

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (the ministry) reconsideration decision of January 15, 2013, 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
- as a result of those restrictions, 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) completed and signed by the appellant's general practitioner on September 26, 2013, and an assessor's report (AR) completed and signed by a registered nurse on October 5, 2012.
- A self-report signed by the appellant on October 4, 2012.
- The appellant's Request for Reconsideration, inclusive of the appellant's written submission to the ministry's reconsideration officer dated December 29, 2012.

### *Admissibility of New Information*

For purposes of the appeal hearing the appellant's advocate prepared a written submission. The document is a mix of evidence and argument. During the appeal hearing the appellant and his witness provided oral testimony that included additional detail with respect to the appellant's diagnosed impairments, the impacts they have on his ability to perform DLA, and the assistance he requires. The ministry stated no position on admissibility of the new information. The panel has admitted both the written submission and the oral testimony as being in support of information and records that were before the ministry at the time of reconsideration, in accordance with s. 22(4) of the *Employment and Assistance Act*.

The ministry relied on its reconsideration decision and submitted no new information.

### *Physical Impairment*

- In the PR the appellant's physician diagnosed him with osteoarthritis, which the physician described as a progressive disease which will worsen over time. In terms of functional skills the physician reported the appellant as being able to walk 1 to 2 blocks unaided on a flat surface, climb 2 to 5 steps, lift 5 to 15 pounds, and to remain seated for 1 to 2 hours.
- In the health history portion of the PR the physician noted that the appellant has pain with walking secondary to pain in his joints.
- The registered nurse, who had known the appellant for one week at the time she completed the AR, wrote that the appellant reports having poor vision with spots in the visual field, that his glasses appear to be out of date, that he is very thin, that he has periods of dizziness, and that he moves very slowly. She indicated that he takes significantly longer than typical walking, climbing stairs, and standing. She also indicated he needs continuous assistance with lifting/carrying/holding.
- In his self-report, which was prepared with the help of the ministry's employment contractor, the appellant reported severe back pain when standing or sitting; bilateral pain in knees, hips, feet and fingers; lack of coordination when walking; severe rib pain; poor sleep; and stomach pain.
- In response to a question at the appeal hearing the appellant described his pain as being at 10 on a scale of 1 to 10.

### *Mental Impairment*

- In the PR the physician reported the appellant as having no difficulties with communication and as having no significant deficits with cognitive and emotional function.
- The registered nurse completed section B.4 of the AR form, which is to be completed for applicants with an identified mental impairment or brain injury. She indicated that the appellant's impairment has a major impact on 7 out of 14 areas of cognitive and emotional functioning, a moderate impact on 5 out of 14 areas, and minimal or no impact on 2 areas.
- The registered nurse also completed the Social Functioning portion of the AR form, which again is to be completed only for an applicant with an identified mental impairment, including brain injury. She indicated the appellant needs periodic or continuous supervision with all aspects of social functioning, saying that he stays by himself, that he finds his extended family too noisy, and that he fails to understand social cues – possibly because of hearing problems.
- The registered nurse described the appellant as functioning marginally with his immediate social network, and as having very disrupted functioning and major social isolation regarding his extended social networks. She noted that he spends most of his time in his room and that he avoids other people.
- In her oral testimony at the appeal hearing, the appellant's sister said that the appellant moved to the community from another community in July, 2012, because he was being exploited financially by family members in the other community, and that otherwise they didn't pay much attention to him. She said that she doesn't think the appellant can read.
- At the request of the panel the appellant read a paragraph from the appeal record aloud.
- The appellant and his sister testified that the appellant frequently goes for dinner with his family in his current community.

### *DLA*

- The appellant's advocate and his sister explained that at the time the PR and AR were completed the appellant was living in a shelter where meals were prepared for him. Since Christmas he has had his own place.
- The physician indicated in the PR that the appellant has been prescribed pain medication which interferes with his ability to perform DLA
- The physician indicated in the PR that the appellant's impairment directly restricts his ability to perform 6 of the 10 prescribed DLA: *basic housework, shopping; mobility indoors and outdoors; use of transportation; social functioning; and decision-making*. The physician described the degree of restriction as "moderate."
- The physician indicated the remaining 4 prescribed DLA as not restricted: *personal self-care; meal preparation; management of medications; and management of finances*.
- The registered nurse described the appellant as being independent with respect to 3 DLA: *management of medications, most aspects of use of transportation; and personal care* (though he takes significantly longer than typical with tasks of self-care).
- The registered nurse reported the appellant as requiring continuous assistance with *meal preparation*, and noted that food was prepared at the shelter.
- She reported the appellant as requiring periodic assistance with *basic housekeeping, shopping; and management of finances*.
- In response to questions at the appeal hearing, the appellant said that he spends his days

walking around or staying home listening to music. He frequently goes out to dinner with his family members, but he usually cooks his own meals, preparing toast and tea for breakfast each day and preparing a good dinner at 5:00 pm. He said that even at the shelter he usually cooked his own meals because the shelter charged for meals. He cleans his home once a week.

- The appellant's sister often drops food off at his home, but the appellant generally does his own grocery shopping when he has money. He testified that his niece goes shopping with him sometimes "but not very often".
- When asked how he gets to the stores for shopping, the appellant said that he walks and he has a bus pass. Earlier testimony was that the grocery store is about 15 blocks from the appellant's residence.
- In response to a question the appellant said that he manages his own money and makes his own decisions about spending it.
- In response to questions about whether he is making friends in his new community, the appellant replied that he is, and that he stays in touch with friends he made when he was at the shelter.

