

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated August 19, 2013 which denied the appellant designation as a Person With Disabilities (PWD) on the basis 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 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 ministry did not attend the hearing. After confirming that the ministry was notified, the hearing proceeded under Section 86(b) of the Employment and Assistance Regulation.

The evidence before the ministry at the time of the reconsideration decision included the Person With Disabilities (PWD) Application comprised of the applicant information dated April 11, 2013, as well as a physician report (PR) and an assessor report (AR) both dated April 11, 2013 and completed by the appellant's family physician of approximately 4 years, as well as the following:

- 1) Letter dated March 4, 2013 from the Canada Revenue Agency(CRA) to the appellant advising in part that the CRA determined that he is eligible for a disability tax credit; and,
- 2) Submissions attached to the Request for Reconsideration dated August 8, 2013 in which the appellant set out his reasons for the request and attached a medical illustration of a woman who was the world's first ostomate, and two photographs of the appellant's abdomen taken on July 20, 2013. The appellant wrote that he has lived as an ostomate and he has a severe physical impairment as he has no control over when stool will exit his stoma.

### *Diagnoses*

The appellant has been diagnosed by his general practitioner with Stage 2 Cancer of Sigmoid Colon (April 2008).

### *Physical Impairment*

- In the PR, the general practitioner indicated in the health history that on April 10, 2008 the appellant underwent surgery for Stage 2 colon cancer in his sigmoid colon and since then he has a colostomy and "...for the last four years, the appellant has been markedly restricted- all of the time- with elimination as his ostomy requires an inordinate amount of time to manage." The general practitioner wrote that the appellant's ostomy output is unpredictable throughout the day and this makes it impossible to plan work or other activities around a pattern of elimination. The appellant always needs quick access to washrooms as a failure to empty the stool and/or gas in his ostomy bag within minutes can cause the pressure of its contents to break the seal between his skin and the ostomy flange and this has lead to numerous leaks in public places. When leaks occur, the appellant must place whatever he is doing on hold and look for a place to remove his soiled clothes, wash and apply a new ostomy appliance.
- Functional skills reported in the PR indicated that the appellant can walk 4 or more blocks unaided on a flat surface, he can climb 5 or more steps unaided, it is unknown how much the appellant can lift, and there is no limitation with remaining seated.
- 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 ostomy supplies.
- In the AR, the general practitioner indicated that the appellant is independent with all mobility and physical abilities, including walking indoors and outdoors, climbing stairs, standing and lifting and carrying and holding. The general practitioner did not provide further comments.
- In his Request for Reconsideration, the appellant wrote that he enjoys his part-time work as a classroom instructor where he has access to a washroom with a shower in case his assistive device fails, as it sometimes does.

### *Mental Impairment*

- In the PR, the general practitioner did not diagnose a mental disorder.
- The general practitioner reported the appellant does not have difficulties with communication and he

has a good ability to communicate in all areas.

- The general practitioner reported no significant deficits with cognitive and emotional function.
- In the AR, the general practitioner did not complete the section of the report relating to impacts to social functioning.

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

- In the AR, the general practitioner indicated that 6 tasks of the DLA personal care are performed independently while bathing takes significantly longer than typical ("90 min. ostomy preparation") and the appellant uses an assistive device for toileting, which also takes significantly longer than typical ("ostomy unpredictable day/night").
- The general practitioner assessed the appellant as being independent with all tasks of basic housekeeping, shopping, meal preparation, paying rent and bills, managing medications and transportation.
- In his Request for Reconsideration, the appellant wrote that his impairment directly and significantly restricts his ability to perform several DLA without an assistive device, consisting of an ostomy flange, ostomy bag, cohesive ring, sure seal ring, protective shield and belt. The appellant wrote that his ability to perform the following DLA is restricted: prepare his own meals, manage personal finances, shop for personal needs, use public or personal transportation facilities, perform housework to maintain his place of residence in acceptable sanitary condition, move about indoors and outdoors, and perform personal hygiene and self care.

#### *Need for Help*

- The general practitioner reported that the appellant lives alone and requires an ostomy appliance.
- The general practitioner indicated in the AR that the section relating to assistance provided by other people is "N/A", or not applicable to the appellant.

