

PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Social Innovation (the ministry) dated 03 September 2013 denying the appellant designation as a person with disabilities (PWD). The ministry determined that the appellant did not meet all of the required criteria for PWD designation set out in the *Employment and Assistance for Persons with Disabilities Act*, section 2. Specifically, the ministry determined that the information provided did not establish that the appellant has a severe mental or physical impairment that in the opinion of a prescribed professional

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

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

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

PART D – Relevant Legislation

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

## PART E – Summary of Facts

The appellant did not appear at the hearing. After confirming that the appellant was notified of the hearing, the hearing proceeded in accordance with section 86(b) of the Employment and Assistance Regulation.

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

1. The appellant's PWD Designation Application dated 13 February 2013. The Application contained:
  - A Physician Report (PR) dated 06 March 2013, completed by the appellant's general practitioner (GP) who has known the appellant for 9 years and has seen him 11 or more times in the past year.
  - An Assessor Report (AR) dated 26 March 2013, completed by a registered social worker (RSW) who had first met the appellant that week and seen him 2-10 times.
  - A Self Report (SR) completed by the appellant.
2. The appellant's Request for Reconsideration, dated 13 August 2013.

In the PR, the GP diagnoses the appellant's impairment as DDD (degenerative disc disease) lumbar spine, and asthma.

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

### Severity/health history

#### *Physical impairment*

##### PR:

Under health history, the GP writes: "[The appellant] is severely affected by his degenerative back problem & asthma. Limited by chronic back pain & SOB [shortness of breath]. Unable to work + limited @ home. As chronic pain but he deals with it OK."

The GP gives the appellant's height and weight as relevant: 73" and 220 lbs.

The GP indicates that the appellant has not been prescribed any medication and/or treatments that interfere with his ability to perform DLA. The GP also indicates that the appellant does not require any prostheses or aids for his impairment.

As to functional skills, the GP reports that the appellant can walk 1 to 2 blocks unaided, climb 2 to 5 steps, lift 5 to 15 lbs. and remain seated for less than an hour.

##### AR:

The RSW lists the appellant's physical impairment that impacts his ability to manage DLA as DDD – lumbar disc disorder (degenerative), 2002; lives in 36' X 14' trailer; asthma (since childhood); smokes tobacco but has been trying to quit.

*Mental impairment*

PR:

The GP indicates that the appellant has no difficulties with communication

The GP assesses the appellant with no significant deficits with cognitive and emotional function.

AR:

The RSW assesses the appellant's ability to communicate as follows: (here and in other assessments reported below, the RSW's comments are in parentheses):

- Speaking – good (poor to unable when pain is present from DDD, is unable to focus & put thoughts into words.)
- Reading – good (poor to unable as above).
- Writing – satisfactory to poor (unable to read or write).
- Hearing – poor (hearing has been damaged by loud machine noises. Also cannot focus when in pain.)

In the section to be completed only for an applicant with an identified mental impairment or brain injury, the RSW assesses the appellant's impairment as having the following impacts on his functioning in the areas specified:

Major impacts:

- Bodily functions – eating problems, toileting problems, sleep disturbance: (Often cannot eat when in great pain. Problems getting to toilet & positioning self. Sleep is disturbed on daily basis, has to reposition to relieve pain, and takes time to get back to sleep).
- Emotion – in appropriate anxiety, depression (occasional panic attacks).
- Attention/concentration – distractible, unable to maintain concentration, poor short term memory.
- Motivation – (Not there).
- Other emotional or mental problems – (Issues of grief & loss (since 1978) – of his mother when he was 8 yrs old. Saw several qualities in mother & father that saved his life: mother died of heroin overdose, father died of cirrhosis of liver.)

Major to moderate impacts:

- Motor activity – agitation, bizarre behaviors, extreme tension (has been committed to psych ward).
- Language – inability to understand, disorganization speech (when stressed).
- Other neuropsychological problems – learning disabilities.

Moderate impacts:

- Impulse control – inability to stop doing something (Tobacco, gradually reducing now).
- Insight and judgment: (Not always safe with his behaviors).
- Executive: (Cannot follow through).

