

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation's (the Ministry) reconsideration decision dated September 23, 2013 which found that the Appellant did not meet all of the 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 has an impairment which was likely to continue for at least two or more years. However, the Ministry was not satisfied as follows:

- That the evidence establishes that the Appellant has a severe physical or mental impairment;
- That 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 the reconsideration decision consisted of copies of the following:

1. Person With Disabilities (PWD) Application: applicant self-report ("SR") dated March 27, 2013, physician report ("PR") dated April 4, 2013 and assessor report ("AR") dated December 18, 2012;
2. A three-page medical consultation report dated March 31, 2012 and prepared by a neurologist ("the Consult Report"),
3. A one-page letter dated September 5, 2013 written by the Registered Nurse who prepared the AR ("the RN Letter");
4. A letter from the Ministry addressed to the Appellant dated July 10, 2013 enclosing a PWD Designation Decision Summary of the same date; and
5. The Appellant's Request for Reconsideration dated June 9, 2013 ("RFR").

### **Diagnoses**

In the PR, the Appellant's general practitioner ("the GP") has diagnosed the Appellant as suffering from back pain disc protrusion with some disc bulging at the L3-L4 level with date of onset being November 2010, hypertension with date of onset being December 2011 and bilateral carpal tunnel syndrome with date of onset being March 2012.

### **Physical Impairment**

In the SR, the Appellant states that as a result of bending for too many years doing stone and cement work, he cannot lift and if he pulls his back he will be in pain for between three and seven days. He says it is painful to tie his boots in the morning and that every day he goes to sleep with pain all night. He says he sleeps for a maximum of four hours and then he wakes up due to back pain and as a result he has to take naps. The Appellant states that arthritis and weather affect his knees and back, that he has cataracts in both eyes, high blood pressure, a previously dislocated left shoulder and collapsed rib cage, a concussion and that he has broken eight of ten fingers,

In the PR, the GP comments that physical activity causes the Appellant back pain and that he is unable to move for up to 7 days. The GP comments further that the Appellant needs narcotics for pain control and that cold weather affects his knees and back. The GP notes that the Appellant has been prescribed oxycocet for pain control with no side effects and that the anticipated duration of this medication is indefinite and that he requires no prostheses or aids for his impairment. The GP states that the Appellant's impairment is likely to continue for 2 years or more. With respect to functional skills, the GP notes that the Appellant is able to walk more than 4 blocks unaided, climb more than 5 steps unaided, that he cannot lift and that he can remain seated for 2 to 3 hours. The GP adds that he has been the Appellant's physician since November 2010 and that he had seen the Appellant 11 or more times in the prior 12 months.

In the AR, the registered nurse ("RN") reports that the Appellant lives alone and comments that he suffers from arthritis in his knees, disc degeneration at the L2-L3 level, a collapsed rib cage due to a car accident, high blood pressure and depression. The RN notes that the Appellant's ability to communicate in speaking is satisfactory and that his ability to read, write and hear are poor with the further comments that the Appellant's eyesight is poor and that both of his eardrums are perforated. The RN indicates that the Appellant can stand independently but that he takes significantly longer ("50% more") walking indoors due to arthritis in his knees and 70% longer walking outdoors and climbing stairs. The RN also notes that the Appellant takes significantly longer carrying and holding due to being in too much pain. The RN comments further that the Appellant is in significant pain when walking, bending over and lifting, that he is on "+++" painkillers due to this. The RN notes that the Appellant can tolerate 1-2 hours of standing and walking while on medication and then is unable to do anything else due to pain. The RN adds that she has known the Appellant for 3 months and that she had seen

him between 2 and 10 times in the prior 12 months.

In the Consult Report, the neurologist noted the results of his examination of the Appellant including that he was able to do deep squats and touch his toes with full forward flexion and the neurologist concluded that the Appellant has symptoms of bilateral carpal tunnel syndrome. The neurologist further comments that the Appellant's low back pain is "predominantly mechanical and myofascial in nature" and that "his CT scan shows some disc bulging at the L3-4 level, but no real nerve root compression."

