

## PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development (the ministry) dated 07 February 2013 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, while the information provided established that the appellant has a severe physical impairment, it had not been established that in the opinion of a prescribed professional, the impairment

(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.

In addition to finding that a severe impairment had been established, the ministry did determine that the appellant satisfied the other 2 criteria: (A) he has reached 18 years of age; and (B) 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 29 October 2012 and received by the ministry on 13 November 2012. The Application contained:
  - The appellant's Self Report (SR1).
  - A Physician Report (PR) dated 29 October 2012, completed by the appellant's general practitioner (GP) who has known the appellant 6 months and seen him 2 - 10 times in that period..
  - An Assessor Report (AR1) dated 29 October 2012, completed by the same GP.
2. The appellant's Request for Reconsideration, dated 04 February 2013, to which he attaches a "To whom it may concern" letter (SR2) describing his restrictions in performing DLA.

The appellant's Notice of Appeal was dated 14 February 2012.

Prior to the hearing, the appellant sent to the Tribunal an undated "To whom it may concern" letter (AR2) from his GP describing the appellant's limitations with DLA.

In the PR, the GP diagnoses the appellant with cardiomyopathy, recurrent arrhythmias, cardiovascular CHF/ventricular thrombosis, diabetes mellitus and ischaemic heart disease (all with onset March 2011).

The panel will summarize the evidence from PR, AR1 and AR2, and the SRs, relating to the appellant's impairments as it relates to the PWD criteria at issue.

### Ability to perform DLA

#### *General restrictions*

PR:

The GP reports that due to his medical conditions "it is impossible for the appellant to do any exertion and heavy work."

The GP indicates that the appellant has been prescribed medication that interferes with his ability to perform DLA, listing medications for the clot in his heart.

Regarding functional skills, the GP assesses the appellant able to walk 1 to 2 blocks unaided, climb 2 to 5 steps, no lifting and with no limitation to how long he can remain seated.

The GP also reports that the appellant has a clot in right groin and has "a cardiac ejection fraction of 15% only, which makes him short of breath very quickly on any activity."

#### *Mobility and physical ability*

AR1:

The GP reports that the appellant "gets easily tired and feels weak on daily life activities."

The GP reports that the appellant is independent for walking indoors, walking outdoors, and standing; continuous assistance from another person is required for climbing stairs, lifting and carrying and holding, with the comment: "[Appellant] gets very easily tired and fatigued with normal daily activities."

*Other DLA*

## Personal care:

AR1: The GP assesses the appellant independent in all aspects.

SR2: The appellant writes:

"In the mornings I cannot take a bath as getting into and out of the tub is an impossibility as I cannot raise myself out of the tub using my legs..... I am left to shower and that must be done quickly as not to lose the ability to stand or balance due to the pain of standing. By the time I have finished showering I am completely out of breath and feeling weak and needs to rest. To dry I must be seated as the pain in my legs and right foot are excruciating and I am very winded..... To ease the pain and to catch my breath and to allow the swelling to go down I need to lay down with my feet and legs raised for 30 minutes"

## Basic housekeeping:

AR1: Assessed as independent in all aspects.

AR2: The GP states that the appellant "is unable to do basic/essential housekeeping activities like mopping, vacuuming, cleaning bathrooms and shoveling snow."

SR2: The appellant writes:

"I cannot sweep or wash the floors and vacuuming is a thing of the past. I must have someone do these things as I cannot stand long enough to do them and physical effort causes me chest and arm pain as well as massive swelling in my right foot and leg. I am left short of breath as well. I can over a day do two loads of laundry taking extended breaks in between each load for the swelling to go down and the pain to subside even after taking further pain medication. But for the most part I try and get help with it or keep it to one load."

## Shopping:

AR1: Assessed as requiring continuous assistance from another person or unable for going to and from stores and carrying purchases home; assessed as independent for reading prices and labels, making appropriate choices, and paying for purchases.

AR2: The GP states that the appellant "is also unable to walk distances especially going grocery shopping and also unable to go from one store to another on his own."

SR2: The appellant writes:

"If I need to go shopping once again must have someone drive me and get them to park as close to the entrance of the store as possible. I can only walk half of a block without help is my foot and legs swell and I have shortness of breath that it becomes impossible for me to walk without assistance i.e. A shopping cart or someone's arm to lean on. At if the store or mall does not have seating for me to rest I ask someone to get whatever is on my list and I wait in the car..."

## Meals:

AR1: Assessed as independent in all aspects.