#### *Help*

- In response to a question in the PR asking what assistance the appellant needs with DLA the physician simply drew a line.
- In the AR the registered nurse indicated the appellant receives help from community service agencies, and that food and counselling were available at the shelter. She also indicated that he uses knee braces for both knees (though one brace is currently in need of repair), and that he does not have an assistance animal.
- The advocate indicated the appellant is currently living in subsidized housing where she sees him once a week.

## 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 Physical Impairment**

The appellant's position, as expressed by his advocate, is that he suffers from osteoarthritis which causes severe pain when walking, standing or sitting. It also causes lack of coordination when walking. He argues that the evidence of the physician and the registered nurse establish that he has a severe physical impairment. The advocate noted that no "worker", including the physician, has a long history of working with the appellant in his new community.

The ministry's position, as expressed in the reconsideration decision, is that the information provided is not consistent evidence of a severe physical impairment, and that the physical functional skills limitations are more in keeping with a moderate degree of 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.

In this case the evidence indicates that the appellant has osteoarthritis, which causes pain and impacts his ability to function. The appellant's functional skills, particularly his mobility, are somewhat restricted by his medical condition, but on the appellant's evidence he spends a significant part of his time walking recreationally and doing errands. There is a significant degree of inconsistency between the evidence of the physician and the registered nurse, and between the prescribed professionals and the appellant, with respect to the degree of restriction in his ability to perform DLA independently. The physician described restrictions as "moderate". The appellant's testimony is that he is able to perform virtually all DLA independently.

On balance, given the level of functioning demonstrated by the evidence, the panel finds that the ministry reasonably concluded that the evidence is not consistent with a severe physical impairment.

### Severe Mental Impairment

The appellant did not expressly advance an argument with respect to mental impairment. His advocate noted, however, that he is unable to complete forms or to read complex documents. The advocate also noted that the assessor reported 7 areas of major impact on cognitive and emotional functioning, and that the appellant has severe social anxiety.

The ministry's position, as set out in its reconsideration decision, is that it is not satisfied that the information provided is consistent evidence of a severe mental impairment.

### Panel Decision

The physician has not diagnosed a mental impairment, and indicated there are no significant deficits to cognitive and emotional function. Section 2(2) of the EAPWDA requires that an impairment must be confirmed by a medical practitioner as being likely to continue for at least 2 years. With respect to the prescribed professionals' evidence that the appellant has deficits in social functioning and decision making, the evidence on balance indicates that these deficits do not significantly impact his ability to manage his own finances and medications, make his own decisions about daily activities, and to maintain a supportive network of family and friends.

Based on the foregoing analysis, the panel finds that the ministry was reasonable in concluding that the evidence is not consistent with a severe mental impairment.

### Restrictions to DLA

The appellant's position is that the medical evidence is sufficient to demonstrate that this legislated

criterion is satisfied. The physician confirms that the appellant's impairment directly restricts his ability to perform several DLA.

The ministry, while acknowledging that the appellant has certain limitations as a result of his medical condition, takes the position that the information provided does not consistently support that an impairment directly and significantly restricts daily living activities continuously or periodically for extended periods.

### Panel Decision

The legislation requires that a severe impairment directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods. The term "directly" means that there must be a causal link between the severe impairment and the restriction. The direct restriction must also be significant – it must be more than trifling and more than merely an inconvenience. Finally, there is a component related to time or duration. The direct and significant restriction may be either continuous or periodic. If it is periodic it must be for an extended time. Inherently, any analysis of periodicity must also include consideration of the frequency. All other things being equal, a restriction that only arises once a year is less likely to be significant than one which occurs several times a week.

In this case the physician has indicated that 6 DLA are directly restricted by the appellant's impairment, but describes those restrictions as "moderate". The evidence of the registered nurse, which indicates significant restrictions to most DLA, is not supported by the appellant's evidence indicating that he performs virtually all DLA independently. Though the registered nurse indicates that the restrictions are either continuous, or periodic, there is no evidence to indicate that the appellant is either not able to perform his DLA independently, or that he is periodically unable to perform them for extended periods of time. He prepares his own meals, cleans his home weekly, does his own shopping as finances permit, goes for frequent walks, uses public transportation, and socializes with his family and friends frequently. He does obtain assistance from his advocate and social agencies, but the things for which he obtains this assistance are not DLA as defined in the EAPWDR.

Based on the foregoing analysis of the evidence, the panel finds that the ministry reasonably concluded that the evidence does not demonstrate that the appellant's ability to perform DLA is directly and significantly restricted continuously or periodically for extended periods.

### Help with DLA

The appellant's position is that as a result of his restrictions he requires help for most DLA. He receives assistance from social services organizations and he also requires the use of assistive devices in the form of knee braces.

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 ministry felt it was unclear whether a knee brace or braces were required.



**Panel Decision**

The evidence indicates that the appellant receives a degree of support from his family and from social services organizations. As noted above, the activities with which the appellant receives help from social services organizations are not DLA. Given the limited evidence of assistance received by the appellant with respect to DLA, and given the appellant's evidence of his ability to independently perform virtually all DLA, it does not appear that the appellant can be said to require the "significant help or supervision of another person" to perform DLA. The appellant does make use of assistive devices (knee braces) for mobility, but otherwise performs DLA independently. The appellant does not have an assistance animal.

Accordingly, the panel finds that the ministry reasonably concluded that as it has not been established that DLA are significantly restricted, it could not be determined that the appellant requires help with DLA as defined by s. 2(3)(b) of the EAPWDA.

**Conclusion**

The panel acknowledges that the appellant is suffering from a progressive medical condition that affects his ability to function. However, 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 is reasonably supported by the evidence and is a reasonable application of the legislation in the circumstances of the appellant, and therefore confirms the ministry's decision.