

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development (the ministry) reconsideration decision dated April 24, 2013 which found that the appellant did not meet three of the five 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 his 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; and,
- as a result of these restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal 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 the time of the reconsideration decision included the following:

- 1) Person With Disabilities (PWD) Application comprised of the applicant information dated November 16, 2012, a physician report dated November 19, 2012 completed by the appellant's family physician of approximately 15 years and an assessor report dated December 13, 2012 completed by a chiropractor who has known the appellant approximately 16 months;
- 2) Letter dated November 28, 2012 from a physiotherapist to the appellant's family physician;
- 3) Note dated March 26, 2013 from the chiropractor who prepared the assessor report in the PWD application;
- 4) Note dated April 3, 2013 from the physician who prepared the physician report in the PWD application; and,
- 5) Request for Reconsideration- Reasons, prepared by an advocate on behalf of the appellant.

### *Diagnoses*

The appellant has been diagnosed by his general practitioner with anxiety, depression, obstructive sleep apnea, left hip labral tear, and lumbar disc herniation.

### *Physical Impairment*

- In the physician report, the general practitioner indicated in the health history that the appellant has "...chronic pain and fatigue affecting ability to maintain gainful employment" and his obstructive sleep apnea affects energy level and day time alertness.
- Functional skills reported in the physician report indicated that it is unknown how far the appellant can walk and how many steps he can climb unaided, he can lift 2 to 7 kg (5 to 15 lbs.) and can remain seated less than 1 hour.
- The general practitioner reported that the appellant has not been prescribed any medications or treatments that interfere with his ability to perform his daily living activities (DLA) and he requires a prosthesis or aid for his impairment, namely a cane, lumbar brace and a CPAP machine.
- In the additional comments to the report, the physician wrote that the appellant's condition has led to financial distress, that he is unable to work and earn a living and he is "...not able to (fully) take care of his needs on a basic level."
- In the assessor report, the chiropractor wrote that the appellant has low back pain, leg pain, groin pain, hip pain and left shoulder pain.
- The appellant is assessed as taking significantly longer than typical and using an assistive device with all mobility and physical ability tasks, including with walking indoors and outdoors, climbing stairs, standing and lifting and carrying and holding. The chiropractor commented that the appellant is "...experiencing low back pain, hip pain, leg pain; requires a cane to walk, may require hip joint surgery."
- The chiropractor indicated that the appellant uses a cane and crutches and commented that he may eventually require a walker or wheelchair. For additional information, the chiropractor wrote that the appellant has seen various specialists, including a neurosurgeon and a physiotherapist. He has had an MRI of his lumbar spine and diagnosed with L4-5 diffuse disc bulge, an MRI of his hip joint with possible torn labrum that may require surgery, and an MRI of his left shoulder showing arthritis of left shoulder and tendon tear as well as degenerative changes.
- In the November 28, 2012 letter from the physiotherapy clinic, the physiotherapist wrote that when the appellant experiences episodes of right sciatic pain that radiates into his posterior LE and foot, he reportedly experiences relief after manual therapy (including traction) and acupuncture treatment. He recently had another exacerbation of LBP [lower back pain] and right sciatica which has not improved over the past month.
- In the March 26, 2013 note, the chiropractor who prepared the assessor report wrote that the appellant has a severe physical or mental disability. He has chronic and severe pain in his lower back, legs,

groin, hips and left shoulder. All movement causes this pain to be worse and therefore restricts his mobility. He is unable to bend over, reach, lift, walk, climb stairs, or sit or stand for extended periods without pain. He is unable to walk for more than a block without needing to stop and must use a cane at all times.

- In the April 3, 2013 note, the physician who prepared the physician report wrote that he agreed that the appellant has a severe physical or mental disability. He has a left hip labral tear, osteoarthritis left hip, lumbar pelvic malalignment, degenerative disc disease and obstructive sleep apnea. He has chronic pain and fatigue. Due to sleep apnea, his sleep is often disrupted and non refreshing leading to daytime sleepiness. He is unable to bend over, reach, lift, walk, climb stairs, sit or stand for extended periods without pain.
- The appellant is unable to walk for more than a block without needing to stop and must use a cane at all times. He is unable to carry over 10 lbs.
- In his self-report included with the PWD application, the appellant wrote that he suffers from chronic pain and chronic fatigue daily. His injuries are two herniated discs, two injured hips, two injured knees, sciatic nerve damage, neck and shoulder injuries, and degenerative disc disease. He has arthritis, severe sleep apnea, bladder control problems, hemorrhoids, acid reflux, problems sleeping, headaches, high blood pressure, shooting pain down his legs, and spasms from his back and stomach area (ribs). He gets help from a back brace, a breathing device and a cane.

