

## PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development (“the ministry”) dated December 5, 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) signed by the appellant on July 25, 2012, a Physician Report (PR) dated July 25, 2012 completed by the appellant's general practitioner (Dr M) since 1996 and an Assessor Report (AR) dated August 30, 2012 and completed by the same general practitioner.
- A July 27, 2012 radiology report describing a CT scan of the appellant's chest. It concluded 'No significant mediastinal or hilar lymphadenopathy is identified. However, right hilar and subcarinal lymph nodes are borderline measuring 1 cm short-axis diameter. The heart is normal in size. No pericardial or pleural effusion is identified.'
- A July 27, 2012 radiology report describing a CT scan of the appellant's lumbosacral spine. The impression relating to the appellant's lower back pain states: 'Multi-level degenerative disc changes with accompanying endplate osteophytes and hypertrophy and hypertrophy of the posterior facet joints and ligaments. Spinal stenosis is suspected at L2-L3. Bilateral foraminal narrowing is present at L4-5.'
- A report of consultations for the appellant on May 6 & 9, 2012. On May 6, 2012 he was seen for nausea and vomiting and diagnosed with acute diabetic ketoacidosis. On May 9, 2012 he was again seen for acute diabetic ketoacidosis.
- A one page hand-written note from the appellant requesting an extension of his reconsideration application.
- A three-page handwritten note from the appellant which states:
  - An x-ray shows the ball of his hip joint and the hip socket are completely deteriorated and will require surgery. This condition is extremely painful. As noted by his doctor he must use a cane to walk indoors and out so he cannot walk one to two blocks 'unaided.'
  - Whereas a normal person would take five seconds to climb five stairs he requires 12 times longer, or one minute. It is also extremely painful. This indicates a severe physical impairment.
  - His physician reported continuous restricted mobility. He needs help every day walking inside and outside. In addition to the need for his cane he needs help putting on underwear, socks, pants and boots/shoes every day.
  - He needs a safety bar to get in and out of the bathtub as well as a raised toilet seat. He states that both are assistive devices.
  - He cannot lift or carry due to his back pain.
  - His back and hip problems make it impossible to work and support his family.
  - When he lifts any amount of weight he gets severe pains from his spinal stenosis. If he lifts anything he cannot walk the next day and sometimes up to a week afterwards.
  - He cannot climb a ladder or stand or sit for any length of time and feels he is unemployable. He is in constant and severe pain.
  - He noted that another CT scan had been ordered and will follow.

*Evidence provided at the hearing:*

The appellant provided the following information:

- He felt the form wasn't filled out properly or completely by Dr M.

- The ministry ignored the fact that his doctor said he needed a cane.
- He requires a cane to go anywhere. He disagrees that he can walk any distance 'unaided.' He hasn't walked 2 blocks in 2 years.
- His back is worse some days more than others. Walking is a real problem. He spent two days in bed last week. Two to three times a month he is bed-ridden from one day to a week.
- He doesn't do any lifting.
- His three sons help him with snow removal and lifting laundry.
- His hip is a separate problem from his back although his hip aggravates his back. He might get surgery in a year or so.
- He has new radiology reports but they had not been submitted to the tribunal. He declined an offer to request an adjournment to obtain them.

### *Diagnoses*

The appellant has been diagnosed by Dr M with diabetes, COPD, multi-level degenerative disc disease (DDD) with spinal stenosis at L2-3, end-stage arthropathy of his left hip, and an 8mm right pulmonary nodule.

### *Physical Impairment*

- In the PR Dr M reports that the appellant has constant low back pain, left hip pain and has been referred for hip replacement. He is not a surgical candidate for his DDD therefore it is likely to continue for two years or more.
- Where asked to provide height and weight "if relevant," Dr M reported a height of 5'8 and weight of 165 lbs.
- He requires 32 units of insulin daily which Dr M reports interferes with his DLA. This medication will be required for life.
- He requires a walking stick.
- Functional skills reported in the PR indicate that the appellant can walk 1 to 2 blocks unaided, climb 5+ steps unaided, sit for less than one hour and cannot lift.
- Regarding Mobility and Physical Ability, the appellant is reported in the AR as:
  - Using assistive device for walking indoors and out ('uses cane for mobility')
  - Takes significantly longer than typical to climb stairs ('very slow')
  - Requires continuous assistance for lifting, carrying and holding ('unable to lift carry due to back pain')
  - The appellant reports that:
    - Whereas a normal person would take five seconds to climb five stairs he requires 12 times longer, or one minute. It is also extremely painful.
    - An x-ray shows the ball of his hip joint and the hip socket are completely deteriorated and will require surgery. This condition is extremely painful. As noted by his doctor he must use a cane to walk indoors and out so he cannot walk one to two blocks 'unaided.'
    - He cannot lift or carry due to his back pain.
    - He doesn't do any lifting.
    - His three sons help him with snow removal and lifting laundry.
    - He needs help every day walking inside and outside
    - His back is worse some days more than others. Walking is a real problem. He spent two days in bed last week. Two to three times a month he is bed-ridden from one day to a week.
    - He has constant pain in his lower back, hip and leg.
  - The radiology report notes: 'Multi-level degenerative disc changes with accompanying endplate

osteophytes and hypertrophy and hypertrophy of the posterior facet joints and ligaments. Spinal stenosis is suspected at L2-L3. Bilateral foraminal narrowing is present at L4-5.'

