

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation's (the ministry) reconsideration decision dated June 5, 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* (EAPWDA) for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that the appellant's impairment was likely to continue for at least two or more 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 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 May 28, 2013;
- 2) Letter from the appellant, undated but stamped May 22, 2013 (the "Letter");
- 3) PWD Designation Decision Summary dated March 14, 2013;
- 4) A PWD application comprised of a Self-report (SR) signed by the appellant on October 24, 2012; a Physician Report (PR) dated November 6, 2012 completed by the appellant's general practitioner of 3 years; and an Assessor Report (AR) dated January 9, 2013 and completed by the appellant's general practitioner. On the AR the general practitioner reports that he has known the appellant for two years and has seen him 11 or more times in the last year; and
- 5) CT Scan of the Lumbar Spine printed November 7, 2012 and signed by the physician May 23, 2012.

In the Notice of Appeal the appellant states that he disagrees with the ministry's reconsideration decision because this is the third doctor he has had since one retired and one moved away and that no one understands his daily struggles with his mental and physical conditions better than he does. The appellant states that he has not held a job in three years because of his conditions.

The appellant did not attend the hearing. Having confirmed that the appellant was notified of the hearing, the panel proceeded with the hearing pursuant to EAR section 86(b).

### ***Physical Impairment***

In the SR, the appellant states that due to back injuries he has not been employed in three years. He reports that at times he cannot sit or walk for any period of time and that he has loss of basic motor skills.

In the Letter, the appellant states that he has synaptic nerve problems in his back and worn out knee joints which have been documented over the years. He reports that the past 4 years has taken away his strength and intent to perform most daily tasks. He reports that he cannot walk more than five minutes without the use of a cane, can't lift more than 5 pounds, can't sit for any length of time before pains start in his left leg and numbness in my left arm. The appellant reports that he cannot hold his grandson, can no longer do daily chores and has had to rely on his children and people for help all the time. He reports that he has others clean his home and lately, he reports that he has been passing out from loss of strength and takes an additional 3 medications to numb some of the pain.

In the Notice of Appeal the appellant states that he has daily struggles due to his physical condition.

In the PR, the general practitioner reports that the appellant has osteoarthritis and degenerative disc disease although the date of onset is not indicated. Under the "Health History" section, the appellant's physician reports that the appellant has osteoarthritic changes to his spine. The physician reports that the appellant is 1.73 meters tall and weighs 124 kg. The physician also reports that the appellant has been prescribed medications for pain and will stay on the medications.

Functional skills reported in the PR indicate that the appellant can walk 2 to 4 blocks unaided, can climb 5+ stairs, can lift between 15 to 35 pounds and can remain seated less than one hour. The physician reports that the appellant does not require any prostheses or aids for his impairment.

In the AR, the physician reports that the appellant's physical impairment is that the sciatica pains in his left leg

impacts his ability to manage DLA. The general practitioner reports that the appellant is independent with walking indoors, standing (can stand for 20-25 minutes), and lifting (can lift 40-50 lbs), but requires periodic assistance with walking outdoors (has to use a cane sometimes), climbing stairs and carrying and holding. The physician explains that the appellant has constant pain.

The CT Scan of the Lumbar Spine indicates that the reason for exam was sciatica ++ left leg and a neurological consult in 2 week. The CT Scan indicates that there was no significant disc lesion or lateralizing process evident although joint osteoarthritic changes are noted and are most pronounced at the L5-S1 level. Bony degenerative changes are also noted with the left sacroiliac joint.

### ***Mental Impairment***

In the SR the appellant states that he has severe depression and has not been employed in 3 years. He reports that his mental condition does not allow him to focus to complete tasks as needed, and there is loss of concentration and memory as well and he has had to have others do his daily home chores. He reports that he is not sociable and stays home most of the time as he can no longer face crowds of people for any amount of time.

