

## PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development (the ministry) dated 17 April 2013 denying the appellant designation as a person with disabilities (PWD). The ministry determined that the appellant did not meet all of the required criteria for PWD designation set out in the Employment and Assistance for Persons with Disabilities Act, section 2. Specifically the ministry determined that the information provided did not establish that the appellant has a severe mental or physical impairment that in the opinion of a prescribed professional

(i) directly and significantly restricts his ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and,

(ii) as a result of those restrictions, he requires help to perform those activities.

The ministry did determine that the appellant satisfied the other 2 criteria: he has reached 18 years of age and his impairment in the opinion of a medical practitioner is likely to continue for at least 2 years.

## PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act (EAPWDA) – section 2

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR) – section 2

## PART E – Summary of Facts

The evidence before the ministry at reconsideration consisted of the following:

1. The appellant's PWD Designation Application dated 07 November 2012. The Application contained:
  - A Physician Report (PR) dated 28 October 2012 completed by the appellant's general practitioner (GP) who had known the appellant for 2 years and has seen him 2 – 11 times in the past year.
  - An Assessor Report (AR) of the same date, completed by the same GP.
  - The appellant did not complete the Self Report
2. From the ministry's files: A Medical Report – Persons with Persistent Multiple Barriers (MR-PPMB), dated 16 April 2012, completed by the same GP.
3. The appellant's Request for Reconsideration, dated 04 April 2013, to which was attached several pages of notes from the appellant.

In the PR, the GP diagnoses the appellant's impairment as calcaneal [heel bone] fracture, bilateral, with a 6 year history.

The panel will first summarize the evidence from the PR and AR relating to the appellant's impairments as it relates to the PWD criteria at issue.

### Severity/health history

#### *Physical impairment*

PR:

The GP reports that six years ago the appellant was involved in an accident and fractured both heels. Prior to this injury he had worked full-time for 12 years in various industries. He has been unemployed for six years. The injury completely changed his life -- with pain, loss of work, loss of finances and over-use of opiates to control the pain, leading to social isolation and depression.

The GP reports that the appellant has been prescribed medication and/or treatments that interfere with his ability to perform DLA due to his prescription pain medication dependence. However the appellant has decreased his medication intake significantly over the past six months. The GP indicates that he will continue to decrease the dosage and stop the medication.

The GP indicates that the appellant's impairment is likely to continue for two years or more, commenting that his condition will unfortunately give him pain for many years into the future, disabling him from any but minimal physical work and exertion.

Functional skills: The GP reports that the appellant is able to walk less than 1 block unaided, climb 5+ steps unaided, lift 15 to 35 pounds, and has no limitation in remaining seated.

The GP reports that the appellant has no difficulties with communication.

Additional comments: the GP states that prior to the injury, which was not work related, the appellant was a sociable, physically hard-working man. Since the injury, with the pain and the opiates, he has become depressed, lonely, and cannot work anymore. He did try for a long time to work with a flooring company as a lot of the work is done kneeling, but he felt that he was not dependable and is now unemployed.

AR:

The GP states: "Chronic bilateral foot pain limits his ability to stand/walk."

#### *Mental impairment*

PR:

The GP reports that the appellant has significant deficits with cognitive and emotional function in the areas of emotional disturbance and attention or sustained concentration.

AR:

The GP did not complete the section on how the appellant's mental impairment impacts daily functioning.

#### Ability to perform DLA

PR:

The GP reports that the appellant's activities are restricted as follows: restricted on a continuous basis for mobility inside the home, mobility outside the home and social functioning. No restrictions are noted for all other DLA: personal self care, meal preparation, management of medications, basic housework, daily shopping, use of transportation, and management of finances.

Regarding social functioning, the GP comments: "Socially the fracture & ensuing chronic pain & use of opiates resulted in him losing a spousal relationship of eight years. He is increasingly reclusive and lives alone." The GP comments further that the appellant is depressed at being unemployable due to his injury.

