

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation's (the ministry) reconsideration decision dated August 19, 2013 which found that the appellant did not meet four of the five statutory requirements of section 2 of the *Employment and Assistance for Persons with Disabilities Act* (EAPWDA) for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement. However, the ministry was not satisfied that:

- the appellant's impairment is likely to continue for at least two years;
- 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 that
- as a result of those restrictions, the appellant requires the significant help or supervision of another person, an assistive device, or the services of an assistance animal, 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 reconsideration consisted of:

- 1) The appellant's Request for Reconsideration (RFR) dated July 19, 2013;
- 2) PWD Decision Summary decision dated June 18, 2013;
- 3) A PWD application comprised of a Self-report (SR) signed by the appellant on March 20, 2013; a Physician Report (PR) and an Assessor Report, both dated March 18, 2013 and completed by the appellant's general practitioner. On the AR the general practitioner reports that she has known the appellant for less than six months and has seen the appellant two to ten times in the last year;
- 4) Letter from the appellant dated March 20, 2013 stating that his intention is to retrain and resume employment as soon as possible, and that with the help of his new doctor he is starting the process to get involved with a pain clinic;
- 5) Report from the appellant's medical specialist to the appellant's general practitioner dated January 8, 2013 (the "Specialist Report");
- 6) Letter from the ministry to the appellant dated June 18, 2013 advising that his application for PWD designation was denied.

In the Notice of Appeal the appellant states that his health condition has not changed and is currently under his physician's care.

### *Admissibility of New Information*

At the hearing, the appellant submitted the following documentation, advising that he had tried to submit it prior to the hearing but was not sure where to submit it:

- 1) Canada Revenue Agency statements of benefits and remuneration paid for 2010, 2011 and 2012 (9 pages);
- 2) Personal medication history printout from December 14, 2012 to June 6, 2013 and copies of prescription receipts (4 pages);
- 3) Xray report dated September 27, 2012 (the "X-ray Report");and
- 4) Medical Report dated November 30, 2011 completed by a medical practitioner from another province (the "Medical Report").

The ministry did not object to the new documentation but noted that the ministry does not consider employability as one of the criteria of PWD designation.

At the hearing the appellant also provided oral testimony stating that he has had osteoarthritis in his spine and hip that limits his employment and requires him to take medication. The appellant stated that he does not want to be unemployed and does not want to receive disability assistance but has no other options at this point. The appellant stated that his general practitioner did not cooperate in completing the PWD application, and filled it out "somewhat vindictively", and did not include information in the reports that he provided to her about his restrictions, after he advised her that if she did not complete the forms he would report her to the College of Physicians and Surgeons. The appellant reports that he now has a new family physician that is treating him and has referred him to a pain clinic as he has debilitating pain and he has an appointment in November 2013.

He has not yet received treatment as he has no funds to pay for treatment.

The panel has admitted the new documentation and oral testimony into evidence as it is in support of information and records that were before the ministry at the time of reconsideration, in accordance with section 22(4) of the *Employment and Assistance Act*. In particular, the new documentation provides further information regarding the impact of the appellant's impairment on his employment history and provides further medical information regarding his impairment.

The ministry did not submit any new information and relied on the reconsideration decision.

### ***Duration***

On the PR the appellant's general practitioner checked "no" in response and reports that it is unknown whether the appellant's impairment is likely to continue for two years or more. The general practitioner states that the appellant is a new patient, has not done any physical therapy yet. The general practitioner reports that there is a possibility of pain improvement with physiotherapy, regular exercise, massage therapy and trigger point injections.

The Medical Report indicates that the appellant had a prolonged disability lasting longer than 12 months which affects training or employment capacity and needs a special diet.

### ***Physical Impairment***

In the SR, the appellant states that he has chronic lower back pain and right hip pain caused from a motor vehicle accident that occurred in 1981. The appellant states that he cannot continue employment activities and he requires pain medication every day. He also states that in the past few years he has attempted to sustain long term employment but due to his physical limitations he has been unable to succeed with his employment. The appellant states that his disability has compromised his ability to be independent and self-reliant.

In the appellant's letter he states that with the help of a new doctor he has been able to start the process to get involved with a pain clinic. In the Notice of Appeal the appellant states that his health condition has not changed.