In the Letter the appellant states that he has severe clinical depression, anxiety and a few other things. He takes 4 different medications but this does not clear or fix anything and he still goes through depression. He has lost self worth, is unemployed and has been fired from his last 5 jobs for his condition interfering with his daily tasks. He has loss of short and long term memory and has been told by potential employers that he is not employable.

In the Notice of Appeal the appellant states that he has daily struggles due to his mental condition and has not held a job in 3 years because of his conditions.

In the PR, the general practitioner reports that the appellant has depression and dysthymia for 2-3 years, and requires medication which will continue. The physician reports that the appellant has no difficulties with communication but has significant deficits with cognitive and emotional function in the areas of executive, emotional disturbance, motivation and attention. Under comments, the physician reports that the appellant has chronic depression.

In the AR, the physician reports that the appellant's ability to communicate in speaking is good and that his ability to communicate in reading, writing and hearing is 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, insight and judgment, psychotic symptoms, other neuropsychological symptoms and other emotional or mental problems. There is minimal impact to attention//concentration, executive and language and moderate impact to emotion (depression), impulse control, memory, motivation and motor activity. Under the comments section the physician notes that the appellant gets depressed, has chronic pain and short term and long term memory loss.

### ***DLA***

In the SR, the appellant states that he needs help from others with his daily home chores and that even with medication he is not able to do some daily tasks.

In the Letter, the appellant states that he cannot hold his grandson, can no longer do daily chores and has had to rely on his children and people for help all the time. He reports that he has others clean his home.

In the Notice of Appeal the appellant states that he has daily struggles due to his mental and physical conditions and that no one understands his struggles better than he does.

In the PR, the general practitioner reports that the appellant's impairment directly restricts his ability to perform DLA of personal self care, management of medications, basic housework, daily shopping, mobility inside the home and mobility outside the home on a continuous basis. The physician reports that the appellant is not restricted with DLA of meal preparation, use of transportation, management of finances or social functioning. Although the physician checked off the box to indicate that the appellant's social functioning is not restricted, he then indicates, in response to the question "if social functioning is impacted, please explain", that the appellant is depressed. Regarding the degree of restriction the physician reports that the appellant has severe depression. Under additional comments the physician reports that the appellant is on chronic permanent medication due to depression.

In the AR, the physician reports that the appellant is independent with the following tasks: dressing, grooming, bathing, toileting, feeding self, regulating diet, transfers (in/out of bed), transfers (on/off of chair), reading prices and labels, meal planning, food preparation, cooking, safe storage of food, and filling/refilling prescriptions.

In the AR, the general practitioner indicates that the appellant requires periodic assistance from another person with the following tasks: going to and from stores (does use the cane), making appropriate choices, paying for purchases, banking, budgeting, paying rent and bills, taking medications as directed, safe handling and storage of medications, getting in and out of a vehicle, using public transit and using transit schedules. The physician reports that the appellant requires continuous assistance with: laundry and basic housekeeping, and that he uses an assistive device for carrying purchases home.

With respect to social functioning, the general practitioner reports that the appellant is independent with making appropriate social decisions and securing assistance from others, requires periodic supervision with interacting appropriately with others and dealing appropriately with unexpected demands and continuous supervision to develop and maintain relationships. The physician reports that the appellant has marginal functioning with his immediate and extended social networks.

### ***Need for Help***

In the SR, the appellant states that he needs help with his daily home chores.

In the Letter, the appellant states that he has to rely on his children and people for help all the time. He has others clean his home and help.

In the AR, the physician reports that the appellant's 20 year old son lives with him and helps with most of the problems. The physician also reports that the appellant uses a cane but does not require 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 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.

**Severe physical impairment:**

The appellant's position is that he has a severe back injury, synaptic nerve problems in his back, worn out knee joints, numbness in his left arm all resulting in an inability to sit or walk for any period of time, loss of basic motor skills, loss of strength and inability to function and passing out from loss of strength. The appellant states that he is appealing the denial because he does not understand how someone that is shown to be medically unemployable can be denied PWD status. The appellant states that he has had to sell everything he owned in order to pay bills and it seems prejudicial that a single white man that is medically and mentally unable to work doesn't get the help that others are entitled to.