#### *Mental Impairment*

- In the physician report, the general practitioner indicated in the health history that the appellant has "anxiety and depression affecting day to day functioning significantly."
- The general practitioner reported the appellant does not have difficulties with communication and the chiropractor indicated that the appellant has a good ability to communicate in all areas.
- The general practitioner reported a significant deficit with cognitive and emotional function in the area of emotional disturbance, with no further comment provided.
- In the assessor report, the chiropractor did not complete the section of the report assessing impacts with cognitive and emotional functioning.
- The general practitioner indicated that there are continuous restrictions with social functioning and commented that "...depression and anxiety affects motivation."
- In the assessor report, the chiropractor indicated that the appellant is independent in all areas of social functioning with no assessment or comments provided with respect to impacts to the appellant's immediate or extended social networks.
- In his self-report included with the PWD application, the appellant stated that he suffers from anxiety and depression and short term memory loss. He has difficulty asking for help and difficulty with stress (physical, mental and financial).
- In the April 3, 2013 note, the general practitioner wrote that the appellant has "...poor memory, low motivation and often feels confused. He reports forgetting to turn off the stove and frequently getting lost even on familiar routes."

#### *Daily Living Activities (DLA)*

- In the physician report, the general practitioner indicated that the appellant is restricted on a continuous basis with personal self care, meal preparation, basic housework, daily shopping, mobility inside and outside the home, use of transportation and social functioning. It is unknown whether the appellant is restricted with management of medications or management of finances.
- Regarding the degree of restriction, the general practitioner wrote that the appellant is "...restricted to a degree that significantly agitates patient."
- In the assessor report, the chiropractor indicated that all tasks of the DLA personal care are performed independently while 6 out of 8 tasks take significantly longer than typical, with no further explanation

provided.

- The appellant is assessed as requiring periodic assistance from another person with laundry and basic housekeeping, with no further explanation or description provided.
- For shopping, the appellant is independent with reading prices and labels, making appropriate choices and paying for purchases, while requiring periodic assistance from another person with going to and from stores and carrying purchases home. The chiropractor wrote that the appellant "...requires a cane to get around and may require assistance carrying purchases home."
- The chiropractor assessed the appellant as being independent with all tasks of the DLA meals, paying rent and bills and managing medications.
- The chiropractor assessed the appellant as taking significantly longer than typical with getting in and out of a vehicle, using public transit, and with using transit schedules and arranging transportation. The chiropractor added comments that the appellant "...requires a cane to get around and may eventually require a walker or wheelchair."
- In the March 26, 2013 note, the chiropractor wrote that the appellant is significantly restricted in his ability to perform DLA. All movement causes severe pain therefore restricting all activities requiring mobility. He experiences episodes of severe and debilitating pain ever 2 to 5 weeks lasting for 1 to 4 weeks during which he is often unable to get out of bed and is unable to perform any DLA.
- The chiropractor wrote that at other times, the constant pain restricts the appellant's ability to prepare meals, get dressed or take a shower, go grocery shopping and carry purchases home, do basic housework and use transportation. He is unable to stand in the kitchen for more than 5 to 10 minutes and is unable to lift pots and pans or reach into cupboards. He is unable to walk for more than a block without needing to stop and must use a cane at all times. He is unable to carry over 10 lbs. and is unable to vacuum or do any cleaning requiring bending or reaching. Getting dressed and in and out of the shower takes him 5 times longer than usual and is very painful without support.
- In the April 3, 2013 note, the general practitioner wrote that the appellant is significantly restricted in the ability to perform DLA as, based on the appellant's report, most movement causes significant pain therefore restricting many activities. He is unable to bend over, reach, lift, walk, climb stairs or sit or stand for extended periods without pain. He experiences episodes of severe and debilitating pain every 2 to 5 weeks lasting 1 to 4 weeks during which he is often unable to get out of bed and is unable to perform any DLA.
- The general practitioner wrote that at other times, the constant pain restricts the appellant's ability to prepare meals, get dressed or take a shower, go grocery shopping and carry purchases home, do basic housework and use transportation. He is unable to stand in the kitchen for more than 5 to 10 minutes and is unable to lift pots and pans or reach into cupboards. He is unable to walk for more than a block without needing to stop and must use a cane at all times. He is unable to carry over 10 lbs. and is unable to vacuum or do any cleaning requiring bending or reaching. Getting dressed and in and out of the shower takes him 5 times longer than usual and is very painful without support.
- In his self-report included with the PWD application, the appellant wrote that he does not have assistance from anyone but he uses a walking cane. He has difficulty getting in and out of the bathtub, difficulty reaching and standing in the shower. It is very difficult for him to stand at the sink, counter or stove which makes meal preparation challenging. Daily activities such as house cleaning are very difficult. He has problems vacuuming and making the bed/changing the sheets is almost impossible. The appellant wrote that he has to wait until he feels better.
- The appellant wrote that he has difficulty doing laundry, shopping for groceries, going up and down stairs or walking on uneven ground. He has difficulty getting in and out of his car which is very painful and sometimes he cannot bend forward enough to get into the car. Public transportation causes a lot of pain.