No impact:

- Psychotic symptoms: (On one occasion went to 4<sup>th</sup> floor).

Ability to perform DLA

PR:

The GP reports that the appellant is restricted in his ability to perform the following DLA on a continuous basis: personal self care, basic housework, daily shopping, mobility inside the home, mobility outside the home, and use of transportation. The GP assesses no restrictions in the DLA of meal preparation, management of medications, management of finances, and social functioning

AR:

The RSW reports that the appellant lives with a roommate.

Regarding mobility and physical ability, the RSW provides the following assessments (her comments in parenthesis):

- Walking indoors – takes significantly longer than typical (DDD – when pain is severe must grab furniture, counters, walls for support)
- Walking outdoors – takes significantly longer than typical (flat surfaces preferred, length varies).
- Climbing stairs – takes significantly longer than typical (very limited).
- Standing – takes significantly longer than typical (10 minutes max).
- Lifting – continuous assistance from another person or unable (cannot lift or carry, gets help)
- Carrying and holding – see lifting above.

The RSW assesses the assistance required for managing DLA as follows (the RSW's comments in parentheses), noting that all DLA take 3x longer:

- Personal care – takes significantly longer than typical for dressing, grooming, bathing, toileting, feeding self, regulating diet, transfers in/out of bed and transfers on/off chair. (When in serious pain often doesn't get up at all. Does not eat or dress).
- Basic housekeeping – takes significantly longer than typical for laundry (When he can) and for basic housekeeping (Roommate does most of it).
- Shopping – takes significantly longer than typical for going to and from stores, reading prices and labels, making appropriate choices, paying for purchases and carrying purchases home (does it when he can).
- Meals – takes significantly longer than typical for meal planning (No plan), food preparation and cooking (Uses fast foods like noodles) and safe storage of food (Not much left).
- Pay rent and bills – takes significantly longer than typical for banking, budgeting, and paying rent and bills (Has difficulty managing his funds).
- Medications – takes significantly longer than typical for filling/refilling prescriptions (Manages these on his own), taking as directed and safe handling and storage.
- Transportation – takes significantly longer than typical for getting in and out of vehicle (Painful). No assessment provided for using public transit (Uses public transit and it does make it painful when the bus shakes) and using public transit schedules and arranging transportation (Gets rides from friends).

With respect to social functioning the RSW does not provide any assessment as to the support/supervision required regarding making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others, ability to deal appropriately with unexpected demands and ability to secure assistance from others. The RSW notes that the appellant is socially withdrawn due to pain and that he has lots of friends.



The RSW does not provide an assessment as to appellant's social functioning with his immediate and extended social networks.

Help provided/required

PR:

The GP indicates that the appellant does not require any prostheses or aids for his impairment and that he obtains help from friends

AR:

The RSW indicates that the appellant receives help for DLA from friends noting that his roommate provides support and assistance in the home.

The RSW does not indicate that the appellant routinely uses any assistive device; nor does he have an assistance animal.

Self report

In his SR, the appellant describes his disability as degenerative disc disease and goes on to write:

"Symptoms include trouble standing for long periods, trouble sitting, many days of immobilization, i.e. bedridden, trouble going to bathroom and getting dressed.

Asthma: serious problems breathing, constantly on inhalers.

Anxiety and stress, sleeping disorder caused by the death of a loved one."

In the Request for Reconsideration the appellant writes:

"I feel this decision is incorrect. My degenerative disc disease causes many problems with my ability to find long-term work. When it goes out it can take up to one week for me to get back on my feet. There is not an employer in the world would let you have one week off.

As I can not find a job like this I am asking you to reconsider this decision. Furthermore I may not need assistance now but my doctor tells me this will get worse and sooner or later I will need help."

In his Notice of Appeal, dated 16 October 2013, the appellant writes:

"Continuing pain, discomfort, worsening stress, anxiety leading to alcohol and substance abuse."

At the hearing, the ministry stood by its position at reconsideration.

## PART F – Reasons for Panel Decision

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

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

The ministry determined that he met the 2 other criteria in *EAPWDA* section 2(2) set out below.