SR2: The appellant writes that after he gets a quick cup of coffee and breakfast, he has to sit down as the pain in his legs and the swelling has started again. By the time he has cleaned up the dishes once again he has to lay down and elevate his legs for 30 minutes. To this point in his day he has not needed the assistance of someone else but by now he is taking pain medication and his legs are swollen and sore. Lunch he can make on his own without much difficulty but preparing supper is a much different story as he must plan everything out so as not to overly exert himself or to stand for

any length of time from cooking to clean-up. He states that he must take many breaks and if he pushes it too much he is too tired and sore and does not want the food and is unable to do the cleanup either. It may take him hours to get the cleanup done. To overcome this he has assistance in cooking supper and with the cleanup.

Pay rent and bills:

AR1: Assessed as independent in all aspects.

Medications:

AR1: Assessed as independent in all aspects.

Transportation

AR1: Assessed as independent in all aspects.

SR2: The appellant writes:

"If I plan to go out for a doctor appointment I must have someone drive me as I cannot take public transportation. It is too far to walk and my right leg and foot swell and the pain is too great to make it to the closest bus stop. I cannot catch my breath and again am very weak from the exertion and even when the bus gets to where I am going I have great difficulty in getting to the office where I have the appointment. By the time I have made it to the office I once again am in need of rest and pain medication. Because of the poor circulation in my right foot and leg in the winter I cannot keep them warm when I am outside. If I get bumped or bump into something I get large bruises that very painful to the touch. As such I have given up on public transportation and have to rely on family members for rides and if I can't make these arrangements I have to change the appointments because I do not have enough money to take a cab.

General comments:

AR1: The GP writes that the appellant "is able to manage his daily living activities in his house with proper rest between the activities. Outdoor activities are very limited and [he] needs assistance."

SR1: The appellant writes: "I get very fatigued and if I try to do even small things I get shortness of breath."

*Social functioning:*

No assessments provided.

Help required to perform DLA

PR: The GP indicates that the appellant does not require any prostheses or aids for his impairment.

AR1: The GP states that the appellant "has a sister who helps him in his daily outdoor activities."

AR2: The GP also states that the appellant "usually needs help to do his grocery shopping. All outdoor activities are very limited and [the appellant] needs assistance to carry them on."

The panel notes references to help required in the SR2 passages cited above relating to meals, shopping and transportation.

At the hearing, the appellant and his advocate in their opening remarks and in answer to questions

gave the following testimony:

- The advocate read from a letter from the Canada Pension Plan (CPP). The appellant was denied CPP disability benefits because of his employment/income history, but the letter indicated that the medical information he had provided has established a severe heart condition and a severe arterial condition, satisfying CPP that he was incapable of any type of employment.
- The appellant stated that he receives help from his mother or sister or daughter for grocery shopping, driving him to medical appointments and doing heavy housework. All of them have full-time jobs, and are available to help him only after work, or on weekends when they do not have other commitments. He has had to reschedule or cancel appointments to one of his three doctors or for tests at a hospital when one or another of these relatives is not available to drive him to an appointment.
- The appellant noted, and the ministry confirmed, that without PWD designation he cannot access the HandyDART service.
- The appellant stated that, as long as he gets a ride, he will go into a store to pick up his prescription medications, but he is not able to walk the aisles to shop for groceries.
- He stated that he lives in a basement suite and it is his responsibility to keep the walkway to the suite clear of snow. As he is unable to shovel snow, he must call someone to have it done for him, usually his sister.
- The appellant said that, due to his difficulties standing for any length of time, he finds himself restricted to meals of sandwiches and canned soup and "other junk." As a result, he is not getting the nutritious diet he needs for his medical condition.
- He stated that, when discussing the original PWD application form with his GP, he answered simply yes or no to whether he could do an activity, not realizing that he had the option of describing that it might take him significantly longer than typical.

The ministry stood by its position at reconsideration.

The ministry did not object to the admissibility of the letter from the GP (AR2) or to any of the testimony presented at the hearing. The panel finds the letter from the GP and, with the exception noted below, the appellant's testimony at the hearing are in support of information that was before the ministry at reconsideration. This evidence clarifies and elaborates upon the nature of the restrictions to the appellant's ability to perform DLA and the resulting help required. The panel therefore admits the new information as evidence pursuant to section 22(4) of the Employment and Assistance Act. The panel did not admit as evidence the contents of the CPP letter, as it was not relevant: the ministry had already determined a severe impairment and employability is not a criterion for PWD designation.