#### *Need for Help*

- The general practitioner reported that the appellant requires a cane, a lumbar brace and a CPAP machine.

- The general practitioner indicated in the physician report that the appellant "...uses a cane; help from another person frequently would be beneficial, e.g. assistance with chores."
- The chiropractor indicated in the assessor report that help required for DLA is provided by the appellant's friends and that he also uses a cane and crutches.

In his Notice of Appeal, the appellant expressed his disagreement with the reconsideration decision.

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

- 1) Letters dated March 25, 2013 from the advocate to the appellant's family doctor and to the chiropractor stating in part that the appellant's application for PWD had been denied and requesting further clarifying information. An assessor question sheet has been completed, after an interview with the appellant, and, if agreed with, can be signed. Alternatively, there is a blank form enclosed to complete;
- 2) Copy of the assessor question sheet as completed by the advocate;
- 3) Copy of the blank assessor question sheet;
- 4) Copies of the question sheets as signed by the chiropractor (March 26, 2013) and the general practitioner (April 3, 2013);

The ministry did not object to the admissibility of these documents. The panel admitted the letters and question sheets as clarifying the process for preparation of the additional supporting evidence provided on reconsideration from the prescribed professionals and being in support of the information and records before the ministry on reconsideration.

At the hearing, the appellant and his advocates provided the following oral evidence:

- The advocate referred to the letters dated March 25, 2013 sent to the chiropractor and the general practitioner and stated that both were given the option of signing the prepared statement, completed after an interview by the advocate with the appellant, or of completing a blank question sheet enclosed with the letter. The advocate pointed out that the general practitioner wrote his own responses on his letterhead.
- The appellant stated that he has been prescribed morphine for his pain and that he takes it regularly. He tries to keep it to just once every 3 days or so since he has been experiencing side effects and he does not want to become addicted to it. The pain relief lasts for about 12 hours and he takes it at night because he cannot drive when he has taken it. He finds that the morphine reduces his pain by about half, but it does not completely take the pain away. He has tried other medications, including oxycontin, but it only made him high and did not take the pain away.
- The appellant expressed his frustration with the ongoing pain and how difficult it is for him to cope.
- The appellant stated that he has also received injections in the tailbone which provided a couple of hours of relief from the pain.
- The appellant stated that it depends on how well he is doing for how far he can walk. Sometimes it is a block or less but he also knows that he needs to keep moving or he will "seize up" so he is always walking and moving.
- He has been using a cane for approximately 2 1/2 to 3 years. At first, he was hoping that his back would get better but he discovered that he could not climb stairs without his cane and he realized that he needed to use it. He only uses the back brace when he is experiencing a relapse since he was relying on it too much before and his muscles were getting weak and not supporting his back. He does exercises to try to develop the muscles in his back.
- The appellant stated that he uses the CPAP machine every night and it controls his sleep apnea and that any disruption to his sleep is from pain in his back.
- The appellant stated that he has been a patient of his family physician for close to 20 years. He dropped off the application for the physician to complete and he said he would call if he needed additional information. The appellant stated that the physician recommended that someone else fill out the assessor report. The appellant asked the chiropractor who had never completed an assessor report before but agreed to help.