The ministry's position is that while they acknowledge that the appellant's physical impairments may impact his functional abilities, the functional skills limitations described by the general practitioner are more in keeping with a moderate degree of impairment and that the evidence does not establish 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 osteoarthritis and degenerative disc disease that cause the appellant constant pain and functional limitations.

Functional skills reported in the PR indicate that the appellant can walk 2 to 4 blocks unaided, can climb 5+stairs, can lift between 15 to 35 pounds, can remain seated less than one hour and has no difficulties with communication. The physician reports that the appellant does not require any prostheses or aids for his impairment.

The panel notes that although the appellant reports that he cannot lift more than 5 pounds, the physician, on the PR, indicates that the appellant can lift 15-35 pounds. There is further inconsistency in that on the AR, the physician indicates that the appellant can lift 40-50 pounds.

While it may be that the physician does not understand the appellant's daily struggles and functional limitations, as the appellant states in his Notice of Appeal, 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 limitations described by the general practitioner indicates that the appellant's functional limitations are in the moderate range rather than severe.

Although the appellant may be unemployable, the panel notes that employability is not a legislated criterion for designation as PWD.

The panel concludes that based on all of the evidence but 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 ministry's position is that although there are significant deficits identified in the areas of cognitive and emotional functions regarding emotional disturbance, motivation, attention and executive, and that the appellant has been diagnosed with depression/dysthymia, the physician' has indicated that his impairments range from no impact to moderate impact. The ministry notes that the physician reports that the appellant has chronic pain and memory loss, both short term and long term and that the CT Scan indicates that he was going to attend a neurological consult in 2 weeks. However, the ministry notes that no neurological consultation was included in the RFR. The ministry's position is that the prescribed professional, the appellant's physician, has not provided enough evidence to establish a severe mental impairment.

The appellant's position is that he has severe clinical depression, anxiety and "a few other things" that have resulted in him being fired from his last 5 jobs. In the SR, he indicates that his mental condition does not allow him to focus to complete tasks as needed and there is loss of concentration. The appellant's position is that his severe depression has resulted in him being less sociable and he stays home most of the time as he can no longer face crowds of people for any amount of time.

### *Panel Decision*

In the PR, the general practitioner reports that the appellant has depression and dysthymia for 2-3 years, and requires medication on an ongoing basis. The physician reports that the appellant has significant deficits with cognitive and emotional function in the areas of executive, emotional disturbance, motivation and attention. Under comments, the physician reports that the appellant has chronic depression.

In the AR, for section 4, cognitive and emotional functioning, the appellant's physician reports that there is no impact to the following areas: bodily functions, consciousness, insight and judgment, psychotic symptoms, other neuropsychological symptoms and other emotional or mental problems. There is minimal impact to attention/concentration, executive and language and moderate impact to emotion (depression), impulse control, memory, motivation and motor activity. Under the comments section the physician notes that the appellant gets depressed, has chronic pain and short term and long term memory loss.

The panel notes that while the physician refers to the appellant's depression as chronic and severe in some parts of the PR and AR, he also indicates that the appellant "does get depressed". The panel also further notes that there is no impact to 6 of the 14 listed items, and minimal impact to 3 of the 14 listed items. There is moderate impact to 5 of the 14 listed items and no major impact to any of the listed items. The panel finds that the ministry's decision, which found that there are some impacts to the appellant's functioning, but 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 his physical and mental impairments directly and significantly restrict his ability to perform DLA including housework, walking, sitting, standing, lifting his grandson, lifting heavy items and socializing.

