

PART C – Decision under Appeal

The appellant appeals the reconsideration decision of the Ministry of Social Development (Ministry) dated December 24, 2012, in which the Ministry denied his application for a Person with Disabilities (PWD) designation because it determined that he did not meet all five of the criteria for a PWD designation set out in sections 2(2) and 2(3) of the *Employment and Assistance for Persons with Disabilities Act (EAPWDA)*. The Ministry found that the appellant met the age requirement and has a physical impairment that, in the opinion of a medical practitioner, is likely to continue for two years or more (the first two criteria). However, the Ministry determined that it was not satisfied that the appellant's physical or mental impairment was severe. The Ministry also determined that it was not satisfied, that, in the opinion of a prescribed professional, the appellant's impairment directly and significantly restricts his daily living activities (DLA) either continuously or periodically for extended periods and that, as a result of restrictions, the appellant requires significant help from other persons 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 Ministry did not attend the hearing. The panel received confirmation from the Tribunal that the Ministry had been notified of the date, time and location of the hearing. Accordingly, under s. 86(b) of the *Employment Assistance Regulation*, the panel heard the appeal in the Ministry's absence.

At the reconsideration, the Ministry had the following information:

- The application for PWD designation, which includes
 - The appellant's self report (section 1) dated September 13, 2012 ("SR");
 - The physician's report (section 2), completed by the appellant's family doctor and dated September 13, 2012 ("PR");
 - The assessor's report (section 3) completed by a physiotherapist who treated the appellant for approximately two years and dated September 13, 2012 ("AR");
- The request for reconsideration dated November 5, 2012; and
- The 2-page written submission of the appellant on reconsideration prepared by his advocate, but not dated.

At the hearing, the appellant provided the following additional documents:

- A one-page written submission on appeal prepared by his advocate dated January 25, 2013; and
- A copy of a two-page letter dated November 27, 2012 prepared by the appellant's advocate subsequent to the Ministry's initial decision denying the appellant's application for PWD in anticipation of the reconsideration with questions for the appellant's physician and the hand-written answers of the appellant's physician dated November 27, 2012.

The appellant and his advocate explained to the hearing panel that they had intended for the two-page letter dated November 27, 2012 to be before the Ministry at reconsideration. The advocate pointed to the copy of a note from her to the Ministry date stamped by the Ministry November 30, 2012 in the appeal materials in which she advised the Ministry that "letter to Doctor requesting additional information is pending." The appellant and his advocate told the panel that they had only discovered that the appellant's physician had not forwarded the letter to the Ministry the week before the appeal hearing (sometime during the week of January 14, 2013). The appellant and his advocate confirmed that the appellant's physician had completed the letter's questions on or before November 27, 2012, in anticipation of the reconsideration, and to explain his answers in section 2 of the PWD application. Accordingly, the panel admitted the additional documents (the submission and the letter) as written testimony in support of the information and records that were before the minister when the decision being appealed was made under section 22(4)(b) of the *Employment and Assistance Act*.

In the PR, the appellant's physician, who has treated the appellant since February 2010 and who indicated that he has seen him 11 or more times in the previous year, confirmed that the appellant suffers from degenerative disc disease starting in December 2010. In the PR, the appellant's physician wrote the following regarding the severity of the appellant's medical conditions relevant to his impairment: "severe constant pain in left leg, walk with a cane, periodic lower back pain, can walk 2 blocks, can't sit longer than 20 minutes, can't stand longer than 20 minutes, trouble sleeping, 10 lb lift restriction from floor to waist, all due to WCB of 2nd Dec 2010, failed back surgery March 21, 2011, cannot bend over, cannot carry shopping bags." The appellant confirmed many of these things in his SR, stating, "Back surgery which resulted in constant pain in left leg, trouble walking, sitting, standing. Trouble sleeping ... can't stand long enough to help with household duties. Can't enjoy any of the activities that I used to do ... Sleeping is a problem because if anything touches left leg, the pain will snap me awake." The appellant's physician indicated that his impairment is likely to continue for two years or more from the date of the report.