AR:

The GP made the following assessments (the GP's comments in parentheses):

- Mobility and physical ability: takes significantly longer than typical for walking indoors, walking outdoors, climbing stairs, standing, lifting, carrying and holding (pain just slows him down).
- Personal self care: independent in all aspects.
- Basic housekeeping: independent in all aspects
- Shopping: takes significantly longer than typical for going to and from stores and carrying purchases home; independent for reading prices and labels, making appropriate choices, and paying for purchases.
- Meals: independent in all aspects
- Pay rent and bills: independent in all aspects
- Medications: independent in all aspects.
- Transportation: takes significantly longer than typical for getting in and out of the vehicle and using public transit; independent for using transit schedules and arranging transportation.
- Social functioning: periodic support/supervision required for making appropriate social

decisions, interacting appropriately with others, and dealing appropriately with unexpected demands; continuous support/supervision is required for developing and maintaining relationships; independent for securing assistance from others.

- The GP describes the impact of the appellant's mental impairment on his immediate and extended social networks as marginal functioning.

Assistance required/provided

PR:

The GP reports that the appellant does not require any prostheses or aids for his impairment. The GP states that the appellant depends on his mother to clean/tidy his home.

AR:

The GP states that presently the appellant's mother is helping him with cleaning house, shopping, etc.

The GP notes that help for DLA is provided by family

The GP indicates that the appellant routinely uses a cane and ankle braces to compensate for his impairment. The GP comments: "Note – just walks slowly except ankle brace."

The appellant does not have an assistance animal.

In the MR-PPMB, the GP describes the appellant's restrictions as "chronic ankle pain with ↓ ROM in both legs. Awaiting another surgery."

In his notes attached to the Request for Reconsideration, the appellant provides the following additional information:

- He writes that there are certainly limits to his standing, walking and seating because his whole body has now going on 7 years of damage, starting with arthritis in every joint, his ankles are atrophied, his hips don't line up, and he had surgery where they chiseled off some of his bone so it would stop touching another bone. His legs are of different length. He walks with a limp, with his knees, hips, ankles, back and neck always in pain. Walking causes him great pain and 24 hours of his day is spent in pain. He states that he has spent 90 to 95% of the last two years in his bed by himself.
- He writes that what his GP meant by "Pain just slows him down" is that when he does something like get out of bed and walk, he does so slowly and unsteadily. He emphasizes the GP's reference to the use of ankle braces.
- He writes that when his medications are gone he is useless – the brain does not work anymore. He will need crutches or canes on some days. He needs full days off his feet, meaning almost no walking and staying in bed.
- After years of being bedridden and depressed, social skills and learning skills have also deteriorated. With his embarrassment, guilt, and every other detrimental emotion, it is virtually impossible for him to have friends and family or even self respect.
- He may not yet be in a wheelchair but for some time now he does not possess the ability to hold a job for which he has the skills.
- He does not know which ailment is more disabling: being a shut in, depressed person or not being able to walk without medical assistance and a limp that causes knee, hip and back problems, which in turn cause sciatic nerve issues causing numbness in his fingers and

occasionally a spasm that is crippling for 30 minutes.

- He states that he sleeps at the most for 2 to 3 hours at a time. He has had 5 to 6 surgeries to repair or help with pain, but if they did anything to help, that is no longer the case. He is always constipated and uses laxatives for every movement, but this causes great, crippling pain.
- He has been told that one day he will need a wheelchair, as there is no cure for the deterioration of his joints and his arthritis.
- Until recently he has hidden from his doctor the fact that he doesn't leave his home or do anything in his home but watch recorded movies and sleep. About three times a week he eats food other than fruit or cereal. He doesn't cook as he just doesn't know how and he doesn't clean but just piles stuff away in other rooms. His house is an embarrassing mess of clutter and cat hair – his only two friends are his two cats.

In his Notice of Appeal, dated 07 May 2013, under Reasons the appellant stated that he is disabled – he cannot stand barefoot more than 5 to 10 minutes, he is in pain 24 hours a day every day; even with his custom orthotics (that are worn out and don't fit properly) he cannot stand up-right for more than 30 minutes of every 12 hours.