- The appellant stated that he started getting treatments from the physiotherapist who wrote the November 28, 2012 letter shortly after he had an operation on his shoulder. She also provided acupuncture for his sciatic pain which gave some relief. On March 7, 2013, he had surgery on one knee because a tendon was torn and he is currently going for physiotherapy for his knee twice a week.
- The advocate clarified that the Roland Morris Disability Questionnaire, for which the appellant was scored at 22 out of 24, is a series of 24 questions relating to the impact from back pain and it is likely that the appellant responded positively to 22 of the questions.
- The appellant stated that he currently goes for chiropractic adjustments every 3 weeks because his back "goes out", and the chiropractor has conducted a decompression procedure twice.
- The appellant explained that he cannot predict when he will have a relapse, that it often occurs after a quick movement or overdoing an activity that causes the herniated discs to push on the nerves in his back. The appellant stated that during a relapse he cannot do anything and no one helps him.
- The appellant stated that he has met with an orthopedic surgeon who has told him that he will need both hips replaced but he is not eligible now since the replaced joint only last about 13 years. The appellant stated that surgery on his back was not recommended.

The panel admitted the oral evidence on behalf of the appellant, pursuant to Section 22(4) of the Employment and Assistance Act, as providing further information about the circumstances surrounding preparation of the PWD reports and the appellant's current condition, and being in support of information that was before the ministry on reconsideration.

The ministry relied on its reconsideration decision.

## PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry's reconsideration decision, that the appellant is not eligible for designation as a person with disabilities (PWD), was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. The ministry found that the appellant does not have a severe mental or physical impairment and that his daily living activities (DLA) are not, 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, it could not be determined that the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

The criteria for being designated as a person with disabilities (PWD) are set out in Section 2 of the EAPWDA as follows:

### Persons with disabilities

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).

Section 2(1)(a) of the EAPWDR defines DLA for a person who has a severe physical or mental impairment as follows:

### Definitions for Act

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 considered each party's position regarding the reasonableness of the ministry's decision under the applicable PWD criteria at issue in this appeal.

### **Evidentiary Considerations**

The ministry argued that the notes provided at reconsideration from the appellant's family physician and chiropractor are problematic because they were prepared by the advocate. The ministry argued that the practice of advocate-prepared statements is not encouraged by the ministry as it is perceived as "putting words in another's mouth." The ministry argued that both medical professionals have been actively treating the appellant for a long time and their initial impression of the appellant's medical conditions and related impairment is considered to be accurate and concurrent. The ministry argued that the information in the original application should, therefore, be given more weight than the prepared statements. The advocate argued, on the other hand, that the medical professionals were sent the prepared statements as well as a blank question form to fill in if they did not agree with the prepared statement. The advocate argued that the prepared statement is completed after an extensive interview with the appellant and that, typically, medical professionals are under time constraints that do not allow for this amount of detail. The advocate pointed out that the general practitioner modified the prepared statement and set it out on his letterhead, but acknowledged that the chiropractor signed the statement as prepared by the advocate. The advocate pointed out that both the general practitioner and the chiropractor know the appellant well, the advocate did not intend to "put words in their mouth" and, as medical professionals, they would not sign a document with which they do not agree since their professional reputation is at stake.