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's impairments directly and significantly restrict his DLA continuously or periodically for extended periods. The ministry notes that although the physician reports, on the PR, that the appellant is continuously restricted in his ability to manage his personal self care, management of medications, basic housework, daily shopping, mobility inside the home and mobility outside and outside the home, on the AR, the same physician reports that the appellant is independent with all aspects of personal care, reading of prices and labels, and all aspects of meals such as meal planning, food preparation, cooking and safe storage of food. The ministry also notes that while the physician reports that the appellant sometimes uses a cane as he requires periodic assistance with lifting and carrying, the AR indicates that he can lift 40-50 pounds.

The ministry also states that while the physician indicates that the appellant requires continuous assistance with basic housework, it is unclear from the functional and mental health assessment why this level of assistance is required. The ministry also states that while some noted DLA are reported as requiring periodic assistance, there is no narrative included to explain the frequency and duration of the assistance and evidence of a significant restriction has not been supplied by the physician. The ministry also states that while the physician indicates that the appellant is independent or requires periodic assistance to manage the majority of his social functioning, he also states that the appellant requires continuous support and supervision with his ability to develop and maintain relationships, but no explanation is provided in the assessment of his cognitive and emotional functioning. The physician also indicates that the appellant does not have any restrictions with his social functioning.

#### *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. The term "directly" means that there must be a causal link between the severe impairment and the restriction. The direct restriction must also be significant – it must be more than trifling and more than merely an inconvenience. Finally, there is a component related to time or duration. The direct and significant restriction may be either continuous or periodic. If it is periodic it must be for an extended time. Inherently, an analysis of periodicity must also include consideration of the frequency. All other things being equal, a restriction that only arises a few times a year is less likely to be significant than one which occurs several times a week. While the legislation must be interpreted in a large and liberal manner, there still must be sufficient evidence on each of the legislative criteria to reasonably satisfy the ministry that they have been met.

Based on the evidence in the PR and the AR, the evidence of the prescribed professional indicates that the appellant's impairment directly restricts 4 of the 8 prescribed DLA in relation to a person who has a severe physical impairment as per EAPWDA section 2(1)(a) (*shop for personal needs, perform housework to maintain the person's place of residence in acceptable sanitary condition, move about indoors and outdoors, and managing personal medication*).

The general practitioner indicated that the appellant is unrestricted in 2 of the 8 prescribed DLA (*prepare own meals and perform personal hygiene and self care*).

The evidence of the general practitioner is not consistent with respect to the remaining 2 of the 8 prescribed DLA (*manage personal finances and use public transportation or personal transportation facilities*). For example, in the PR the physician reports that the appellant's management of finances and use of



transportation is not restricted, but in the AR he reports that the appellant requires periodic assistance with banking, budgeting, paying rent and bills, getting in and out of a vehicle, using public transport and using transit schedules and arranging transportation.

With respect to a person who has a severe mental impairment, the evidence regarding the additional two prescribed DLA, making decisions about personal activities, care or finances; and relating to, communicating or interacting with others effectively, is inconsistent. For example, on the PR, the physician reports that the appellant's social functioning is not restricted, although he includes additional comments that the appellant gets depressed but on the AR, the physician indicates that the appellant is independent with making appropriate social decision and securing assistance from others, requires periodic assistance with interacting appropriately with others and dealing appropriately with unexpected demands and continuous supervision to develop and maintain relationships. The physician also reports that the appellant has marginal functioning with respect to immediate and extended social networks.

The panel finds that while there are noted restrictions to some aspects of 4 of the 8 prescribed DLA and inconsistent evidence that 4 DLA may be restricted, there is no additional information to indicate how much or how often the appellant requires periodic assistance, under what circumstances the periodic assistance is required, or whether it takes the appellant significantly longer to perform any of the DLA.

The panel concludes that 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 evidence provided by the prescribed professional, the noted restrictions in the appellant's ability to perform some aspects of some DLA did not constitute a direct and significant restriction of the appellant's ability to perform 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 his daily home chores and that he has to rely on his children and people for help all the time.

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 some assistance from his children and friends and the AR, which reports that the appellant's 20 year old son lives with him and helps with most of the problems. 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 children or friends.

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.