

## PART C – Decision under Appeal

The decision being appealed is the Ministry of Social Development and Social Innovation (the “Ministry”) February 14, 2014 reconsideration decision in which the Ministry determined that the appellant was not eligible for Persons with Disabilities (“PWD”) designation because he did not meet all the requirements for PWD designation in section 2(2) of the *Employment and Assistance for Persons with Disabilities Act*. Based on the information provided, the Ministry was not satisfied that in the opinion of a prescribed professional, the appellant’s severe mental and physical impairments

(i) directly and significantly restrict 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 was satisfied that the appellant has reached 18 years of age, that in the opinion of a medical practitioner the appellant’s impairments are likely to continue for 2 years or more, and that the appellant has severe mental and physical impairments.

## PART D – Relevant Legislation

*Employment and Assistance for Persons with Disabilities Act* (“EAPWDA”) Section 2(2) and 2(3).

*Employment and Assistance for Persons with Disabilities Regulation* (“EAPWDR”) Section 2.

## PART E – Summary of Facts

For its reconsideration decision, the Ministry had the following evidence:

1. Appellant's PWD application consisting of the following 3 parts:
  - The appellant's self report ("SR") dated September 24, 2013;
  - A physician's report ("PR") completed on September 18, 2013 by the appellant's family physician who indicated that the appellant had been his patient for 2 years and he'd seen the appellant 2-10 times in the 12 months preceding the report.
  - An assessor's report ("AR") completed on September 30, 2013 by the appellant's family physician.
2. Two pages of copies of diagnostic imaging reports for the appellant dated February 21, 2013 and April 29, 2013.
3. One page report from a neurosurgeon to the appellant's family physician dated July 22, 2013 outlining the appellant's condition and proposed surgery, including risks involved and that the appellant will consider surgery and contact the office if he wishes to book the procedure.
4. Two-page handwritten submission on reconsideration from the appellant dated February 3, 2013 in which he describes his condition, the pain medication he has been prescribed and tasks that he has difficulty performing.

The following is a summary of the relevant evidence before the panel at the hearing, including the testimony of the appellant at the hearing and in his SR and submissions on reconsideration.

### *Diagnosis, Duration and Severity*

In the PR, the doctor diagnosed the appellant with spinal stenosis onset in February 2013 and depression onset in 2010. The diagnostic imaging report from April 29, 2013 confirms that the appellant has "severe spinal stenosis L4-5 with right paracentral disc herniation multilevel severe degenerative facet disease." The appellant's doctor wrote in the PR that the appellant is "quite severely depressed the last 4 years, suicidal at times. He has significant spinal stenosis of the lumbar spine. Has lived in his vehicle off and on the last 2 years." The appellant told the panel that he has been living in a camper for several months. In the PR, the doctor indicated that the appellant had not been prescribed any medication that interferes with his ability to perform his DLA, but at the hearing, the appellant said that he takes three different types of medication for pain that interfere with his daily living activities as they affect his ability to drive and he doesn't drive (he said his son will drive him to appointments).

The doctor wrote that the appellant's impairments are likely to continue for 2 years or more and wrote, "his spinal stenosis could be fixed by surgery but he does not want to do this. He has severe depression but has declined medication." The appellant told the panel that he has not declined spinal surgery, but that he has talked to people who have told him that the surgery is not 100% guaranteed to fix his spinal problems. The appellant also told the panel that he is concerned that if he had the surgery, he has nowhere to spend the 12 weeks post-surgery recovering - he said that he cannot recover living by himself in a camper and he cannot move in with his son and his son's family

as their apartment is too small. In his SR, the appellant wrote that he has severe depression and anxiety and that the side-effects from his spinal stenosis include severe headaches, trembling and shaking on a daily basis.

In the PR, the doctor described the severity of the appellant's medical condition and its impacts as follows:

- The appellant can walk unaided less than 1 block, can climb 5+ stairs unaided, can lift 7-16 kg, and can remain seated 1-2 hours.
- The appellant has no difficulties with communication.
- The appellant has deficits with cognitive and emotional functioning in the following areas: executive, perceptual psychomotor, emotional disturbance, motivation, and attention or sustained concentration. The doctor wrote, "Depressed, poor insight, inability to follow through with treatment."
- The doctor wrote the additional comment, "unable to maintain relationships, poor insight into his illness & available treatments. Will need surgery for his back."