At the hearing, the appellant stated that his pain is debilitating.

In the PR, the general practitioner reports that the appellant has myofascial low back pain (chronic), with no evidence of nerve root impingement and normal neurologic exam, worse in the last five years, and minor osteoarthritis in the pelvis and lumbar spine and a right femur fracture from a motor vehicle accident that occurred in 1981. The general practitioner reports that the appellant has not been prescribed any medications and/or treatments that interfere with his ability perform daily living activities (DLA) but that he takes over the counter and prescription pain medication and muscle relaxants. The general practitioner also reports that the appellant has been prescribed pain medication but she is not aware if the appellant is taking it. The general practitioner reports that the anticipated duration of the mediations is unknown as the pain is self-reported and the appellant takes medications for pain relief as needed.

Functional skills reported in the PR indicate that the appellant can walk 4+ blocks unaided, can climb 5+ stairs, can lift between 5 to 15 pounds and can remain seated for 2 to 3 hours. The physician reports that the appellant does not require any prostheses or aids for his impairment.

Under Part F – additional comments, the general practitioner reports that the appellant is a new patient who requested assistance with a disability claim, that he had moved here from another province last year, and that she did not have access to his previous medical records. The general practitioner reports that the appellant

reports chronic pain and was referred to the specialist for assessment.

In the AR, the general practitioner reports that the appellant is independent with walking indoors, walking outdoors, climbing stairs, standing, lifting, and carrying and holding. The physician comments that the appellant reports having pain in walking and sitting and standing for a few years. Under Part E – additional information, the general practitioner reports that the appellant's history is self-reported and that as his new family physician it is difficult to predict the course of his chronic pain. The general practitioner reports that the appellant was referred to a specialist for nerve conduction studies and assessment and was diagnosed with myofascial pain.

The Specialist Report states that the appellant reports ongoing low back pain since a motor vehicle accident that took place 30 years ago, and that the appellant has "*some character of neuropathic-type pain*" but no clinical or electro-diagnostic evidence of L5 or S1 radiculopathy or peripheral neuropathy. The specialist recommends that the appellant try a tricyclic antidepressant or pain medication, that he participate in a regular exercise program, attend for deep tissue massage therapy, and possibly undergo trigger-point injections. The Specialist Report also indicates that x-rays of the lumbar spine, pelvis and SI joints done on October 3, 2012 revealed moderate disc space narrowing from L2-3 to L5-S1, most prominent at L2-3 on the left side with mild facet arthropathy present and the hips and SI joints appear well maintained.

The X-ray Report indicates that the appellant has mild lower facet arthropathy in his lumbar spine and minor changes of osteoarthritis in the SI joints, but the hip joints appear well maintained.

On the Medical Report, the medical practitioner also indicated that the appellant had osteoarthritis of the spine and hips that has lasted more than 12 months and requires Ibuprofen. The medical practitioner reports that the appellant will be expected to be ready for work in one year but cannot return to his former occupation as an equipment operator. The medical practitioner reported that the appellant was capable of other work (desk job) but needs training.

### ***Mental Impairment***

The appellant does not provide any information regarding a mental impairment.

In the PR, the general practitioner reports that the appellant does not have any significant deficits with cognitive and emotional function.

In the AR, the general practitioner reports that the appellant's ability to communicate with speaking, reading, writing and hearing are satisfactory. For section 4, cognitive and emotional functioning, the appellant's physician reports that there is no impact to the following areas: bodily functions, consciousness, emotion, impulse control, insight and judgment, attention/concentration, executive, memory, motivation, motor activity, language, psychotic symptoms, other neuropsychological symptoms or other emotional or mental problems.

### ***DLA***

In the SR, the appellant states that he can no longer continue employment activities and requires pain medications every day. In the Notice of Appeal the appellant states that his health condition has not changed and he is currently under doctor's care.

In the PR, the general practitioner reports that the appellant's DLA are not restricted and that he has normal ability in DLA. Under additional comments the general practitioner reports that the appellant thinks he is not able to work due to his low back pain and he reports difficulty and pain in walking and sitting.