- Regarding Personal Care, the AR states:
  - He takes significantly longer than typical with:
    - Dressing ('has to get help [unreadable] putting on socks + pants')
    - Bathing ('would need a safety bar')
    - Transfers in/out of bed, and
    - Transfers in/out of chair ('takes longer to get up in the am. Takes more time getting up from chairs.')
  - The appellant reports that he needs help putting on underwear, socks, pants and boots/shoes every day.
- Regarding Basic Housekeeping the AR states that his wife does most of it.
- With Shopping the appellant is reported in the AR as takes significantly longer than typical to go to/from stores and carrying purchases home ('usually drives to & from stores; uses carts + vehicle to bring purchases home').
- With respect to Transportation the appellant is reported to take significantly longer than typical with getting in/out of a vehicle ('needs time to get in and out of vehicle').
- The AR reports that assistance is provided by the appellant's family.
- The appellant states that his three sons help with lifting, snow removal etc.
- The AR states that he requires a cane, a raised toilet seat and safety bars in the bathroom.

In the PR, Dr M found the appellant continuously restricted in mobility outside the home and unrestricted or unknown restriction in eight of nine categories.

#### *Mental Impairment*

- There is no evidence of a mental impairment.

#### *DLA*

Examining the evidence in light of the DLA categories set out on the EAPWDR the following is noted:

- Prepare own meals – independent.
- Manage personal finances – independent.
- Shop for personal needs – independent with three of five categories, needs to drive to/from stores and uses cart/vehicle to carry purchases home. Cannot lift.
- Use public or personal transportation facilities – needs extra time to enter/exit vehicle; does not use public transit.
- Perform housework to maintain the person's place of residence in acceptable sanitary condition – his wife does this. Cannot lift.
- Move about indoors and outdoors – requires a cane, takes significantly longer to climb stairs and walk anywhere. Causes much pain.
- Perform personal hygiene and self-care – needs help dressing, takes significantly longer get in/out of bed and chairs.
- Manage personal medication – independent.

*Need for Help*

- Dr M reports that the appellant currently uses a cane daily, a cart when grocery shopping and requires a safety bar and raised toilet seat.
- The appellant reports that he cannot walk without his cane.

At the hearing, the ministry relied on its reconsideration decision but did not provide additional evidence.

## 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 is that his back and hip problems are a severe impairment which restricts his ability to walk, lift, dress himself, work, or stand/sit for any length of time.

The ministry's position is that the medical information provided indicates a moderate impairment, not a severe impairment and that the appellant's self-reported restrictions on working are not applicable to the PWD application.

### *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, Dr M, has diagnosed the appellant with diabetes, COPD, multi-level degenerative disc disease (DDD) with spinal stenosis at L2-3, end-stage arthropathy of his left hip, and an 8mm right pulmonary nodule. Of primary relevance to the PWD application is the appellant's hip and lower

back pain. No restrictions to function or DLA were ascribed to the appellant's lung problems or diabetes.

Accordingly, the panel will consider the reasonableness of the ministry's decision respecting severity of physical impairment based on the evidence respecting the appellant's hip and lower back pain.

The appellant described the pain and limitations resulting from his hip and back, which were reflected in the PR and AR, in terms of the time it takes to walk and climb stairs, as well as the assistance he requires with dressing and lifting.

Despite the appellant's difficulty with mobility and lifting, the required use of a cane, safety bars, raised toilet seat, the ministry was reasonable in finding that a severe impairment does not exist. The appellant is still able to be mobile and the extra time required to walk or climb stairs or the inability to lift is not indicative of a severe impairment. While the level of pain experienced by the appellant is unfortunate, the question before the ministry is one of physical functionality. The ministry's conclusion is also substantiated given his level of independence with most DLA.

### **Severe Mental Impairment**

The ministry was reasonable in finding that a severe mental impairment did not exist. There is no evidence or diagnosis of a mental impairment.

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

The appellant's position is that he is restricted in his DLA from his lower back and hip problems.

The ministry's position is that Dr M found no or unknown restriction to 9 of 10 daily living activities and continuous restriction to mobility outside the home. The ministry noted that, acting as the assessor, Dr M reported that the appellant was independent with all daily living activities but required occasional help with clothing and took longer to transfer in/out of bed, chair and vehicle.

The panel finds the ministry was reasonable in this conclusion. Dr M reported both as the appellant's physician and his assessor. As his physician he found him restricted only on mobility outside the home. This was confirmed by the appellant and Dr M acting as assessor. However, the appellant is mobile with the use of his cane, although it causes him much pain.

His restriction on lifting is applicable to housework and shopping for personal needs. However, Dr M found him 'unknown' in this category in the PR, and that his wife does most of the housekeeping in the AR. For shopping, Dr M found him 'unrestricted' in the PR and noted difficulty driving to/from stores and the requirement for a cart/vehicle to transport purchases home. The report did not make it clear whether he was constrained from performing these DLA due to his condition or whether his wife does these as part of her normal routine. It was reasonable for the ministry not to find restrictions in these categories.

With respect to perform personal hygiene and self-care, Dr M found him unrestricted in the PR but noted that he takes significantly longer than necessary with dressing and bathing. He needs help putting on some clothing, needs a safety bar in the bath and has difficulties with transfers in and out of bed and chairs. In the other four of eight categories he is independent. Again, the ministry was reasonable in not finding that his impairment directly and significantly restricts the appellant's ability to perform this daily living activity when looking at the evidence as a whole, which points to a reasonable level of independence.



The panel concludes that the noted restrictions in the appellant's ability to perform some aspects of some DLA were reasonably viewed by the ministry as not constituting 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 criterion of s. 2(2)(b)(i) of the EAPWDA.

### **Help to perform DLA**

The appellant's position is that he requires the use of assistive devices and the significant assistance of another person to perform DLA.

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, although it noted the need for a cane and safety bar.

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 the 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 decision which determined that the appellant was not eligible for PWD designation was reasonably supported by the evidence, and therefore confirms the decision.