The panel finds that the April 3, 2013 note from the general practitioner has been modified from the original prepared statement by the advocate and is mostly consistent with, while providing more detail to, the assessment made in the physician report, except with reference to the exacerbations of pain. The panel finds that the March 26, 2013 note from the chiropractor has not been modified from the prepared statement and there are some inconsistencies with the original assessment in the PWD application, such as reference to the episodes of increased pain and whether the appellant experiences restrictions to the DLA of meal preparation. There is no explanation provided by either the general practitioner or the chiropractor for not previously referring to the appellant's exacerbations of pain or for the chiropractor's change of assessment in some areas. The panel finds that, in the absence of an explanation by the medical professionals, the ministry was reasonable in placing more weight on the original evidence of the chiropractor in the assessor report over that in the prepared statement, but only when the information in the two reports is inconsistent. Additionally, the panel finds that more weight is reasonably placed on the April 3, 2013 note from the general practitioner where it differs from that of the prepared statement signed by the chiropractor as the physician with close to 20 year's history with the appellant has provided an intentional and more considered response to the questions posed.

### **Severe Physical Impairment**

The appellant's position is that a severe physical impairment is established by the evidence of his pain in his lower back, legs, groin, hips and left shoulder. The advocate argued that the ministry has ignored important



information and did not consider the application or reconsideration request in its entirety and the evidence overall. The advocate argued that the general practitioner indicated that continuous help is required for 8 out of 10 activities and, along with other statements in the application, clearly demonstrated a severe impairment. The advocate argued that when information is ambiguous, it must be interpreted in a manner that is remedial to the appellant, pursuant to Section 8 of the *Interpretation Act*, and consistent with the purpose and intent of the legislation.

The ministry's position is that it acknowledges that the appellant has some functional limitations as a result of his physical conditions but these are more in keeping with a moderate degree of impairment. The ministry argued that the appellant's general practitioner reported that the appellant's ability to walk and climb stairs is unknown to him, while lifting is limited to 5 to 15 lbs. and sitting to less than 1 hour. The ministry argued that the chiropractor reported independent function with all aspects of mobility and physical abilities albeit a cane is used and activities take longer than typical and how much longer is not described. The ministry argued that while it is acknowledged that the appellant suffers chronic pain, remedial measures in the form of analgesics are available to ameliorate the pain and allow for better physical functionality. The ministry argued that the information in the additional statements by the general practitioner and the chiropractor regarding the episodes of debilitating pain is not substantiated in the original information in their reports or the letter from the appellant's physiotherapist.

#### *Panel Decision*

The diagnosis of a medical condition is not itself determinative of a severe impairment. To assess the severity of an impairment one must consider the nature of the impairment and its impact on the appellant's ability to manage his DLA as evidenced by functional skill limitations, the restrictions to DLA, and the degree of independence in performing DLA. The ministry describes this approach well when it defines the word "impairment" in the physician report as being "a loss or abnormality of psychological, anatomical or physiological structure or function causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration." This definition is not set out in legislation and is not binding on the panel, but in the panel's view it quite appropriately describes the legislative intent.

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 medical practitioner, the appellant's general practitioner of over 15 years, diagnosed the appellant with left hip labral tear, lumbar disc herniation and obstructive sleep apnea. Although the appellant lists a number of additional injuries in his self-report including two injured knees, sciatic nerve damage, neck and shoulder injuries, arthritis, bladder control problems, hemorrhoids, acid reflux, headaches, and high blood pressure, the panel finds that only the conditions confirmed by the medical practitioner as likely to continue for 2 or more years can be considered as meeting the legislative criteria of sufficient duration. In the physician report, the general practitioner indicated that the appellant has "...chronic pain and fatigue affecting ability to maintain gainful employment" and his obstructive sleep apnea affects energy level and day time alertness. In the additional comments to the report, the physician wrote that the appellant's condition has led to financial distress, that he is unable to work and earn a living and he is "...not able to (fully) take care of his needs on a basic level." The panel finds that this statement about meeting needs, in the context of the previous statements, more likely than not refers to the appellant's financial ability and not to his physical ability. Although the general practitioner has treated the appellant for more than 15 years, the functional skills reported in the physician report indicated that it is unknown how far the appellant can walk and how many steps he can climb unaided. The general practitioner reported that the appellant can lift 2 to 7 kg (5 to 15 lbs.) and can remain seated less than 1 hour. In the April 3, 2013 note, the general practitioner clarified that the appellant is unable to bend over, reach, lift, walk, climb stairs, sit or stand for extended periods without pain.