In the AR, the general practitioner reports that the appellant is independent with all DLA, including all aspects

of social functioning. The general practitioner reports that the appellant has good functioning with his immediate and extended social networks.

***Need for Help***

The appellant does not provide any information indicating that he requires help with DLA.

In the PR the general practitioner reports that the appellant is able to live independently and responds that help required for DLA is unknown as he is new in the community, lives with his girlfriend, and is currently unemployed and receiving Employment Insurance benefits.

In the AR, the general practitioner reports that the appellant presented requesting assistance with his disability claim as he thinks he is not able to work, is currently unemployable and on employment insurance. She reports that he advised that he was unable to pay for physiotherapy. The general practitioner further reports that the appellant lives with his girlfriend. She also reports that he needs help for physiotherapy to improve his low back pain to be able to work.

The physician also reports that the appellant does not require any assistive devices or the assistance of an assistance animal.

## PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry's reconsideration decision denying the appellant designation as a PWD was reasonably supported by the evidence or was a reasonable application of the applicable legislation in the circumstances of the appellant. In particular, was the ministry reasonable in determining that the appellant:

- does not have an impairment that will continue for at least two or more years as confirmed by a medical practitioner;
- does not have a severe physical or mental impairment;
- that the appellant's DLA's 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, the appellant does not require the significant help or supervision of another person, 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.

**Duration**

The appellant's position is that he has had chronic low back and hip pain for many years since a motor vehicle accident and that the pain will continue.

The ministry's position is that the appellant's general practitioner has not confirmed that the appellant's impairment will continue for two years or more.

***Panel Decision***

Section 2(2)(a) of the EAPWDR requires that there must be an opinion of a medical practitioner indicating that the appellant's impairment is likely to continue for at least two years. The panel notes that the Medical Report indicates that the appellant's condition of osteoarthritis in his spine and hips had lasted longer than 12 months but the Medical Report is from 2011.

As the appellant's general practitioner, on the PR, reports that it is unknown whether the appellant's impairment will continue for two years or more and that the appellant may have pain improvement with physiotherapy, regular exercise and deep massage to find the trigger points, the panel finds that the ministry's determination that the physician had not confirmed that the appellant's impairment will continue for two or more years from the date of the application was reasonable.

**Severe physical impairment:**

The appellant's position is that he has debilitating back and hip pain, that he is unable to work and requires daily pain medication. The appellant's position is that the Medical Report and the Specialist Report support the fact that he has had chronic pain for several years and that he has osteoarthritis, facet arthropathy and requires treatment for his impairment.

The ministry's position is that as the appellant's general practitioner reports that the appellant is independent in all aspects of mobility and physical ability but the appellant reports he has had pain for a few years with walking, sitting and standing, the ministry is not satisfied that the information establishes that the appellant has a severe physical impairment. The ministry also states that while the appellant may not be able to work, the PWD application is not intended to assess employability or vocational abilities and that employability is not an

eligibility criterion for designation as a PWD.

*Panel Decision*

The panel finds that a medical practitioner, the appellant's general practitioner, has diagnosed the appellant with chronic myofascial low back pain and minor osteoarthritis in the pelvis and lumbar spine. The general practitioner notes that the appellant reports that for more than a few years he has pain with walking, standing and sitting, but the general practitioner reports that the appellant is independent with all aspects of mobility and physical ability. In particular, functional skills reported in the PR indicate that the appellant can walk 4+ blocks unaided, can climb 5+stairs, can lift between 5 to 15 pounds, and can remain seated two to three hours.

While the appellant stated that his general practitioner does not understand his daily struggles and did not cooperate in completing the PWD application, and while the legislation 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, 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 panel finds that the functional skills described by the general practitioner indicate that the appellant's functional limitations are in the mild to moderate range rather than severe.

Although the X-ray Report confirms that the appellant has minor changes of osteoarthritis in the SI joints, it indicates that the appellant has mild lower facet arthropathy in his lumbar spine. The panel finds that this information does not support a finding that the appellant has a severe physical impairment.

Although the appellant states that the Specialist Report confirms his severe physical impairment, the panel finds that the Specialist Report, while recommending various treatment, only indicates that he appellant has mild facet arthropathy and "*some character of neuropathic-type pain*", and the ministry was reasonable in concluding it does not provide further information indicating that the appellant has a severe physical impairment.