In the PR, the appellant's physician indicated that the appellant had not been prescribed any medication and/or treatments that interfere with his ability to perform DLA; however, the appellant told the panel that he

takes prescribed pain medication (Tylenol 3s) and ibuprofen daily to control his pain and prescribed anti-depressants to help him sleep, and that he uses 2 prescribed inhalers on a daily basis to help his breathing. The appellant also told the panel at the hearing that his physician told him at a recent visit that his physician may prescribe stronger medication (morphine) to help him control his pain and that if he quit smoking, his breathing would improve. In the DLA section of the PR, the appellant's physician indicated that the appellant's activity is restricted continuously in the following DLA: meal preparation, basic housework, and shopping. The appellant's physician wrote that the appellant "cannot stand, sit or bend or carry or lift as explained" and that the appellant's wife does all the housework. For all other listed DLA in the PR, the physician checked that the appellant's activity was not restricted and did not indicate the restriction was periodic for any DLA.

At the hearing, the appellant and his advocate clarified aspects of the PR (which the appellant's physician also confirmed in the letter of November 27, 2012 noted below). In the "functional skills" section of the PR, the appellant's physician checked that the appellant could walk 1-2 blocks unaided on a flat surface. However, in other places in the PR the physician wrote that the appellant "walks with a cane" in answer to the question whether the appellant requires any aids for his impairment and later noted that the appellant "walks with a cane and wife does all the housework" in answer to the question "What assistance does your patient need with DLA?" The appellant told the panel that he only walks with a cane, and that his physician misunderstood the question in the "functional skills" section. In the November 27, 2012 letter admitted at the hearing, the appellant's physician confirmed this misunderstanding, writing: "He walks with a cane and can walk 2 blocks, but with a cane. I stated he walks with a cane." The appellant also told the panel that the physician's response that he could climb 5+ steps unaided in the functional skills section of the report is incorrect as the appellant requires his cane to climb any stairs. The appellant's physician clarified this in the November 27, 2012 letter writing, "As stated walks with a cane and can climb stairs with support of a cane and hand rails."

In the AR, the appellant's physiotherapist indicated that the appellant has a "L4 disc herniation and subsequent (L) leg weakness". The appellant's physiotherapist indicated that the appellant is independent in three items listed under "mobility and physical ability": standing, lifting, and carrying and holding (and the words "restricted to 10 lbs" are written beside lifting and carrying and holding). With respect to the listed mobility and physical abilities of walking indoors, walking outdoors and climbing stairs, the appellant's physiotherapist checked "uses assistive device" and wrote "walking stick (cane)" beside these activities. The physiotherapist also wrote "walking outdoors with cane independently is limited to about 2-3 blocks before (L) leg becomes too weak and painful, at this time needs to have a rest."

In completing the required portion of the AR concerning DLA, the appellant's physiotherapist indicated that the appellant was "independent" regarding the following listed DLA: Personal Care – grooming, toileting, feeding self, regulating diet, transfers in/out of bed, and transfers in/out of chair; Shopping – reading prices and labels, making appropriate choices, and paying for purchases; Meals – meal planning and safe storage of food; Pay Rent and Bills – banking, budgeting, and pay rent and bills; Medications – filling/refilling prescriptions, taking as directed, safe handling and storage; Transportation – using public transit and using transit schedules and arranging transportation. In respect to the following listed DLA, the appellant's physiotherapist indicated that he "takes significantly longer than typical" with the comments as noted: Dressing "reduced balance, difficulty putting pants on & shoes on"; Bathing "unable to get into/out of bath tub – shower"; Going to and from stores – "standing/walking limitations"; Food Preparation and Cooking – "unable to stand longer than 20 mins before pain in (L) leg requires him to rest"; and Getting into and out of a vehicle – "bending knees, trunk is difficult." The appellant told the panel that he can't take a bath as he can't get into and out of a bathtub – he only takes showers and his wife has to help him wash his feet as he cannot bend over to reach them.

In the AR, the appellant's physiotherapist indicated that the appellant requires "continuous assistance from another person or unable" with respect to the DLA of laundry "unable to bend torso to get into washer", basic housekeeping "limited by pain and reduced lumbar [range of motion]", and carrying purchases home "uses delivery service where available." The appellant's physiotherapist wrote the following comment, "For basic housekeeping he relies on wife for majority cleaning, laundry. He is limited by pain with standing and inability

to bend trunk” In the section of the AR concerning the assistance provided to the appellant, the physiotherapist noted that “laundry and housecleaning duties carried out by wife” and that the appellant “uses a single cane in his (R) hand for all walking indoors and outdoors. Able to walk about 20 minutes before he needs to rest.” The appellant’s physiotherapist also provided the following additional information in the AR:

The applicant first attended physiotherapy in December 2009 with symptoms in his (L) leg from a L4 disc herniation. After conservative treatment followed by a L4-L5 microdiscectomy (March) operation the applicant’s symptoms have not improved. He continues to experience (L) medial shin pain and weakness globally on the (L) leg. Currently he is ambulating independently with a cane and is limited to about 20 mins. Since the last appointment in October 2011 his symptoms in his (L) leg have not changed, but he reports increasing weakness in his (L) leg and more difficulty with walking and standing.