He is unable to walk for more than a block without needing to stop and must use a cane at all times. The general practitioner also stated that the appellant "uses" a cane for walking or standing, which was modified from the suggested words "must use" in the prepared statement, and the words "at all times" were removed. At the hearing, the appellant stated that it depends on how well he is doing for how far he can walk. Sometimes it is a block or less but he also knows that he needs to keep moving or he will "seize up" so he is always walking and moving.

The general practitioner indicated that the appellant requires aids for his impairment, namely a cane, lumbar brace and a CPAP machine. At the hearing, the appellant stated he only uses the back brace when he is experiencing a relapse since he was relying on it too much before, and that the CPAP machine effectively controls his sleep apnea. In the assessor report, the chiropractor assessed the appellant as taking significantly longer than typical and using an assistive device with all mobility and physical ability tasks, including with walking indoors and outdoors, climbing stairs, standing and lifting and carrying and holding. Although the chiropractor referenced the specialists consulted and tests conducted with respect to the appellant's lumbar spine and left hip, the resulting reports and consults were not provided. In the April 3, 2013 note, the general practitioner removed the statement from the suggested prepared statement that all activities take the appellant 5 times longer to complete on his own or often go undone. The general practitioner also removed the reference to "severe pain" and the statement that "all movement causes the pain to be worse and therefore restricts his mobility", and replaced it with the statement that "based on the patient report," "most movement" causes "significant pain therefore restricting many activities."

The general practitioner reported in the April 3, 2013 statement that the appellant "experiences episodes of severe and debilitating pain every 2 to 5 weeks, lasting 1 to 4 weeks, during which he is often unable to get out of bed and is unable to perform any daily activities." In his self-report included with the PWD application, the appellant stated that daily activities such as house cleaning are very difficult, that he has problems vacuuming and making the bed/changing the sheets is almost impossible and that he has to wait until he feels better to perform these tasks. The panel finds that the evidence demonstrates that it is 'almost impossible' for the appellant to perform many tasks, including a demanding task like vacuuming, during an exacerbation of his pain, and that he is able to perform these tasks at other times, when he is feeling better.

Further information has been provided regarding the frequency and duration of exacerbations of the appellant's pain and the panel finds that the evidence presents such a large range that it is difficult to determine whether these exacerbations occur for extended periods of time. The panel finds that the ministry reasonably concluded that the appellant is, nevertheless, able to function independently and effectively for a reasonable duration for the majority of the time. The appellant uses a cane for most activities of mobility which take longer than typical; however, the panel finds that the ministry reasonably determined that has not been established how much longer than typical these activities take. Therefore, the panel finds that the ministry reasonably determined that the appellant's level of physical functioning does not establish that the appellant has a severe physical impairment under section 2(2) of the EAPWDA.

### **Severe Mental Impairment**

The appellant argued that a severe mental impairment is established by the general practitioner's diagnosis of anxiety and depression and the narrative that these conditions are affecting the appellant's day-to-day functioning significantly.

The ministry's position is that a severe mental impairment has not been established. The ministry relies on the evidence that the general practitioner reported one deficit to cognitive and emotional functioning in the area of emotional disturbance. The ministry argued that the appellant's communication is good with no difficulty. Continuous restrictions to social functioning are described by the general practitioner as "depression and anxiety affects motivation" and the chiropractor reported that the appellant is independently able to perform all aspects of social functioning without supervision or support.

*Panel Decision*

The general practitioner diagnosed the appellant with anxiety and depression and indicated, in the health history, that the appellant has "...anxiety and depression affecting day to day functioning significantly." The general practitioner reported the appellant does not have difficulties with communication and the chiropractor indicated that the appellant has a good ability to communicate in all areas. The general practitioner reported a significant deficit with cognitive and emotional function in the area of emotional disturbance, with no further comment provided, and the chiropractor did not complete the section of the report assessing impacts with cognitive and emotional functioning. While the general practitioner indicated that there are continuous restrictions with social functioning and commented that "...depression and anxiety affects motivation," the chiropractor reported that the appellant is independent in all areas of social functioning with no assessment or comments provided with respect to impacts to the appellant's immediate or extended social networks. In the April 3, 2013 note, the general practitioner wrote that the appellant has "...poor memory, low motivation and often feels confused. He reports forgetting to turn off the stove and frequently getting lost even on familiar routes." In his self-report, the appellant stated that he has difficulty asking for help and difficulty with stress (physical, mental and financial), which the appellant reiterated at the hearing. The panel finds that the information respecting the appellant's ability to function in terms of specific daily tasks does not support a severe impairment of mental functioning. Although the appellant stated in his self-report that he forgets to take his medication, the chiropractor indicated that the appellant independently manages all listed "mental" tasks of daily living, including managing his medication, making appropriate choices and paying for purchases when shopping, banking, budgeting, and paying rent and bills. Therefore, the panel finds that the ministry reasonably determined that a severe mental impairment was not established under section 2(2) of the EAPWDA.

