

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of December 3, 2013, which found that the appellant did not meet three of 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 in the opinion of a medical practitioner the appellant’s 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 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.

## 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 information before the ministry at the time of reconsideration included the following:

- The appellant's PWD application form consisting of the appellant's self-report [dated July 16, 2013], and a physician's report ("PR") and assessor's report ("AR") signed by the appellant's physician of 8 years [both dated July 24, 2013].
- The appellant's Request for Reconsideration dated November 21, 2013.
- A questionnaire provided to the appellant by his physician, completed and signed by the appellant on July 16, 2013 (the "Questionnaire").
- Various medical reports including diagnostic imaging reports related to the appellant's impairment (collectively referred to herein as "the Medical Reports").

### *Physical Impairment*

- In the PR the appellant's physician diagnosed him with ankylosing spondylitis. The physician described it as a permanent condition with no known cure, causing progressive back pain.
- The physician reported the appellant's functional skills as they would be on a "worst day". He indicated the appellant can walk less than 1 block (200 ft.) unaided on a flat surface, climb 5+ steps unaided, do no lifting, and remain seated less than 1 hour.
- In the AR the physician reported the appellant as being able to independently walk indoors and outdoors, climb stairs, and stand, though indicating the appellant uses an assistive device and takes 2 to 3 times longer than typical to do these activities.
- The physician indicated the appellant requires periodic assistance with lifting/carrying/holding, and that he takes 2 times longer than typical to do these activities.
- The Medical Reports, from early 2012, indicate the appellant felt stiff in the morning for at least 2 hours after getting up, woke up at night with pain and stiffness in his back, was moderately restricted in movement in his lower back, and showed mild scoliosis in his 12 rib-bearing vertebrae. A specialist discussed biological therapy medications with the appellant but the appellant did not want to try them as he was doing fairly well at the time.
- In the Questionnaire the appellant indicated that he cannot lift anything over 30 lbs., that he can walk 1 to 2 blocks unaided, and that he uses a cane in the mornings.
- In his self-report the appellant wrote that he has difficulty bending down to lift objects such as toys and lifting his 42 lb. child. He indicated that he takes pain killers and anti-inflammatory medication, and that he cannot walk for distances any more without his back stiffening up.
- In his Request for Reconsideration the appellant wrote that he had not been able to work for some time, that he couldn't lift anything over 40 lbs., and that his impairment was difficult to cope with mentally, physically and emotionally. He wrote that his back is only going to get worse in time.
- In his oral testimony the appellant stated that he appealed the ministry's decision because he didn't feel the reconsideration officer was getting the full picture – that the appellant's condition is progressively worsening.
- The appellant said that since the PWD application was completed in July, his condition has worsened to the point that he needs a cane to climb stairs, and he no longer lifts his child. He

takes the child on walks to a nearby park.

- He said that biological therapy has been recommended but he doesn't want to try it as he understands there are some potential risks. He stated that if he does try it he will need financial assistance as the medication will cost \$1,500 per month.

#### *Mental Impairment*

- The PR provides no diagnosis of a mental impairment.
- The physician indicated the appellant has no difficulties with communication, and no significant deficits with cognitive and emotional function.
- In the AR the physician reported the appellant's ability to communicate as being good in all respects.
- Section B.4 of the AR form, which is meant to provide detail of impacts to cognitive and emotional functioning, starts with the instruction "Complete item #4 for an Applicant with an identified mental impairment or brain injury." The physician indicated that the appellant has a major impact in terms of sleep disturbance, and crossed out the rest of section B.4.
- In the Questionnaire the appellant indicated that he suffered from depression or anxiety problems, that he had poor interest or motivation, and that he had problems with concentrating or paying attention.