The appellant confirmed that his physiotherapy ended and he can no longer afford to go. At the hearing, the appellant told the panel that he suffers from emphysema, for which he uses his puffers (inhalers). However, the panel notes that the appellant’s physician has not confirmed in the PR or in the November 28, 2012 letter that the appellant suffers from the impairment of emphysema.

The panel also notes that neither the appellant’s physician in the PR, nor the appellant’s physiotherapist in the AR, indicate that the appellant suffers from a mental impairment and that the appellant did not assert to the panel that he suffers from a mental impairment.

The panel made the following findings of fact:

- The appellant is over 18 and suffers from degenerative disc disease.
- In the opinion of a prescribed professional, the appellant’s physician, the appellant’s impairments will last for 2 years or more.

PART F – Reasons for Panel Decision

The issue on this appeal is the reasonableness of the Ministry's decision to deny the appellant's application for PWD designation on the basis that the Ministry was not satisfied that his physical or mental impairment is severe, and that, in the opinion of a prescribed professional, his impairment significantly restricts his ability to perform DLA, either continuously or periodically for extended periods, and that, as a result of restrictions, he requires an assistive device or significant help from other persons to perform DLA.

Legislation

EAPWDA s. 2

Persons with disabilities

2(1) In this section: ...

- "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 assistive animal.

EAPWDR s. 2

Daily living activities

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,
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- (d) physical therapist,
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The appellant's position is that the Ministry's denial of his application for PWD designation is not reasonable. The appellant says that his impairment is severe, that it causes him chronic pain in his left leg – he described it to the panel as "having a beehive attached" to his left foot – and that his severe impairment significantly restricts his DLA either continuously or periodically for extended periods of time. The appellant submits that the Ministry's determination that his impairment is not severe is unreasonable based on the evidence in the PWD application and in his doctor's letter of November 27, 2012. The appellant reiterated to the panel that he always requires an assistive device – a cane – to walk and to climb stairs, and that his wife helps him by performing all the laundry and housekeeping, which he cannot do any longer. The appellant says that the Ministry "ignored the written statements" in the PWD application and "focused solely on the check marks on the functional skills questions" and for this reason, the determination that his impairment is not severe is unreasonable.

In the reconsideration decision, the Ministry found that "the minister is not satisfied that the information provided establishes a severe impairment." The reconsideration decision notes that the appellant's physician "indicates that you are able to walk 2 blocks and to climb 5+ steps unaided" and that in the assessor's report, the appellant's physiotherapist states "that you are independently able to do most aspects of mobility and physical abilities albeit you use a cane to ambulate." The reconsideration decision then determines, "as the functional skills are more in keeping with a moderate degree of impairment, the minister is not satisfied that the information provided is evidence of a severe physical impairment." The Ministry also notes in the reconsideration decision the appellant's submissions on reconsideration, but that the information "does not demonstrate either a severe impairment or significant restriction in your ability to perform daily living activities." In considering whether the appellant has established that his impairment directly and significantly restricts his DLA continuously or for extended periods, the Ministry noted the physician's response in the report that the appellant required continuous assistance with meal preparation, basic housework and daily shopping, but wrote in the reconsideration that as the appellant's physician "reports your ability to walk 2 blocks and to lift 10 lbs, the need for help would only be required for longer distances and heavier weights." The Ministry's reconsideration decision acknowledges that the assessor's report indicates independent function with "25 of 28 activities" but determines that "as the majority of [DLA] are performed independently or require little help from others, the information from [the appellant's] prescribed professionals does not establish that impairment significantly restricts [DLA] either continuously or periodically for extended periods." Finally, the Ministry's reconsideration decision states, "it has not been established that [DLA] are significantly restricted (criterion 4); therefore, it cannot be determined that significant help is required from other persons. A cane is used to ambulate."