In the RN Letter, the author indicates that the Appellant has been diagnosed with "disc protrusion, hypertension and bilateral carpal [sic] tunnel syndrome which greatly affect his mobility." The RN Letter goes on to state that the Appellant is not able to sit or stand without extreme pain for more than 2 hours, he is not able to lift independently and bending is not an option. The RN Letter further states that the Appellant's sleep is disrupted nightly due to his chronic back pain.

At the hearing, the Appellant stated he has experienced constant pain in his back for the past 10 years and that he has been taking pain medication for the past 3 years. He stated that his pain was constant and that if he didn't take his pain medication and did "something stupid" his back would "go out." The Appellant reported not being able to bend or lift, that if he stood for 3 hours his back hurt and that he has to take naps during the day as he only sleeps for 3 hours at a time at night.

In response to questions, the Appellant confirmed that he takes oxycontin and muscle relaxants every day to manage his pain and help him sleep. The Appellant further stated that he has been diagnosed by his GP with arthritis in his knees but could not say why that was not noted in the PR. The Appellant stated that he does some exercises for his back and that he is scheduled to see a surgeon regarding his back.

The Ministry representative relied on the reconsideration decision and stated that looking at the evidence as a whole, the Ministry determined that there was not sufficient evidence that the Appellant was suffering from a severe physical impairment.

### ***Mental Impairment***

In the PR, the GP does not diagnose the Appellant with a mental impairment and indicates that the Appellant does not have any significant deficits with cognitive or emotional functioning.

In the AR, for section 4, cognitive and emotional functioning, where asked to complete for an applicant with an identified mental impairment or brain injury, the RN assesses the degree that the Appellant's mental impairment restricts or impacts daily functioning as follows:

- Major impact on bodily functions, emotion, motivation, motor activity and other emotional or mental problems.
- Moderate impact on consciousness, insight and judgment, attention/concentration, executive, memory, language and other neuropsychological problems.
- Minimal impact on impulse control.
- No impact on psychotic symptoms.

The RN comments that the Appellant has severe depression due to physical limitations and chronic pain. She notes further that the Appellant's independence has decreased due to his limitations and he is unable to get out of bed in the morning due to depression.

In the RN Letter, the author comments that he has been referred to her services due to his depression which is related to chronic pain and loss of livelihood.

At the hearing, the Appellant stated that he finds his situation very depressing and that it keeps him up at night. In response to a question, the Appellant stated that he was diagnosed by his GP with "mild depression" and that his GP had offered him anti-depressants as well as a referral to a psychiatrist but that he refused both.

The Ministry representative relied on the reconsideration decision and stated that looking at the evidence as a whole, the Ministry determined that there was not sufficient evidence that the Appellant was suffering from a severe mental impairment.

### **DLA**

In the SR, the Appellant notes that previously, he was able to hike all day, swim non-stop for 3-5 hours, hunt all day for 12-16 hours, fish, log, ski, golf, pick mushrooms and sit. However, he notes that after his injury, he was able to hike only 2 hours every second day, swim for a maximum of 20 minutes due to back pain, hunt for a maximum of 2 hours every second day, pick mushrooms for a maximum of 2 hours every second or third day, that he won't try to swim or golf, that he never sleeps more than four hours at a time and that he can drive for a maximum of 4 hours which leaves him in pain for 2 days afterwards.

In the PR, the GP has indicated that none of the Appellant's DLA are restricted.