After reconsideration but before the hearing, the appellant submitted on 30 May 2013 an Operative Report by the appellant's surgeon regarding a surgical procedure on 03 July 2013 for a preoperative diagnosis of OA left ankle. The postoperative diagnosis was OA left ankle. The surgeon reports that: "... it was seen that there was grade 2 degeneration both on the underside of the tibia and the talus. This was debrided with shaver. There was no bone spur. There was mild synovitis which was debrided as well."

At the hearing, the appellant reviewed the evidence in the PR and AR and the submission he prepared for his reconsideration request, placing emphasis on his need for a cane and ankle brace, and his reliance on others for daily living activities. The appellant stated that his mother visits and brings him food and cleans his home approximately every third day, while his aunt visits, cooks and provides cleaning assistance and social support every second day. He stated that his mother and aunt practically do everything in the house. The appellant described constant chronic bilateral foot pain that impacts everything he does and limits his ability to perform physical activities. He stated that when he goes shopping at large stores he uses a power cart provided because he is unable to walk. He reiterated that as a result of the constant chronic pain, he experiences social isolation and depression.

The ministry stood by its decision at reconsideration

The panel finds that the information provided by the appellant in his Notice of Appeal, at the hearing and in the 03 July 2013 Operative Report is in support of the information before the ministry at the time of the reconsideration. The surgical confirmation of arthritis confirms the appellant's reference to arthritis in his Request for Reconsideration. The panel therefore admits this new information as evidence pursuant to Section 22(4)(b) of the Employment and Assistance Act.

## PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry reasonably determined that the appellant is ineligible for PWD designation because he did not meet all the requirements in section 2 of the EAPWDA. Specifically the ministry determined that the information provided did not establish that the appellant has a severe mental or physical impairment that in the opinion of a prescribed professional

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

The Ministry did determine that he met the 2 other criteria in EAPWDA section 2(2) set-out below.

The following section of the EAPWDA applies to this appeal:

2 (1) In this section:

"**assistive device**" means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform;

"**daily living activity**" has the prescribed meaning;

"**prescribed professional**" has the prescribed meaning.

(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person has a severe mental or physical impairment that

- (a) in the opinion of a medical practitioner is likely to continue for at least 2 years, and
- (b) in the opinion of a prescribed professional
  - (i) directly and significantly restricts the person's ability to perform daily living activities either
    - (A) continuously, or
    - (B) periodically for extended periods, and
  - (ii) as a result of those restrictions, the person requires help to perform those activities.

(3) For the purposes of subsection (2),

- (a) a person who has a severe mental impairment includes a person with a mental disorder, and
- (b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires
  - (i) an assistive device,
  - (ii) the significant help or supervision of another person, or
  - (iii) the services of an assistance animal.

The following section of the EAPWDR applies to this appeal:

2 (1) For the purposes of the Act and this regulation, "daily living activities",

(a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:

- (i) prepare own meals;
- (ii) manage personal finances;
- (iii) shop for personal needs;
- (iv) use public or personal transportation facilities;
- (v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
- (vi) move about indoors and outdoors;
- (vii) perform personal hygiene and self care;
- (viii) manage personal medication, and

(b) in relation to a person who has a severe mental impairment, includes the following activities:

- (i) make decisions about personal activities, care or finances;
- (ii) relate to, communicate or interact with others effectively.

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

### Severity of impairment

For PWD designation, the legislation requires that a severe mental or physical impairment be established. The determination of the severity of impairment is at the discretion of the minister, taking into account all the evidence, including that of the appellant. However, the starting point must be medical evidence, with the legislation requiring that a medical practitioner (in this case, the appellant's physician) identify the impairment and confirm that impairment will continue for at least two years.

In the discussion below concerning the information provided regarding the severity of the appellant's impairments, the panel has drawn upon the ministry's definition of "impairment." This definition consists of "cause" and "impact" components: "impairment is a loss or abnormality of psychological, anatomical or physiological structure or function [the cause] causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration [impact]." The cause is usually set out as a disease, condition, syndrome or even by a symptom (e.g. pain). A severe impairment requires the identified cause to have a significant impact on daily functioning.