The panel notes some inconsistency between the DLA restrictions reported in AR2 and those tabulated in AR1 (e.g. "unable to do basic/essential housekeeping activities like mopping, vacuuming, cleaning bathrooms and shoveling snow" in AR2 vs. "independent" in AR1.) However, the panel finds that the restrictions described in AR2 are consistent with the functional skills limitations reported in the PR (e.g. "no lifting", precluding mopping, vacuuming, etc.) Accordingly, the panel can find no reason not to rely on the evidence provided by the GP in AR2.

## 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 while the information provided established that the appellant has a severe physical impairment, it had not been established that in the opinion of a prescribed professional, the impairment

- (i) directly and significantly restricts her ability to perform daily living activities either continuously or periodically for extended periods; and,
- (ii) as a result of those restrictions she requires help to perform those activities.

In addition to finding that a severe impairment had been established, 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 (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.

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.

### Significant Restrictions to DLA

The ministry's position is that there is not enough evidence from the general practitioner to establish that the appellant's impairments significantly restrict his ability to manage the majority of her DLA, either continuously or for extended periods.

The appellant's position is that he is directly and significantly restricted in a number of DLA.

The panel notes that, according to the legislation, the direct and significant restriction in the ability to perform DLA must be a result of a severe impairment, a criterion which the ministry has determined has been established, and be in the opinion of a prescribed professional. This does not mean that other evidence should not 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". Accordingly, the panel will examine the evidence relating to each DLA for which the GP, the appellant's prescribed professional, has specifically noted restrictions, using the list of DLA set out in section 2(1) of the EAPWDR:

- Shop for personal needs: the GP has assessed the appellant requiring continuous assistance from another person or unable for going to and from stores and carrying purchases home.
- Perform housework to maintain the person's place of residence in acceptable sanitary condition: The GP wrote that the appellant "is unable to do basic/essential housekeeping activities like mopping, vacuuming, cleaning bathrooms and shoveling snow."
- Move about indoors and outdoors: the GP has assessed the appellant's ability to walk is limited to 1 to 2 blocks and to climb limited to 2 to 5 steps. The GP wrote that the appellant is "unable to walk distances especially going grocery shopping and also unable to go from one store to another on his own."

While the GP did not address specifically the other DLA requiring physical effort, the appellant's evidence is consistent with the GP's comments in the PR that the appellant's medical conditions "makes him short of breath very quickly on any activity" and in AR1 that he "gets easily tired and feels weak on daily life activities." The evidence of the appellant with respect to these DLA is summarized as follows:

- Prepare own meals: must rest between each step in the process; doing anything that requires standing while preparing meals or cleaning up is tiring; the result is resorting to soup and sandwich meals, to the detriment of the quality of the diet needed to maintain his health.
- Use public or personal transportation facilities: the nearest bus stop is too far away and there is the risk of bruising from being bumped on a bus; must rely on rides from mother/sister/daughter, and only at their convenience/availability.

- Perform personal hygiene and self care: cannot take a bath; needs to rest for 30 minutes with legs elevated after showering and dressing.

Based on the foregoing, it is difficult for the panel to consider these restrictions to DLA as being anything other than significant and continuous. The restrictions to the 3 DLA relating to shopping, housework and mobility were, in the opinion of a prescribed professional, actively restricted on a continuous basis. The restrictions described by the appellant in 3 other DLA (meal preparation, use of transportation and personal self care) were consistent with the opinions provided by the GP regarding how his heart condition makes him "short of breath very quickly on any activity," and that his functional skills are limited because he "gets very easily tired and fatigued with normal daily activities."

The panel notes that the ministry did not have the benefit of the additional information provided in the GP's letter (AR2). On the basis of all the information available, 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.

#### Help with DLA

The ministry's position 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.

The position of the appellant is that the evidence shows that he requires help to manage his significantly restricted DLA. This includes the help from his mother/sister/daughter for shopping, driving him to his many medical appointments and doing housework.

The evidence is that the appellant's ability to perform DLA is significantly restricted on a continuous basis. The panel finds that the evidence clearly demonstrates the appellant requires help in relation to the significantly restricted DLA: due to his lifting restrictions, he requires the help of his mother/sister/daughter to maintain his home in a clean and sanitary condition and their help with shopping; and due to his mobility limitations, he requires assistance for shopping and moving about outdoors, particularly for attending medical appointments. 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.