In his Notice of Appeal, the appellant expressed his disagreement with the reconsideration decision. The appellant wrote that the general practitioner has confirmed all elements of Section 2, that his ostomy will continue for the rest of his life, and it directly and continuously affects his ability to perform DLA, and he requires help in relation to a DLA because in order to perform it he requires an assistive device (ostomy appliance).

At the hearing, the appellant provided the following oral evidence:

- The appellant stated that there are many DLA that he could not do if he did not have an assistive device; in particular, he could not prepare his meals, manage personal finances, shop for personal needs, use transportation, perform housework, move about indoors and outdoors, and perform personal hygiene and self care .
- The appellant stated that he could not do these activities without his ostomy appliance, or assistive device, because stool would be constantly dripping out of his stoma. If he were to do his housework without the ostomy appliance, for example, it would be pointless because he would be making more of a mess in the process.
- The appellant stated that the only DLA that does not apply is managing personal medications because he does not take any medications.
- The appellant acknowledged that he can walk and climb stairs but stated that he must always use his ostomy appliance.
- The appellant stated that if he did not have his ostomy supplies of an ostomy flange, bag, cohesive ring, sure seal ring, protective shield and belt, as an assistive device, he would be housebound like the world's first ostomate as set out in the illustration provided. The appellant showed the panel the various ostomy supplies that he must use.

- The appellant stated that the tumour was taken out of his colon 5 years ago but he is being monitored and has to have an ultrasound every 6 months to ensure there is no cancer.
- The appellant stated that there were no complications with his ostomy and it was a typical procedure. He has a prolapsed stoma so that it comes out more than normal but it has been like this since he had surgery in April of 2008.
- The appellant stated that his ostomy appliance is worn 100% of the time and the frequency for changing the appliance varies from once a week, where there has been no physical activity, to more frequently if the weather has been warm or if he has been cycling or engaging in strenuous physical activity.
- The appellant stated that the ostomy bag must be changed first thing in the morning, around 5:00 am, and again at 6:30 am, and after meals, for example. Over the years, he has become aware when there is a build-up of gas or stool which requires a release of the gas or emptying of the bag and he will get to a washroom. When he first had the appliance in the beginning, he had leaks in public places because he was not aware that it needed to be emptied and did not get to a washroom in time.
- The appellant stated that he must always be in close proximity to a washroom with a toilet and sink in the same private room.
- There are many things that he did before that he can no longer do because of his assistive device and his need for immediate access to a washroom. He cannot drive a bus or taxi or be a chauffeur, for example. The appellant stated that he currently teaches one day a week at a college which works well with his need to access the washroom.
- The appellant stated that he has been granted a disability tax credit from the Canada Revenue Agency but he has not applied for a federal disability pension.

The panel admitted the appellant's evidence regarding his condition, pursuant to Section 22(4) of the *Employment and Assistance Act*, as oral testimony in support of information that was before the ministry when the decision being appealed was made.

## PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry's determination that the appellant is not eligible for designation as a PWD was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. 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 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.

### **Severe Physical Impairment**

The appellant's position is that a severe physical impairment is established by the evidence of his physician that he had surgery for colon cancer in April 2008 which resulted in a stoma that is an impairment that is likely to continue for two or more years with the physician noting "lifetime." The appellant argued that he is required to use his ostomy appliance as an assistive device 100% of the time, otherwise there would be stool dripping out of his stoma, which meets the definition in the legislation of a requirement for 'help' with all but one of the listed DLA.

In the reconsideration decision, the ministry determined that there is not sufficient information to establish that the appellant has a severe physical impairment. The ministry found that the general practitioner indicated that the appellant is independent in all aspects of mobility and physical abilities and that he is independent in the majority of his DLA. The ministry found that the appellant's general practitioner reported that the appellant is able to walk 4 or more blocks unaided, climb 5 or more steps unaided and although it is unknown how much he is able to lift, there are no limitations with remaining seated.