In the AR, the doctor reported that the appellant could walk independently indoors, but takes significantly longer walking outdoors and climbing stairs, writing the comment, "cannot walk more than 1 city block." The doctor did not check any of the options regarding the appellant's limitations with standing, lifting, carrying and holding, but wrote the comments, "limited time to stand," "30 lbs occasionally [illegible]" and "10 lbs [illegible] intermittently" beside these aspects. In his submissions on reconsideration and in person at the hearing, the appellant said that he avoids stairs whenever possible and he requires a cane at all times for mobility and standing as he needs the cane for support to help relieve the pain in his lower back. The appellant said that he requires help carrying laundry and grocery bags and can't lift anything over 10 lbs.

In the AR, the doctor indicated that the appellant's mental impairment had a major impact in the area of emotion, moderate impact in the areas of attention/concentration, executive, memory, motivation and other emotional or mental problems (such as hostility) but without commentary, and minimal or no impact in the areas of bodily functions, consciousness, impulse control, insight and judgment, motor activity, language, psychotic symptoms, and other neuropsychological problems.

In its reconsideration decision, the Ministry found that it was satisfied that the information submitted in the appellant's original PWD application established severe mental and physical impairments.

#### *Daily Living Activities*

In the PR, the doctor indicated that the appellant's activity was not restricted for 6 of the listed DLAs (personal self care, meal preparation, management of medications, basic housework, daily shopping, and mobility inside the home). For the DLAs of mobility outside the home, use of transportation and social functioning, the doctor indicated that the appellant's activity was restricted continuously and he wrote the following comments: "self isolates, anxiety disorder" "unable to maintain relationships" and "his son helps him." The doctor did not check mark any of the options for the DLA of management of finances.

In the AR, the doctor indicated that the appellant could independently perform all tasks of the DLAs of personal care, basic housekeeping, meals, paying rent and bills, and medications. For the DLA of

shopping, the doctor indicated in the AR that the appellant could independently perform the task of going to and from stores, but the doctor did not check mark any of the options for the other tasks of the DLA of shopping (reading prices and labels, making appropriate choices, paying for purchases, and carrying purchases home). For the DLA of transportation, the doctor check marked that the appellant could independently perform the task of getting in and out of a vehicle, but the doctor left blank the options for the tasks of using public transit and using transit scheduled and arranging transportation. The doctor did not provide any commentary.

The appellant told the panel that since his injury, he has not been able to use transportation and that transportation was the biggest issue for him. The appellant told the panel that he is able to look after himself, saying that he "is not an invalid" but that it is very difficult for him in his living situation. He said that he needs to live in a place without stairs as he can't climb stairs.

In the AR, the doctor indicated that the appellant has marginal functioning with his immediate and extended social networks. Although the doctor did not check mark any of the options for the aspects of social functioning listed in the AR, the doctor wrote, "does not socialize, speaks only to son, separated from wife."

#### *Help with Daily Living Activities*

In the AR, the doctor indicated that the appellant receives assistance from family, but did not provide any commentary, and in the PR, the doctor wrote that the appellant's son helps him. In the AR, the doctor indicated that the appellant uses a cane and the appellant told the panel that he needs his cane for all his mobility. The appellant told the panel that he knows he will eventually require a scooter and/or a wheelchair to help him with his mobility.

The panel admits the testimony of the appellant at the hearing as oral testimony in support of the information before the ministry at the time the decision under appeal was made, pursuant to s. 22(4) of the *Employment and Assistance Act*.

## PART F – Reasons for Panel Decision

The issue in this appeal is whether the Ministry reasonably determined that the Appellant was not eligible for PWD designation because he did not meet all of the requirements in section 2(2) of the EAPWDA, and specifically, that, in the opinion of a prescribed professional, the appellant's severe impairments do not (i) directly and significantly restrict 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 eligibility criteria for PWD designation are set out in the following sections of the EAPWDA:

2 (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 "daily living activities" referred to in EAPWDA section 2(2)(b) are defined in the EAPWDR as:

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 now consider each party's position regarding the reasonableness of the Ministry's decision under the applicable PWD criteria at issue in this appeal. The panel notes that the Ministry accepted that the appellant met the first three criteria for PWD designation (age, duration and severe impairment). However, to qualify for designation as a PWD, an individual must meet all five of the legislated criteria. Accordingly, the panel's focus in this decision is on the evidence of the impact of the appellant's severe impairments on his ability to perform his DLA and the requirement for assistance with the performance of DLA.