Subsection 2(2) of the *EAPWDA* requires that, to be designated a person with disabilities, the Ministry must be satisfied that the appellant has a **severe** mental or physical impairment that in the opinion of a medical practitioner is likely to continue for at least 2 years (subs. 2(2)(a)) **and** that a prescribed professional (the appellant's physician and/or physiotherapist) is of the opinion that the appellant's impairment directly and significantly restricts his ability to perform DLA, either continuously or periodically for extended periods (subs. 2(2)(b)(i)) and, as a result of the restrictions, the appellant requires help to perform those activities (subs. 2(2)(b)(ii)). According to subsection 2(3)(b) of the *EAPWDA*, the help required under subs. 2(2)(b)(ii) must be "an assistive device" (3)(b)(i) or the "significant help or supervision of another person" (3)(b)(ii).

The panel notes the additional evidence admitted at the hearing from the appellant's physician which clarifies that the appellant cannot walk 2 block and climb 5+ steps unaided – the appellant requires his cane to walk and climb stairs, as was reported in the AR and in the appellant's SR in the PWD application, and by the appellant at the hearing. The panel also notes the appellant's evidence set out in his SR and at the hearing that his impairment causes chronic pain for which he takes daily pain medication and which restricts his ability to bend over such that he cannot pick up things from the floor or wash his own feet. The panel also notes that the physiotherapist provided evidence of the appellant's limitation in the AR, including the following report of physical functioning which takes significantly longer: dressing, bathing, going to and from stores, food preparation and cooking, getting into and out of a vehicle. The physiotherapist also provided the following

narrative in the AR regarding the appellant's limitations, as follows: dressing – reduced balance, difficulty putting pants on & shoes on; bathing – unable to get into and out of bath tub/shower; going to and from stores – standing/walking limitations; food preparation and cooking – unable to stand longer than 20 minutes before pain in leg requires him to rest; getting into and out of a vehicle – bending knees, trunk is difficult. The physiotherapist had treated the appellant for at least two years. Accordingly, the panel finds that the Ministry's determination that the appellant did not meet the criterion of "severe physical impairment" was unreasonable based on the evidence.

The panel also finds that there was no evidence of a severe mental impairment and the appellant did not submit that he had a severe mental impairment. Therefore, the panel finds that the Ministry reasonably determined that the appellant did not have a severe mental impairment.

The PR indicates that the appellant's activity is restricted continuously for meal preparation, basic housework, and shopping (that his wife does all the housework). The physician also added the following comments (as noted previously): "cannot stand, sit or bend or carry or lift" and "walks with a cane and wife does all the housework." The PR does not indicate that the appellant's impairment restricts any of his other DLA, either continuously or periodically for extended periods. In the AR, the appellant's physiotherapist indicated that the appellant requires "continuous assistance from another person or unable" for the DLA of "laundry", "basic housekeeping", and "carrying purchases home." The AR also indicates that the appellant "takes significantly longer than typical" for the DLA of dressing, bathing, going to and from stores, food preparation and cooking and getting into and out of a vehicle. However, for these DLA and all the other ones listed in the AR, the physiotherapist reports that the appellant is independent performing them. Although the appellant takes significantly longer than the average person to perform several DLA, only 3 aspects of DLA require continuous assistance. Therefore, the panel finds that the prescribed professionals did not provide evidence that the appellant's impairment significantly restricts his DLA either continuously or periodically for extended periods, but that their evidence was that the appellant could perform most aspects of DLA independently. Accordingly, the panel finds that the Ministry's determination that the information from the appellant's prescribed professionals does not establish that his impairment "directly and significantly restricts" his DLA either continuously or periodically for extended periods as required by subs. 2(2)(b) of the *EAPWDA*, is reasonable.

The panel notes the evidence that the appellant uses a cane to walk and climb stairs and his wife performs the basic housekeeping, including laundry and meal preparation. However, the panel finds that, as criterion 4 has not been met (the appellant's prescribed professionals have not confirmed that his impairment significantly restricts his DLA either continuously or periodically for extended periods), the Ministry's finding that it could not be determined that significant help from other persons is required to perform DLA is reasonable.

Therefore, the panel finds that the Ministry's reconsideration decision was reasonably supported by the evidence and it therefore confirms the Ministry's reconsideration decision denying the appellant's application for PWD designation.