**Restrictions in the ability to perform DLA**

The appellant's position is that his physical and mental impairments directly and significantly restrict his ability to perform DLA on an ongoing basis to the point that he requires the significant assistance of another person or the use of an assistive device, being a cane, with many of his DLA. The advocate argued that in the physician report the general practitioner has identified restrictions with 8 out of 10 listed DLA, namely continuous restrictions with personal self care, meal preparation, basic housework, daily shopping, mobility inside and outside the home, use of transportation, and social functioning. The advocate argued that while the chiropractor, as assessor, has not ticked 'uses assistive device' for most activities, a cane is clearly required at all times as virtually all activities involve walking. The advocate argued that it is likely that the assessor interpreted 'periodic' and 'continuous' assistance to mean receipt of assistance rather than need for assistance.

The ministry's position is that the majority of DLA are performed independently or require little help from others and the information from the prescribed professionals does not establish that an impairment significantly restricts DLA either continuously or periodically for extended periods. The ministry argued that while the general practitioner reported continuous restrictions to several DLA, the restriction is described as "to a degree that significantly agitates patient." The ministry argued that the information does not substantiate that the appellant is unable to perform these tasks. The ministry pointed out that the chiropractor reported that a majority of DLA (i.e. 24 out of 28 tasks) as well as all aspects of social functioning are performed independently. Although periodic help is indicated to do laundry, basic housekeeping, going to and from stores and carrying purchases home, there is no indication of the frequency or duration of required help from others to determine the significance of this. The ministry argued that although a number of tasks take longer than typical, there is no information on how much longer.

*Panel Decision*

The evidence of the appellant's general practitioner of over 15 years is that the appellant is restricted with mobility inside and outside the home and he is unable to walk for more than a block without needing to stop.

The chiropractor assessed the appellant as taking significantly longer than typical with walking indoors and walking outdoors; however, the chiropractor has not specified how much longer than typical it takes the appellant with his mobility. At the hearing, the appellant stated that it depends on how well he is doing for how far he can walk. Sometimes it is a block or less but he also knows that he needs to keep moving or he will "seize up" so he is always walking and moving. The panel finds that the distance that the appellant can walk varies with the exacerbation of his pain and that he uses a cane at all times although it is not clear on the evidence whether a cane is required.

The general practitioner indicated that the appellant is continuously restricted with personal self care and the chiropractor assessed the appellant as independent with all tasks and taking significantly longer than typical with 6 out of 8 tasks, namely dressing, grooming, bathing, toileting, and transfer in/out of bed and on/off of chair, but not as requiring assistance from another person. In the April 3, 2013 note, the general practitioner indicated that getting dressed and in and out of the shower takes the appellant 5 times longer than usual and is very painful without support. In his self-report, the appellant wrote that he has difficulty getting in and out of the bathtub, difficulty reaching and standing in the shower.

The general practitioner reported that the appellant is continuously restricted with meal preparation and the chiropractor indicated that the appellant is independent with all tasks, including, meal planning, food preparation, cooking and safe storage of food. In the April 3, 2013 note, the general practitioner wrote that the constant pain restricts the appellant's ability to prepare meals, that he is unable to stand in the kitchen for more than 5 to 10 minutes and is unable to lift pots and pans or reach into cupboards. In his self-report, the appellant wrote that it is very difficult for him to stand at the sink, counter, or stove which makes meal preparation challenging.

In the physician report, the general practitioner indicated that it is unknown whether the appellant is restricted with management of medications. The chiropractor indicated that the appellant is independent with all tasks, including filling/refilling prescriptions, taking medications as directed and safe handling and storage.