### *Mental impairment*

The position of the ministry is that the narrative provided by the GP is not supportive of a severe mental health condition that significantly limits the appellant's ability to function either continuously or periodically for extended periods. For these reasons the ministry was not satisfied that the information provided is evidence of a severe mental impairment.

The appellant's position is that his GP has noted depression as a medical condition in the MR-PPMB, and has identified two deficits to cognitive and emotional functioning, namely in the areas of emotional disturbance (i.e. depression) and attention and sustained concentration, as well as continuous restrictions to social functioning. The GP also reported that he is increasingly reclusive and lives alone. The appellant argues that this evidence is sufficient to establish a severe mental impairment.

The panel notes that, while the GP reported depression as a secondary medical condition in the MR-PPMB, and mentioned depression under Health History, he did not diagnose any mental health condition (in particular, depression) as an impairment – a medical condition causing significant restrictions to daily functioning. Moreover, while the GP identified two deficits to cognitive and emotional functioning, he did not complete the section in the AR on impacts on daily functioning applicable to an applicant with an identified mental impairment, leading the panel to conclude that the GP does not consider the appellant's depression to be an impairment. The panel therefore finds that the ministry reasonably determined that a severe mental impairment had not been established.

### *Physical impairment*

The ministry noted that the GP reports the appellant is independently able to perform all aspects of mobility and physical abilities, albeit pain slows him down. Noting that an ankle brace is worn, the position of the ministry is that the functional skill limitations as described are not sufficiently restricted aside from walking; however other than ankle braces, no assistive devices such as a cane, crutch or walker are routinely used/required. The ministry was therefore not satisfied that the information provided is evidence of a severe physical impairment.

The position of the appellant is that, as a consequence of the damage caused by his heel fractures, he now also suffers from arthritis and bone degeneration at the bottom of his legs, and as a result he walks with a limp, with his knees, hips, ankles, back and neck always in pain. Walking causes him great pain and 24 hours of his day is spent in pain, to the point that he is bedridden most of the day. He notes that the ministry did not take into account the fact that not only does he use ankle braces but also a cane moving about indoors and outdoors. He also notes that, while the GP reports that he is able to walk only less than one block, the ministry forms do not ask how often he can do so in one day: in his case he is limited to being on his feet for only 30 minutes in any 12 hour period. He points to his GP's comment that: "He is disabled from physical activities for life." He argues that a careful reading of the GP's comments, not just the tick marks in the boxes, provide the evidence to establish that he has a severe physical impairment.

It appears to the panel that the GP has not provided a comprehensive picture of the nature of the appellant's physical impairment. While he has diagnosed bilateral calcaneal fracture as the impairment, he did not mention the resulting arthritis and bone degeneration noted in the surgeon's operative report 03 July 2012. Nor did the GP make reference to the series of five surgeries that the appellant has had to repair the damage caused by the heel fractures. The arthritis in the appellant's knees and hips, as mentioned by the appellant, has also not been confirmed by the GP. Nevertheless, what is important in the assessment of severity of impairment, as discussed above, are the impacts on daily functioning of the overall medical condition stemming from the heel fractures. The GP reports that the appellant is able to walk less than 1 block unaided, that chronic bilateral foot pain limits his ability to stand/walk and that he takes significantly longer than typical for all aspects of mobility and physical ability, with the comment that "Pain just slows him down." Further, ankle braces and a cane are required for moving about. Noting the GP's comment that: "He is disabled from physical activities for life." and the appellant's evidence that any activity on his feet is limited to 30 minutes in any 12 hour period and that he spends much of the rest of the time bed-ridden, the panel finds that the ministry was not reasonable in determining that a severe physical impairment had not been established.

### *Significant restrictions in the ability to perform DLA.*

The ministry noted that the GP reported continuous restrictions to mobility inside and outside the home and social functioning; no restriction is reported to seven of 10 other DLA. The ministry further noted that the appellant's mother cleans and tidies his home. In terms of assistance from other people, the ministry noted that the GP reported that all activities are performed independently, although going to/from stores, carrying purchases home, getting in/out of vehicle and using public transit takes significantly longer than typical, though how much longer is not described. While



support/supervision is required for most aspects of social functioning, no specific description of the degree or duration is provided to determine the significance of this. The position of the ministry is that as a majority of DLA are performed independently or require little help from others, the information from the GP, the appellant's prescribed professional, does not establish that impairment significantly restricts DLA either continuously or periodically for extended periods.

