic housekeeping, shopping, meals, paying rent and bills and social functioning. The physician does note, however, that all tasks associated with the DLA meals are done for the appellant with no further explanation.
- Respecting the final DLA, transportation, the appellant independently manages getting in and out of a vehicle but due to anxiety takes significantly longer with the remaining two tasks – using public transit and using transit schedules. A friend helps with transportation to appointments.
- The appellant reports that he cannot vacuum due to nerve pain in his left leg and that he is unable to take a bath due to hip pain and must, when showering, rest against the wall.

*Need for Help*

- The general practitioner reports that the appellant uses a cane when the left leg pain is bad and that a friend helps with transportation to appointments etc.
- The appellant reports the daily use of a cane.

## PART F – Reasons for Panel Decision

The issue on 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, in the opinion of a prescribed professional, directly and significantly restricts him from performing DLA either continuously or periodically for extended periods thus necessitating the need for help with 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.

(4) The minister may rescind a designation under subsection (2).

### EAPWDR

2 (1) For the purposes of the Act and this regulation, **"daily living activities"**,

- (a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:
  - (i) prepare own meals;
  - (ii) manage personal finances;

- (iii) shop for personal needs;
- (iv) use public or personal transportation facilities;
- (v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
- (vi) move about indoors and outdoors;
- (vii) perform personal hygiene and self care;
- (viii) manage personal medication, and

(b) in relation to a person who has a severe mental impairment, includes the following activities:

- (i) make decisions about personal activities, care or finances;
- (ii) relate to, communicate or interact with others effectively.

(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.

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

### **Severe Physical Impairment**

The appellant's position, based on his written submissions, is that as a result of hip and leg pain he is severely impaired to the point of requiring a cane for walking.

The ministry's position as stated in its reconsideration decision is that the physical functional skills reported by the physician are more in keeping with a moderate degree of impairment. Additionally, the ministry notes that the PWD application is not intended to assess employability or vocational abilities and employability is not an eligibility criterion for PWD designation.

### *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 notes that the legislative criteria respecting daily functioning do not consider a person's employability.

The panel finds that a medical practitioner, the appellant's general practitioner, has diagnosed the appellant with chronic pain syndrome affecting his left hip and leg, back, and neck which limits the appellant's functioning in terms of the distance he can walk unaided (1-2 blocks), the amount of weight he can lift (under 5 lbs), and the time he can remain seated (less than 1 hour). However, the appellant's physician also clearly identifies the appellant as independently managing all aspects of physical mobility and, but for noting the use of a cane when left leg pain is bad without further explanation, as well as all physical tasks of DLA. While the appellant asserts that he requires the use of a cane for all walking, this level of impairment is not supported by the medical information from the general practitioner or the diagnostic testing report which identified "early axon polyneuropathy" in the left leg and minimal foot denervation which was not considered significant. Although heavy consumption of alcohol is reported by the physician, there is no evidence of any resulting limitation to physical functioning. Based on this analysis, the panel finds that the ministry reasonably viewed the appellant's physical limitations as being more in keeping with a moderate impairment and reasonably determined that a severe physical impairment was not established under section 2(2) of the EAPWDA.

### **Severe Mental Impairment**

The appellant's argument appears to be that longstanding severe anxiety has resulted in a severe mental impairment which leaves him barely able to leave his home some days.

The ministry's position is simply that a severe mental impairment has not been established by the evidence provided respecting the appellant's cognitive and emotional functioning

### ***Panel Decision***

The appellant has been diagnosed by a medical practitioner with chronic anxiety and previous problem with excessive alcohol intake. Additional narrative from the physician indicates that the appellant currently abuses alcohol though no impact on cognitive or emotional functioning is attributed to alcohol use. The physician reports that the appellant has one significant deficit in terms of cognitive and emotional functioning, namely emotional functioning related to anxiety, which has a major impact on the appellant's daily functioning. Bodily functions, specifically sleeping problems, are also reported to have a major impact on daily cognitive functioning though the source of this problem is identified by the physician as physical pain which disrupts sleep, rather than the appellant's mental impairment (anxiety). The appellant's evidence is that although anti-anxiety medication is sometimes effective and he is being treated by a psychiatric nurse, he is sometimes barely able to leave his home. Despite the noted daily impact on emotion and sleep, the physician reports that the vast majority of aspects of cognitive and emotional functioning either minimally impact or have no impact at all on the appellant's daily functioning. Additionally, with the exception of an impact on the appellant's ability to use public transit and mix with strangers or be in crowds, his anxiety is not identified by the physician as having any impact on the ability to perform DLA. Further, the appellant is reported as having good communication abilities, independently managing all aspects of social functioning, and as having no difficulties making decisions respecting his personal care or finances. Based on the foregoing analysis, the panel concludes that the ministry reasonably determined that there is not enough evidence to establish a severe mental impairment under section 2(2) of the EAPWDA.

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

The appellant's position is that he requires daily use of a cane for walking, is unable to vacuum due to pain, must rest on the wall when showering, and is some days barely able to leave his home.

The ministry's position is that a direct and significant restriction in the ability to perform DLA, either continuously or periodically for extended periods, is not established by the physician's evidence that the appellant independently manages the majority of DLA independently, including social functioning.

The legislation requires that the minister be satisfied that, in the opinion of a prescribed professional, a person is directly and significantly restricted in his or her ability to perform the prescribed DLA either continuously or periodically for extended periods. The evidence of a prescribed professional, the appellant's general practitioner, is that the appellant requires the use of a cane to mobilize when the left leg pain is bad but that the appellant is otherwise able to independently walk 1-2 blocks. The physician did not provide any information describing how often the appellant's leg pain is bad. The physician also reports that the use of public transportation is restricted due to the appellant's anxiety. The physician indicates that all tasks associated with the DLA meals are performed by someone other than the appellant but that the appellant is independent for these tasks, leading the panel to conclude that although the appellant does not need assistance with meals, his living arrangements result in this assistance. Apart from the noted restrictions with walking and the use of public transportation, all other listed tasks of DLA are managed independently without restriction. In view of the level of independence performing DLA reported by the physician, the panel finds the ministry reasonable in not being satisfied that the appellant was, in the opinion of a prescribed professional, directly and significantly restricted in his ability to perform DLA, continuously or periodically for extended periods as required by s. 2(2)(b)(i) of the EAPWDA.

#### **Help to perform DLA**

The appellant's position is that he requires the daily use of an assistive device, a cane, for walking.

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

The evidence of the prescribed professional establishes that the appellant requires the use of a cane when his leg pain is bad and that he requires the assistance of another person with transportation due to anxiety. However, the use of an assistive device or need for the assistance of another person does not, in and of itself meet the legislative criterion respecting help. The need for assistance from another person or an assistive device must arise from direct and significant restrictions with DLA. The panel finds that as direct and significant restrictions in the appellant's ability to perform DLA have not been established, the ministry reasonably concluded that 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 decision which held that the appellant was not eligible for PWD designation was reasonably supported by the evidence, and therefore confirms the decision.