The general practitioner reported that the appellant is continuously restricted with basic housework and the chiropractor indicated a need for periodic assistance from another person with laundry and basic housekeeping, with no other comments provided. In the April 3, 2013 note, the general practitioner wrote that the constant pain restricts the appellant's ability to do basic housework, that he is unable to vacuum or do any cleaning requiring bending or reaching. In his self-report included with the PWD application, the appellant stated that daily activities such as house cleaning are very difficult, that he has problems vacuuming and making the bed/changing the sheets is almost impossible and that he has to wait until he feels better to perform these tasks. As previously set out, the panel finds that the evidence demonstrates that it 'almost impossible' for the appellant to perform a demanding task like vacuuming, during an exacerbation of his pain, and that he is able to perform these tasks at other times.

For daily shopping, the general practitioner reported that the appellant is continuously restricted and the chiropractor indicated that the appellant is independent with 3 out of 5 tasks and requires periodic assistance with 2 tasks, namely with going to and from stores and carrying purchases home. The chiropractor commented that the appellant requires a cane to get around and may require assistance carrying purchases home. No further information is provided by the chiropractor regarding the frequency and duration of the assistance required.

The general practitioner reported continuous restrictions with use of transportation and the chiropractor indicated that the appellant takes significantly longer than typical with getting in and out of a vehicle, using transit schedules and arranging transportation. The chiropractor commented that the appellant requires a cane to get around and may eventually require a walker or wheelchair. However, the chiropractor did not provide further information regarding how much longer it takes the appellant to perform these tasks. In his self-report, the appellant wrote that he has difficulty getting in and out of his car which is very painful and

sometimes he cannot bend forward enough to get into the car. Public transportation causes a lot of pain.

For management of finances, the general practitioner reported that it is unknown whether there are any restrictions with this DLA and the chiropractor indicated that the appellant is independent with all tasks, including banking, budgeting, and paying rent and bills.

For social functioning, the general practitioner reported continuous restrictions and the chiropractor indicated that the appellant is independent with all aspects of social functioning, including making appropriate social decisions, developing and maintaining relationships, interacting appropriately with other, dealing appropriately with unexpected demands, and securing assistance from others. The general practitioner commented regarding the impact to social functioning that "...depression and anxiety affects motivation."

The advocate argued that the general practitioner has identified continuous restrictions with 8 out of 10 listed DLA and the degree of restriction was further defined by the general practitioner as "significantly agitates patient." Although there are continuous restrictions identified, whether these restrictions are significant depends on how they manifest in terms of the degree of assistance required by the appellant. In this case, the panel finds that the evidence from the prescribed professionals indicated that while the appellant requires periodic assistance with the DLA of basic housekeeping, with two of the tasks of daily shopping and with meal preparation, the ministry reasonably determined that there is insufficient evidence to establish that the need for assistance is for extended periods of time. The advocate argued that while the chiropractor, as assessor, has not ticked 'uses assistive device' for most activities, a cane is clearly required at all times as virtually all activities involve walking. In the April 3, 2013 note, however, the general practitioner modified the original statement from one that the appellant "must use a cane for walking and standing at all times, as well as a back brace" to: "he uses a cane for walking or standing as well as a back brace." The panel finds that the ministry reasonably concluded that there is not enough evidence from the prescribed professional to establish that the appellant's impairment significantly restricts his ability to manage his DLA either continuously or periodically for extended periods, thereby not satisfying the legislative criterion of section 2(2)(b)(i) of the EAPWDA.

### **Help to perform DLA**

The appellant's position is that he requires the significant assistance of another person to perform DLA even if he does not currently receive it, and that he uses a cane, a back brace and a CPAP machine as assistive devices.

The ministry's position is that because it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required. The ministry acknowledged that assistive devices are required, namely a cane, a lumbar brace and a CPAP machine.

### ***Panel Decision***

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 does not receive assistance from anyone with his DLA even during exacerbations of his pain but he uses a walking cane. Regarding the appellant's need for assistance, the general practitioner indicated in the physician report that "...help from another person frequently would be beneficial, e.g. assistance with chores." The panel 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, as defined by section 2(3)(b) of the EAPWDA.

**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.