#### *DLA*

- The physician reported the appellant has not been prescribed any medications that interfere with his ability to perform DLA.
- In the AR the physician indicated the appellant independently manages all aspects of the 5 DLA of *personal self-care* (takes 2 to 3 times longer than typical with some aspects), *meal preparation* (takes 2 times longer), *managing personal finances*, *managing personal medications*, and *moving about indoors and outdoors* (takes twice as long).
- The physician drew a line through the section of the AR dealing with the DLA of *social functioning*.
- He indicated the appellant requires periodic assistance with some aspects of 3 DLA: *basic housekeeping*, *daily shopping* (going to and from stores, and carrying purchases home), and *using transportation* (getting in and out of a vehicle takes twice as long as typical.)
- In his oral testimony the appellant said that he has to roll out of bed onto his knees in the morning and walk around the house until he loosens up his back.

#### *Help*

- In the AR the physician noted the appellant requires help with physical activities such as lifting. He indicated the appellant uses a cane and does not have an assistance animal.
- In his oral testimony, the appellant said that he takes care of his child, but that his parents and his sister help him with babysitting and shopping for groceries.

#### *Admissibility of New Information*

In oral testimony the appellant provided new information regarding his impairment. This information provides additional detail with respect to issues addressed in the original PWD application. Accordingly, the panel has admitted this new information as being in support of information and records that were before the ministry at the time of reconsideration, in accordance with s. 22(4) of the *Employment and Assistance Act*.

APPEAL #

The ministry relied on its reconsideration decision and submitted no new information.

## PART F – Reasons for Panel Decision

The issue on this 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 physical or mental impairment, and that in the opinion of a prescribed professional the appellant's impairments do not directly and significantly restrict him from performing DLA either continuously or periodically for extended periods, and that as a result of those restrictions the appellant does not require help to perform DLA?

The relevant legislation is as follows:

### EAPWDA:

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.

**EAPWDR section 2(1):**

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.

(2) For the purposes of the Act, "**prescribed professional**" means a person who is

(a) authorized under an enactment to practise the profession of

- (i) medical practitioner,
- (ii) registered psychologist,
- (iii) registered nurse or registered psychiatric nurse,
- (iv) occupational therapist,
- (v) physical therapist,
- (vi) social worker,
- (vii) chiropractor, or
- (viii) nurse practitioner, or

(b) acting in the course of the person's employment as a school psychologist by

- (i) an authority, as that term is defined in section 1 (1) of the *Independent School Act*, or
- (ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the *School Act*,

if qualifications in psychology are a condition of such employment.

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**Severe Physical Impairment**

The appellant's position is that his back condition constitutes a severe physical impairment. He argued that his is a progressive impairment that has already gotten worse since he submitted his PWD application.

The ministry's position, as set out in its reconsideration decision, is that the appellant's functional skills limitations are more in keeping with a moderate degree of physical impairment rather than a severe impairment.

### Panel Decision

In the panel's view, the evidence regarding the appellant's physical functional skills is insufficient to show that the appellant's progressive medical condition has yet reached the point of being severe. The physician has described the appellant's functional limitations based on his "worst days", but the panel has been provided with no evidence to indicate how often those "worst days" occur. Despite the evidence that the appellant can do "no lifting" on "worse" days, the evidence in total indicates that the appellant can generally lift up to 40 pounds.

The panel notes that while the evidence indicates the appellant's impairment leaves him unable to work at his former occupation, employability is not a statutory criterion regarding PWD designation – the focus of the legislation is on the ability to perform DLA.

As discussed in more detail in the subsequent section of this decision under the heading Significant Restrictions to DLA, the functional skills limitations resulting from his impairment do not appear to have translated into significant restrictions in the appellant's ability to manage his DLA independently. Accordingly, the panel has concluded that the ministry reasonably determined that the evidence falls short of establishing that the appellant has a severe physical impairment.

### Severe Mental Impairment

The appellant advanced no argument with respect to severe mental impairment.

The ministry's position, as set out in its reconsideration decision, is simply that there is not enough evidence to establish a severe mental impairment.

### Panel Decision

There is no evidence to indicate that the appellant has been diagnosed with a mental impairment. In terms of mental functional skills, the evidence indicates that the appellant's communications skills are good in all respects. There is no evidence of any significant impacts to the appellant's cognitive and emotional functioning; based on the information in the Medical Reports the one impact noted by the physician in the AR (sleep disturbance) is most likely related to pain and stiffness caused by the physical impairment rather than a mental impairment.