The following section of the *EAPWDA* applies to this appeal:

2 (1) In this section:

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

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

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

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

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

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

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

The following section of the *EAPWDR* applies to this appeal:

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

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

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

- (viii) manage personal medication, and
- (b) in relation to a person who has a severe mental impairment, includes the following activities:
- (i) make decisions about personal activities, care or finances;
  - (ii) relate to, communicate or interact with others effectively.

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

### **Severity of impairment**

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

In the discussion below concerning the information provided regarding the severity of the appellant's impairments, the panel has drawn upon the ministry's definition of "impairment." This definition consists of "cause" and "impact" components: "impairment is a loss or abnormality of psychological, anatomical or physiological structure or function [the cause] causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration [impact]." This definition is not set out in legislation and is not binding on the panel, but in the panel's view it appropriately describes the legislative intent. The cause is usually set out as a disease, condition, syndrome, injury or even a symptom (e.g. pain or shortness of breath). A severe impairment requires the identified cause to have a significant impact on daily functioning.

The panel also notes that the legislation requires that for PWD designation, the minister must be "satisfied" that the person has a severe mental or physical impairment. For the minister to be "satisfied" that the person's impairment is severe, the panel considers it reasonable for the ministry to expect that the information provided presents a clear and complete picture of the nature and extent of the impacts of the person's medical conditions on daily functioning.

### **Physical impairment**

In the reconsideration decision, the ministry noted that employability is not an eligibility criterion for PWD designation. The ministry reviewed the physical skills limitations reported by the GP (able to walk 1 to 2 blocks, etc) and the mobility and physical ability assessed by the RSW. The ministry found that the functional skill limitations described by the GP and the RSW are more in keeping with a moderate degree of physical impairment. The ministry was therefore not satisfied that the information provided was evidence of a severe physical impairment.

The position of the appellant, as set out in his Request for Reconsideration, is that his DDD causes many problems with his ability to find long-term work. When his back goes out it can take up to one week for him to get back on his feet. The evidence provided by his GP and the RSW all point to a severe physical impairment.

### **Panel findings**

The appellant and his GP referred to his inability to work as demonstrating the severity of his impairment. The legislation reads that for PWD designation, the minister must be satisfied that "the person has a severe mental or physical impairment that .... directly and significantly restricts the person's ability to perform [prescribed] daily living activities and as a result of those restrictions, the person requires help [an assistive device, the significant help or supervision of another person, or the services of an assistance animal to perform those activities." As ability to search for, accept or continue in employment is not listed as one of prescribed DLA, the panel finds that the ministry reasonably held that employability is not a factor in assessing eligibility for PWD designation.

The panel finds it difficult to gain a clear and complete picture of the impact of the appellant's DDD and asthma on his daily physical functioning. The GP reports that the appellant is limited by chronic back pain and SOB, that he is limited at home, and that while he has chronic pain "he deals with it OK." The GP reports that the appellant is able to walk 1 to 2 blocks unaided on a flat surface, climb 2 to 5 steps and lift 5 to 15 lbs. However, in assessing ability to perform DLA, the GP indicates that the appellant is restricted with mobility inside and outside the home on a continuous basis where "continuous," as indicated by a footnote in the PR form, means "continuous assistance – refers to needing significant help most or all of the time for an activity." By comparison, the RSW assesses the appellant's ability to walk indoors as taking significantly longer than typical (DDD – when pain is severe must grab furniture, counters, walls for support) and for walking outdoors as taking significantly longer than typical (flat surfaces preferred, length varies). No explanation is provided as to what is meant in terms of distance or time by "length varies" and it is unclear why grabbing something while walking indoors is required, but not outdoors.