In the AR, the RN comments that the Appellant can do his DLA but must modify them if bending as he is unable to bend over and as such, putting on shoes, mopping the floor and picking up bags are not an option. The RN then makes the following assessments:

- **Personal care:** the Appellant is independent with grooming, bathing, toileting, feeding himself, regulating his diet and transferring on and off of a chair but takes significantly longer dressing ("takes 1 hr to put clothes on") and transferring in and out of bed ("takes 30 minutes").
- **Basic housekeeping:** the Appellant is independent with laundry but takes significantly longer with basic housekeeping as he is impaired if bending is involved.
- **Shopping:** the Appellant is independent going to and from stores, making appropriate choices and paying for purchases. He uses an assistive device to read prices and labels (eyeglasses) and carrying purchase home (a backpack).
- **Meals:** the Appellant is noted as independent in all aspects of this DLA.
- **Pay rent and bills:** the Appellant is noted as independent in all aspects of this DLA.
- **Medications:** the Appellant is noted as independent in all aspects of this DLA.
- **Transportation:** the Appellant is noted as taking significantly longer getting in and out of a vehicle as he must employ "step by step movement to decrease pain" and as a result this takes 20% longer. The Appellant is noted as independent using public transit and using transit schedules and arranging transportation.
- **Social functioning:** the Appellant is noted as independent in making appropriate social decisions, in developing and maintaining relationships and interacting appropriately with others. However, the Appellant is noted as requiring continuous support or supervision dealing appropriately with unexpected demands and securing assistance from others and the RN comments that the Appellant accesses mental health services for stressful situations and case management needs.

The RN describes how the Appellant's mental impairment impacts his relationships with both his immediate and extended social networks as very disrupted functioning and comments that the Appellant has difficulty socializing and that he can be aggressive.

At the hearing, the Appellant stated that he is able to do odd jobs for people for extra money and in response to a question he stated that he can perform the majority of his DLA if he takes it easy and performs them in moderation.

The Ministry representative relied on the Reconsideration Decision and submitted that the evidence did not support a finding that the Appellant needs continuous assistance or that his DLA are restricted continuously or that the Appellant was periodically restricted for extended periods of time. The Ministry representative commented that the PR and AR demonstrate that the Appellant can perform the majority of his DLA independently.

***Need for Help***

In the PR, the GP comments that the Appellant occasionally needs a cane or crutches when his back aches.

In the AR, the RN notes that the Appellant lives alone and receives assistance from local mental health and addiction service providers. The RN notes that the Appellant requires a kidney belt and assistance for bending over or picking up as well as a cane.

In his Notice of Appeal dated October 4, 2013, the Appellant submits that he is physically disabled due to his degenerative disc and arthritis and that he is depressed because of this. He submits that he cannot lift, sleep, walk or sit without pain. He notes further that he experiences chronic pain and that he takes oxycocete, oxycodone, gabapentin and blood pressure pills.

Neither the Ministry nor the Appellant sought to introduce any new information at the hearing. The Ministry relied on the reconsideration decision.

## PART F – Reasons for Panel Decision

The issue on the appeal is whether the Ministry's decision to deny the Appellant 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. In particular, was the Ministry reasonable in determining:

- That the Appellant does not have a severe mental or physical 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.

### **Severity of mental impairment**

The Appellant says that he suffers from depression which constitutes a severe mental impairment.

The Ministry takes the position that the information provided by the Appellant does not establish a severe mental impairment.

#### *Panel Decision*

Section 2(2)(a) of the EAPWDA is clear that when addressing the issue of a severe mental impairment in the context of a person applying for a PWD designation, that person must be found to have a severe mental impairment that, in the opinion of a medical practitioner, is likely to continue for at least 2 years. The panel finds in the present case that the evidence does not demonstrate that the Appellant's GP, a medical practitioner, has diagnosed the Appellant with depression or any other mental impairment and that he specifically notes in the PR that the Appellant does not have any significant deficits with cognitive and emotional function.

While the panel notes that the RN describes the Appellant in the AR as suffering from severe depression, the RN is not a "medical practitioner" as required by the EAPWDA and further that this description is inconsistent with the Appellant's own evidence at the hearing that his physician had previously diagnosed him with only mild depression and that he had refused anti-depressant medication and a referral by his GP to a psychiatrist.

Given the evidence as a whole and the lack of a diagnosis by a medical practitioner that the Appellant suffers from a severe mental impairment, the panel concludes that at the Ministry was reasonable in determining that the evidence did not establish that the Appellant has a severe mental impairment under section 2(2) of the EAPWDA.