### *Restrictions to Daily Living Activities*

The appellant says that the pain in his lower back and leg has significantly increased since his injury a year ago and restricts his daily living activities. The appellant told the panel that he is living in a camper. He said that he is only able to sleep if he is on something very hard – describing his bed as a sheet of plywood with a couple of sleeping bags on it. The appellant said that he drives his camper to a fast food restaurant where he will use the toilet facilities and have a cup of coffee and some food, and will spend the majority of his day in his camper. The appellant said that he is not an invalid, but he needs his cane for all of his mobility and cannot lift anything heavier than 10 pounds. In his SR, the appellant wrote that he has great difficulty dressing himself and sitting for any length of time is painful due to the sciatica in his leg.

The appellant's physician indicated in the PR that the appellant required continuous assistance performing the DLA of mobility outside the home, use of transportation and social functioning. In the commentary supporting this section of the PR, the physician wrote that the appellant "self isolates anxiety disorder" as the impact on his social functioning. To describe the degree of restriction, the doctor wrote, "unable to maintain relationships." In the AR, the appellant's physician indicated that the appellant could independently perform all the tasks of several of the listed DLAs (personal care, basic housekeeping, meals, paying rent and bills, and medications) as well as the task of going to and from stores for the DLA of shopping, and the task of getting in and out of a vehicle for the DLA of transportation. The doctor did not check mark the other listed tasks for the DLAs of shopping and transportation and did not provide any commentary to explain his answers in this section of the AR. With respect to the restrictions caused by the appellant's mental impairment (his depression and anxiety) on his social functioning, the doctor did not check any of the options (independent, periodic support or continuous support), but wrote, "does not socialize, speaks only to son, separated from wife."

In its reconsideration decision, the Ministry determined that based on the information provided by his physician, the Ministry does not have enough evidence to confirm that the appellant's impairment significantly restricts his ability to perform his DLAs continuously or periodically for extended periods..

### *The Panel's Findings*

Section 2(2)(b) of the EAPWDA requires that a prescribed professional provide an opinion that an applicant's severe impairment directly and significantly restricts his daily living activities, continuously or periodically for extended periods. Daily living activities are defined in section 2(1) of the EAPWDR and are also listed in the PR and in the AR. In this case, the appellant's physician is the prescribed professional and the information is provided in the PR and AR. The information contained in the other medical reports does not address the impact of the appellant's impairments on his ability to perform his DLA.

In the PR, the doctor indicated that the appellant required continuous assistance performing the DLA of mobility outside the home, use of transportation and social functioning indicating that the appellant self isolates because of his anxiety disorder and is unable to maintain relationships. The doctor did not address the continuous assistance the appellant requires for the DLA of mobility outside the home and use of transportation in the PR. Further, the physician indicated in the AR completed two weeks after the PR that the appellant could independently perform all of the tasks of the listed DLAs

which the doctor check marked – none of the DLAs require continuous or periodic assistance to be performed. Although the doctor wrote comments that the appellant's depression and anxiety had an impact on his social functioning, the doctor did not check mark any of the available options in the AR and did not indicate if the appellant requires continuous or periodic support in these areas.

Based on the information provided by the appellant's physician, the panel finds that the Ministry was reasonable in determining that it did not have enough evidence to confirm that the appellant's severe impairments significantly restrict his daily living activities either continuously or periodically for extended periods.

#### *Help with Daily Living Activities*

The appellant said that his son helps with his transportation – driving him to his appointments. The appellant says that he walks with a cane and requires his cane for all his mobility and standing. In the PWD application, the physician wrote in the PR that the appellant's son helps him and in the AR that the appellant uses a cane.

The Ministry's position is that the evidence does not establish that the appellant needs a significant amount of assistance from another person or from an assistive device.

#### *The Panel's Findings*

Section 2(2)(b)(ii) of the EAPWDA also requires the opinion of a prescribed professional confirming that because of restrictions in his ability to manage daily living activities, the appellant requires help with those activities. The panel notes that in the PWD application, the appellant's physician wrote only that the appellant's son helps him and check marked that the appellant uses a cane and did not provide any further narrative. Accordingly, the panel finds that the Ministry reasonably concluded that the evidence does not establish that the appellant needs significant help from other persons or from an assistive device to manage his daily living activities.

#### **Conclusion**

Having reviewed and considered all of the evidence and the 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. Therefore the panel confirms that decision.