The panel notes that neither the GP nor the RSW report the routine use of, or need for, an assistive device. Further, the GP has not given, in the space provided in the PR, any additional information relevant to an understanding of the significance of the appellant's medical conditions and the nature and extent of his impairment and the impact these have on his daily functioning. There are also inconsistencies between the impacts on the ability to perform DLA and the help required, as assessed by the GP and the RSW (see below). Moreover, while the appellant has reported "many days of immobilization," and that "when [his back] goes out it can take up to one week for me to get back on my feet," neither the GP nor the RSW address whether the appellants back condition leads to episodic periods of immobility, and the length and frequency of such immobility. Without a clearer and more complete picture of how the appellant's medical conditions impact his daily physical functioning, the panel finds that the ministry reasonably determined that a severe physical impairment had not been established.

#### Mental impairment.

In the reconsideration decision, the ministry noted that in the PR the GP indicates that the appellant has no significant deficits in the areas of cognitive and emotional function. However the information provided by the RSW in the AR indicates that the appellant has difficulty in several areas of cognitive and emotional functioning. No explanation is provided regarding the differences between the two reports. As no new information was provided at reconsideration, the position of the ministry is that a severe mental impairment has not been established.

The position of the appellant is that his medical conditions are causing him worsening stress and

anxiety, with the impacts reported by the RSW sufficient to establish a severe mental impairment.

*Panel findings*

The panel notes that the GP has not diagnosed the appellant with any mental health condition or brain injury. The GP has also not identified any significant cognitive and emotional deficits nor any difficulties with communications. On the other hand, as summarized above, the RSW has assessed many major and major-to-moderate cognitive and emotional impacts on daily functioning, as well as difficulties with communication. While these impacts, particularly in such areas as sleeplessness, attention/concentration and motivation, may affect the appellant's ability to perform DLA, the panel does not consider such impacts as indicative of a mental impairment. No information has been provided to explain the difference between the assessments respecting communications ability. Accordingly, the panel finds that the ministry was reasonable in determining that a severe mental impairment had not been established.

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

The position of the ministry is that the degree of impairment and restriction reported in the PR from the GP is not reflected in the AR completed by the RSW. No explanation is provided regarding the differences between the two reports. Therefore the ministry did not have enough evidence from the prescribed professionals to establish that the appellant's impairments significantly restrict his ability to manage his DLA, either continuously or periodically for extended periods.

The position of the appellant is that the RSW has indicated that almost all DLA take him 3x longer to perform and that he needs help from his roommate for basic housekeeping. This evidence is sufficient to establish that this criterion has been met.

*Panel findings*

The panel notes that, according to the legislation, the direct and significant restriction in the ability to perform DLA must be a result of a severe impairment, a criterion which has not been established in this appeal. This DLA criterion must also be considered in terms of the framework of the legislation, which starts with the provision that the minister may designate a person as a person with disabilities "if the minister is satisfied that" the criteria are met, including this one. In exercising the discretion conferred by the legislation, it is reasonable that the minister would expect that the opinion of a prescribed professional be substantiated by information that would satisfy the minister that there are direct and significant restrictions in the ability to perform DLA, either continuously or periodically for an extended period.

As summarized above, the GP assesses the appellant restricted in the DLA of personal self care, basic housework, daily shopping, mobility inside and outside the home and use of transportation, with continuous assistance required from friends. By comparison, the RSW assesses the appellant taking 3x longer than typical for 26 of 28 listed activities, reporting that continuous assistance from his roommate is required for basic housekeeping. No explanation is offered to explain the differences in the two reports. It may be that the GP ignored the footnote in the PR form and was simply indicating that the restrictions reported in the PR were along the lines of 3x longer than typical, but the panel cannot make this assumption. It is difficult for the panel to consider 3x longer than typical as

demonstrating a significant restriction in the ability to perform DLA without information about how much time it actually takes to do specific tasks, especially those that are particularly time consuming.

The panel notes that the GP reports the appellant independent with social functioning and the RSW provides no assessment as to support/supervision required for social action or any impacts on the appellant's relationships with his immediate and extended social networks.

Based on the foregoing, and as a severe mental or physical impairment has not been established, the panel finds that the ministry was reasonable in determining that this criterion had not been met.

### **Help with DLA**

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

The appellant's position is simply that, as reported by the RSW, he requires help from his roommate for support and assistance in the home.

### ***Panel findings***

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

### **Conclusion**

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