The panel notes that although the appellant reports that he has daily, debilitating pain, he has not provided any further information about his limitations except with respect to employment. While the panel appreciates that the appellant has some impairment if he is unable to work, the panel notes that employability is not a legislated criterion for designation as PWD.

The panel concludes that based on all of the evidence, particularly that of the prescribed professional, the ministry reasonably determined that the appellant's level of independent physical functioning does not establish that the appellant has a severe physical impairment under section 2(2) of the EAPWDA. Therefore, the panel finds that the ministry's decision, which concluded that the evidence does not establish a severe physical impairment under section 2(2) of the EAPWDA, was reasonable.

**Severity of mental impairment:**

The appellant did not provide any evidence or submissions that he has a severe mental impairment.

The ministry's position is that there is not enough evidence to establish that the appellant has a severe mental impairment.

*Panel Decision*

The panel finds that the appellant's general practitioner reports that the appellant has no significant deficits in the areas of cognitive and emotional functions and no impacts on the appellant's daily functioning due to

cognitive and emotional functioning. The general practitioner reports that the appellant's reading, writing, speaking and hearing are satisfactory and that his relationships with his immediate and extended social networks is good.

As the general practitioner has not diagnosed a mental disorder, identified any mental impairment or any impact to the appellant's cognitive and emotional functions, the panel finds that the ministry's decision, which found that there was not enough evidence to establish a severe mental impairment under section 2(2) of the EAPWDA, was reasonable.

### **Restrictions in the ability to perform DLA**

The appellant's position is that he has debilitating low back and hip pain that requires him to take pain medication on a daily basis.

The ministry's position is that based on the information provided by the appellant's physician, there is not enough evidence to establish that the appellant has a severe impairment that directly and significantly restricts his DLA continuously or periodically for extended periods. In particular, the ministry notes that the appellant's general practitioner reports that the appellant has normal ability in DLA and does not take significantly longer to perform any DLA. The general practitioner also reports that the appellant currently lives with a girlfriend but is able to live independently.

### *Panel Decision*

The legislation requires that in the opinion of a prescribed professional a severe impairment directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods.

Based on the evidence in the PR and the AR, the evidence of the prescribed professional indicates that the appellant is independent with all DLA and is not restricted in any manner. While the appellant states that the general practitioner did not cooperate in completing the PWD application, the appellant has not provided any evidence from his new family physician indicating that he is restricted with DLA either continuously or for extended periods. In addition, the appellant did not provide any evidence himself regarding any restrictions with DLA.

The panel finds that as the prescribed professional indicates that the appellant is independent with all DLA, the ministry was reasonable in finding that the appellant's impairment does not significantly restrict his ability to perform DLA, either continuously or periodically for extended periods.

Therefore, the panel finds that the ministry reasonably determined that, based on the information provided by the prescribed professional that there are no noted restrictions in the appellant's ability to perform his DLA, the information provided did not constitute a direct and significant restriction of the appellant's ability to perform his DLA thereby not satisfying the legislative criteria of section 2(2)(b)(i) of the EAPWDA.

### **Help with DLA**

The appellant's position is that he needs help with funding for physiotherapy treatment as he does not have the funds to pay for treatment.

The ministry's position is that as it has not been established that DLA's are significantly restricted, it cannot be determined that significant help is required from other persons, and no assistive devices are required.

Section 2(2)(b)(ii) of the EAPWDA requires that, in the opinion of a prescribed professional, 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) of 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 panel accepts the appellant's evidence that he requires funding to pay for physiotherapy treatment and the appellant's general practitioner, in the AR, confirms that he needs help with physiotherapy to improve his low back pain.

However, the evidence does not establish that the appellant requires the significant help or supervision of another person in order to perform DLA. For example, there is no additional information provided as to the amount, frequency or duration of help or supervision provided by the appellant's girlfriend with whom he lives.

Based on the evidence, 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 significant help to perform DLA as a result of those restrictions as required by EAPWDA section 2(2)(b)(ii).

### **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 a reasonable application of the applicable legislation in the circumstances of the appellant. Therefore, the panel confirms the ministry's reconsideration decision.