Section 2(1)(b) of the EAPWDR prescribes two DLA that are specific to mental impairment – make decisions about personal activities, care or finances (*decision making*), and relate to, communicate or interact with others effectively (*social functioning*). The evidence indicates that the appellant is not significantly restricted with respect to *decision making* in that he independently manages his finances (pay rent and bills) and his medications. Based on the evidence in the AR, he also independently manages the decision-making components of the DLA of *daily shopping*, and *meal preparation* (meal planning and food storage). There is no evidence of any disruption of the appellant's *social functioning*.

Considering the evidence as a whole, the panel concludes that the ministry reasonably determined that it does not demonstrate a severe mental impairment.

### Significant Restrictions to DLA

The appellant's position is that his DLA are significantly restricted. He stated that his condition is chronic and progressive, that he requires help from others to perform DLA, and that his condition is only going to get worse.

The ministry's position is that as the majority of the appellant's DLA are performed independently or require little help from others, the information from the appellant's prescribed professional (his physician) does not establish that his impairment significantly restricts DLA either continuously or periodically for extended periods.

### Panel Decision

In the panel's view, the evidence is consistent in indicating that the appellant is not significantly restricted with respect to the following 6 of the 10 prescribed DLA – *personal self-care, meal preparation, management of medications, management of finances, decision-making, and social functioning*. Taking 2 to 3 times longer to perform some aspects of these DLA does not constitute a significant restriction.

With respect to *moving about indoors and outdoors*, the evidence indicates that while on his worst days the appellant is limited to walking about 200 feet outdoors, he is generally able to take his child for walks in the local park. There is no evidence that the appellant is significantly restricted from moving about indoors except for some time in the mornings to loosen up after he first gets out of bed.

With respect to the DLA of *use of transportation*, the evidence is that the appellant periodically requires assistance to get in or out of a vehicle, and that generally it takes him about twice as long as typical to get in or out of a vehicle or to use public transit.

The physician indicated direct restrictions to the remaining 2 of the 10 prescribed DLA. With respect to *basic housework*, the physician's evidence indicates the appellant gets periodic help from his family. He also gets periodic assistance with two aspects of *daily shopping* (going to/from stores and carrying purchases home.) There is no evidence as to how often the appellant requires this help. Presumably help is only required with carrying purchases on the appellant's "worst days", since he can otherwise lift 30 to 40 lbs.

The evidence, considered as a whole, demonstrates that the appellant does experience direct restrictions in his ability to perform some DLA. However, he is mostly able to perform his DLA independently except perhaps during the "worst days". As noted above, there is no evidence as to how often these "worst days" occur. In the panel's view, the evidence does not present a compelling picture of an individual whose ability to manage his DLA is significantly restricted as contemplated by the legislative scheme. Accordingly, the panel concludes that the ministry reasonably determined that the appellant's ability to manage his DLA independently is not significantly restricted either continuously or periodically for extended periods.



**Help with DLA**

The appellant's position is that he relies on help from his parents to perform the DLA of *basic housework and daily shopping*.

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

**Panel Decision**

In the panel's view, on the evidence it would be difficult to conclude that the help provided to the appellant by his parents with respect to aspects of housework and shopping constitutes "the significant help or supervision of another person" that is required by s. 2(3)(b)(ii) of the EAPWDA.

The appellant's use of a cane to perform DLA is not sufficient to fulfill this legislative criterion.

For these reasons, the panel finds that the ministry reasonably concluded it could not be determined that the appellant requires help with DLA as defined by s. 2(3)(b) of the EAPWDA.

**Conclusion**

The panel acknowledges that the appellant's medical conditions affect his ability to function, and that the effects of his impairment may progress over time. However, having reviewed and considered all of the evidence and the relevant legislation, the panel finds that the ministry's decision declaring the appellant ineligible for PWD designation is a reasonable application of the legislation in the circumstances of the appellant. The panel therefore confirms the ministry's decision.