### *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 PR 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 approximately 4 years, diagnosed the appellant with Stage 2 Cancer of Sigmoid Colon for which he underwent surgery in April 2008 and the tumour was removed. In the PR, the general practitioner indicated in the health history that since then the appellant has a colostomy and "...for the last four years, the appellant has been markedly restricted- all of the time- with elimination as his ostomy requires an inordinate amount of time to manage." The general practitioner wrote that the appellant's ostomy output is unpredictable throughout the day and this makes it impossible to plan work or other activities around a pattern of elimination. The appellant always needs quick access to washrooms as a failure to empty the stool and/or gas in his ostomy bag within minutes can cause the pressure of its contents to break the seal between his skin and the ostomy flange and this has led to numerous leaks in public places. At the hearing, the appellant stated that he has become more aware of when the ostomy bag

requires emptying but he still needs to be in close proximity to an appropriate washroom, which requires planning. The appellant acknowledged that there were no complications with his ostomy and that he continues with part-time employment that allows for access to a washroom.

In terms of functional skills, the general practitioner reported that the appellant can walk 4 or more blocks unaided on a flat surface, he can climb 5 or more steps unaided, it is unknown how much the appellant can lift, and there is no limitation with remaining seated. In the AR, the general practitioner indicated that the appellant is independent with all mobility and physical abilities and does not require assistance or an assistive device with walking indoors and outdoors, climbing stairs, standing, lifting and carrying and holding. The general practitioner reported that the appellant has not been prescribed any medications or treatments that interfere with his ability to perform his DLA and he requires ostomy supplies as an aid for his impairment.

At the hearing, the appellant acknowledged that he has no difficulty with his functional skills and that he is independent in his mobility and physical ability but argued that he must use his ostomy appliance as an assistive device and, therefore, requires help at all times. Section 2 of the EAPWDA defines "assistive device" to mean 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. The general practitioner identified the ostomy appliance as an assistive device and, in the AR, indicated that the appellant performs all tasks of his DLA independently except for the task of toileting, due to his restriction with elimination, which requires the use of the assistive device in order to perform it. The evidence demonstrates that the appellant is able to independently perform all other tasks of personal care and all other DLA and function independently, with the exception of restrictions to the type of employment that he is able to consider due to his need to be near a washroom. 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 did not argue that he has a severe mental impairment.

In its reconsideration decision, the ministry determined that a severe mental impairment has not been established as the appellant's general practitioner reported no deficits to cognitive and emotional functioning and the general practitioner also indicated that the appellant's communication is good and no difficulty is identified.

### **Panel Decision**

The general practitioner did not diagnose a mental disorder in the PR as part of the PWD application. The general practitioner reported the appellant does not have difficulties with communication and he has a good ability to communicate in all areas. The general practitioner indicated no significant deficits or applicable impacts to cognitive and emotional function and no noted restrictions with social functioning. 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 impairment directly and significantly restrict his ability to perform DLA on an ongoing basis as he requires the use of an assistive device, being an ostomy appliance, with all but one of his DLA.

In its reconsideration decision, the ministry stated that it relies on the medical opinion and expertise of the appellant's physician and the ministry does not have enough evidence to confirm that the appellant's

impairment significantly restricts his ability to perform his DLA continuously or periodically for extended periods. The ministry determined that although bathing and toileting take the appellant significantly longer than typical and the appellant uses an assistive device for toileting, the majority of the appellant's DLA are performed independently and there was no indication that these DLA take the appellant significantly longer.

#### *Panel Decision*

The general practitioner indicated that the appellant is independent with 6 out of 8 tasks of personal self care but that he takes significantly longer than typical with bathing, which takes 90 minutes for his ostomy preparation, and that he uses an assistive device and takes significantly longer than typical with toileting as it is noted that his ostomy is unpredictable day and night. Although the appellant argued that he is significantly restricted in all but one of his DLA because of his use of an assistive device, the panel finds that the ministry reasonably determined that this has not been supported in the reports by the general practitioner. The general practitioner indicated in the AR that all tasks of the remaining DLA are performed independently without the need for an assistive device, that the appellant is independent with preparing meals, managing personal finances, shopping for personal needs, using public or personal transportation facilities, performing housework, moving about indoors and outdoors, and managing personal medication. The panel finds that the ministry reasonably concluded that there is insufficient 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 use of an assistive device to perform all but one of his DLA.

The ministry found in the reconsideration decision 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 an assistive device is required, namely ostomy supplies, but found that this does not, in itself, establish a severe impairment.

#### *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 as this is marked in the AR as "not applicable" to the appellant, but he uses an ostomy appliance as an assistive device for toileting. 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.