The position of the appellant is that the evidence shows that he is significantly restricted in moving about indoors and outdoors and that, as his ability to stand and move about is significantly restricted by his chronic pain, it follows that his ability to do anything that requires him to be on his feet, such as housekeeping, preparing meals and shopping, is by definition significantly restricted. Indeed, the GP reports that he relies on his mother for help with cleaning and shopping. The appellant submits that this evidence clearly shows that he is significantly restricted on a continuous basis in the ability to perform any DLA requiring physical effort.

The panel notes that, according to the legislation, the direct and significant restriction in the ability to perform DLA must be a result of a severe impairment, with a severe physical impairment, though not a mental one, having been established in this appeal, and be in the opinion of a prescribed professional. This does not mean that other evidence should not be factored in, but the legislative language makes it clear that the prescribed professional's opinion is fundamental to the ministry's determination as to whether it is "satisfied" that this criterion is met.

The panel notes that for one of the DLA listed in section 2(1)(a) of the EAPWDR, namely moving about indoors and outdoors, the GP has provided some detail: the appellant is able to walk less than one block and that "Pain just slows him down." For the other DLA in which some restrictions are noted in terms of taking significantly longer than typical – shopping and use of transportation – no further detailed information or description is provided, including how much longer than typical. The panel notes that for basic housekeeping the GP assessed the appellant as independent, but stated that the appellant's mother provides help, but no further information is provided to explain this apparent contradiction. The GP assesses the appellant as taking significantly longer than typical for 2 aspects of shopping (going to/from stores and carrying purchase home), but also notes that the appellant's mother provides help for this DLA as well. Again, no further information is provided that would substantiate a significant restriction in this DLA.

The panel has found that a severe physical impairment has been established, but not a severe mental one. With respect to the DLA relating to a person with a mental impairment, i.e. EAPWDR section 2(1)(b)(i) make decisions about personal activities, care or finances; and 2(1)(b)(ii) relate to, communicate or interact with others effectively, the panel notes that there is no evidence that the appellant has difficulties with respect to section (b)(i). With respect to the DLA regarding relating to others, the GP indicates that the appellant requires continuous support/supervision regarding developing and maintaining relationships and periodic support supervision for making appropriate social decisions, interacting appropriately with others and dealing appropriately with unexpected demands. However, the GP provided no information regarding the nature, frequency or duration of such support/supervision. The panel finds that as a severe mental impairment has not been established, and as there is little evidence, apart from him being increasingly reclusive, that this DLA is significantly restricted, the ministry was reasonable in determining that it had not been established that these two DLA were significantly restricted.

While the GP has identified one DLA – moving about indoors and outdoors – which can be reasonably considered to be significantly restricted, there is insufficient information provided on those assessed as taking significantly longer. In addition, the majority of DLA requiring physical effort were assessed as independent by the GP. Accordingly, the panel finds the ministry reasonably determined that this criterion had not been met.

#### Help with DLA

The ministry's position is that as it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required from other persons.

The appellant's position is simply that he relies on ongoing help from others, particularly from his mother for cooking, housekeeping and shopping. Moreover, he relies on assistive devices for moving about – ankle braces and a cane.

The panel notes that the legislation requires that in the opinion of a prescribed professional the need for help must arise from direct and significant restrictions in the ability to perform DLA that are either continuous or periodic for extended periods. The panel finds that the ministry reasonably determined that since it has not been established that DLA are directly and significantly restricted, it cannot be determined that help is required as provided under section 2(2)(b)(ii) of the EAPWDA.

#### Conclusion

Having reviewed and considered all of the evidence and the relevant legislation, the panel finds that the ministry's decision that the appellant was not eligible for PWD designation was reasonably supported by the evidence and therefore confirms the ministry's decision.