### **Severity of physical impairment**

The Appellant takes the position that he has been diagnosed with and is being treated for hypertension, bilateral carpal tunnel syndrome and back pain with disc protrusion in his lumbar spine and that his physical impairment arising out of those conditions is severe in nature.

The Ministry takes the position that the information provided does not establish a severe physical impairment.

#### *Panel Decision*

In the PR, the Appellant's physician indicates that functionally, the Appellant can walk 4 or more blocks

unaided, climb 5 or more steps unaided, remain seated for 2-3 hours but not lift. He comments that physical activity causes the Appellant to experience back pain. The GP has been the Appellant's physician since November 2010.

The Appellant is described in the AR as taking significantly longer walking indoors and outdoors, climbing and carrying and holding and independent standing. He is also described in the AR as being in significant pain when walking, bending over and lifting.

In the Consult Report, the neurologist diagnoses the Appellant with bilateral carpal tunnel syndrome and myofascial mechanical back pain and in the course of his examination, the neurologist notes the Appellant as being able to perform deep squats and to touch his toes with full forward flexion.

In the SR, the Appellant states that he is able to hike, swim, hunt and pick mushrooms albeit at a much reduced rate than he had previously.

At the hearing, the Appellant gave evidence that he has been in constant pain for the past 10 years and that he has been taking painkillers and muscle relaxants for the past 3 years to help with sleep and pain management.

Considering all of the evidence, the panel agrees with the Ministry's position that the Appellant's physical impairment is moderate in nature and the panel therefore concludes that the Ministry was reasonable in determining that the evidence does not establish that the Appellant has a severe physical impairment under section 2(2) of the EAPWDA.

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

The Appellant's position is that his physical and mental impairments directly and significantly restrict his ability to perform all DLA to the point that he requires continuous assistance or periodic assistance for extended periods from others to perform DLA.

The Ministry's position is that it has not been established by the evidence that the Appellant's physical and mental impairments directly and significantly restrict his ability to perform DLA.

#### *Panel Decision*

The evidence of the GP in the PR is that none of the Appellant's listed DLA are restricted in any way. In the AR the RN reports the Appellant to be independent in 6 out of 8 personal care activities, 1 out of 2 basic housekeeping activities aside from those activities involving bending which take significantly longer than typical, 3 out of 5 shopping activities, all meal activities, all paying rent and bills activities, all medications activities and all transportation activities other than getting in and out of a vehicle which takes the Appellant significantly longer than typical.

The RN provides further comments in the AR including that the Appellant can perform his DLA but that he must modify them if bending is required. This is consistent with the evidence of the Appellant at the hearing where he stated that he can do the majority of his DLA if he takes it easy and does so in moderation. The Panel further notes the Appellant's evidence at the hearing that he is able to assist others with light DLA to supplement his income.

Based on the evidence, the panel concludes that the Ministry was reasonable in finding that the Appellant's impairment does not directly and significantly restrict his ability to perform DLA, either continuously or periodically for extended periods under section 2(2)(b)(i) of the EAPWDA.

**Help with DLA**

The Appellant's position is that he requires help to perform his DLA.

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

*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. Section 2(3) of the EAPWDA provides that a person requires help in relation to a DLA if, in order to perform it, the person requires an assistive device, the significant help or supervision of another person, or the services of an assistance animal.

While the panel finds that the GP has indicated in the PR that the Appellant requires the assistance of a cane or crutches when his back aches to perform his DLA and while the RN indicates in the AR that the Appellant uses a kidney belt to compensate for his impairment and that he requires a cane and assistance for bending over and picking up, the evidence of the prescribed professionals establishes that the Appellant does not require assistance continuously or periodically for extended periods of time with his DLA.

The panel finds therefore 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 which determined that the Appellant was not eligible for PWD designation was a reasonable application of the applicable enactment in the circumstances of the Appellant, and therefore confirms the decision.