

PART C – Decision under Appeal

The decision being appealed is the Ministry of Social Development and Social Innovation (the "Ministry") February 6, 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 the appellant has a severe mental or physical impairment that in the opinion of a medical practitioner is likely to continue for at least 2 years and, 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 was satisfied that the appellant has reached 18 years of age.

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 August 22, 2013;
 - A physician's report ("PR") completed on July 25, 2013 by the appellant's family physician who indicated that the appellant had been his patient for 13 years and he'd seen the appellant 11 or more times in the 12 months preceding the report.
 - An assessor's report ("AR") completed on July 24, 2013 by the appellant's family physician.
2. Two pages of copies of reports from an outpatient pain management clinic – the first page from a consultation of the appellant on February 27, 2013, the second page from a consultation of the appellant on February 7, 2013. These documents were resubmitted by the appellant in the additional material submitted prior to the hearing.

For this appeal, the appellant submitted the following additional documents:

- A copy of the medical report portion of the appellant's application for CPP disability benefits completed by the appellant's family physician on July 24, 2013 (5 pages);
- Reports from the outpatient pain management clinic regarding the appellant's consultations on February 27, 2013, June 5, 2013, July 3, 2013, and February 7, 2013. Of these reports, the February 27, 2013 report was before the ministry at reconsideration, as was the second page of the February 7, 2013 report.
- Medical imaging reports for the appellant dated February 7, 2013, July 19, 2013, and August 28, 2013; and
- a one-page typed submission prepared by the appellant for the hearing.

At the hearing, the appellant told the panel that his doctor had completed the medical report portion of the application for CPP disability benefits at the same time that his doctor completed the PWD application, but that the appellant had not proceeded with the CPP disability benefits application because he'd been told he would not qualify for it because his medical condition is unknown. The appellant told the panel that the reports from the outpatient pain management clinic and the medical imaging reports were supposed to be before the ministry at reconsideration and he had submitted them to the ministry prior to the reconsideration, but the ministry worker advised him that his file had been inadvertently closed and these documents were not before the reconsideration adjudicator. The appellant said that the information in these reports confirmed that he had been treated for pain and had undergone injections for his pain, but he was still suffering from chronic pain in his back.

The ministry representative had read all of the additional material submitted by the appellant prior to the hearing and did not object to its admission at the hearing. The information contained in the medical report portion of the CPP disability benefits application completed by the appellant's physician on July 24, 2013 is essentially the same as the information provided by the physician in the PWD application. The information in the outpatient pain management clinic reports and medical imaging reports supports the information before the ministry at the time of the reconsideration decision (in fact, two of the pages from the outpatient pain clinic were before the ministry at reconsideration) regarding the appellant's impairment. The submissions of the appellant provided on appeal are written testimony in support of the information before the ministry at reconsideration.

Accordingly, the panel admits the additional information submitted by the appellant as evidence under subs. 22(4) of the Employment and Assistance Act.

Diagnosis & Duration

In the PR, the doctor diagnosed the appellant with severe musculoskeletal back pain onset June 2010. In the AR, the doctor described the appellant's impairment as "severe low back pain." In assessing the duration of the appellant's impairment in the PR, the doctor wrote, "unknown. This man has had little improvement since the onset of his pain, but it is hopeful that he will receive some benefit from the pain clinic management." At the hearing, the appellant told the panel that his physician and the treating physicians at the outpatient pain clinic have not been able to pinpoint the cause of his chronic back pain and he has no definitive diagnosis (such as a herniated disc or degeneration). The appellant told the panel that he has been attending the outpatient pain clinic regularly since his 2010 injury and he still suffers from severe chronic back pain.

Physical Impairment

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

- The appellant developed back pain after an injury at work in 2010. He has had progressive pain which has resulted in him not being able to work, he has to take high doses of narcotic analgesic and is now being managed by the pain clinic in his city.
- He is unable to do any significant physical activity without severe pain and has problems with sitting or standing for significant periods of time.
- The appellant has been prescribed "strong narcotic analgesics with resulting sedation and fatigue" that interfere with his ability to perform daily living activities and the doctor wrote that the anticipated duration of the medication is "indefinite at present, depending on response to treatment at pain clinic."
- Can walk unaided less than 1 block, it is unknown how many stairs he can climb unaided, can lift 7-16 kg, and can remain seated less than one hour.

In the AR, the doctor described the appellant's impairments as "severe low back pain limits activity requiring physical exertion prolonged sitting or standing." The doctor in the AR reported that the appellant could walk independently indoors, but takes significantly longer with all other aspects of mobility and physical ability (walking outdoors, climbing stairs, standing, lifting, carrying and holding) writing the comment, "Patient's physical abilities/exertion is limited by his pain. Unable to do prolonged sitting, standing, lifting etc."

In the February 7, 2013 consultation report from the pain management clinic, the attending physician wrote, "this gentleman has significant pain behaviours. He is however able to toe walk, heel walk, heel toe walk. He had a good forward flexion, however, pain with extension and pain with testing of the facets. Neurologically, he had normal sensation. Straight leg raise was normal, as were the reflexes." In the June 5, 2013 outpatient consultation report, the attending physician noted that the appellant had reduced the amount of medication he was taking for his pain, and the appellant confirmed this at the hearing. In the July 3, 2013 report, the attending physician noted that the appellant had injections for his pain, but "this was of no value."

The appellant told the panel that he is in constant pain in his back and although he has tried everything to get rid of the pain (physiotherapy, classes at the chronic pain clinic, medication and

injections), he is still in constant pain. The appellant told the panel that he cannot stand, walk or sit for any extended period of time because of the pain and when asked to describe how much longer it takes him to perform activities compared to before his injury, the appellant said about 3 times longer. The appellant is very frustrated by his ongoing pain and by the fact that his physicians cannot figure out what is causing his pain. The appellant said that he continues to take classes at the outpatient pain clinic and is scheduled to take another one starting next month.

Mental Impairment

In the PR, the doctor reported that there are no significant deficits with cognitive and emotional function, and in the AR, the doctor did not complete the chart for impact of impairment on cognitive and emotional functioning, and did not complete the section for social functioning DLA. In his SR and his submissions at the appeal, the appellant said that he has felt depressed because of his pain.

Daily Living Activities

In the PR, the doctor indicated that the appellant's activity was not restricted for 8 of the listed DLAs (personal self care, meal preparation, management of medications, daily shopping, mobility inside the home, use of transportation, management of finances and social functioning). For the DLAs of basic housework and mobility outside the home, the doctor indicated that the appellant's activity was restricted continuously and he wrote the following comments: "unable to do prolonged – heavy exertion and prolonged walking, sitting, etc." "[The appellant] requires help from others to do any physical work."

In the AR, the doctor indicated that the appellant could independently perform all tasks of the DLAs of personal care, meals, paying rent and bills, medications, and transportation. For the DLA of basic housekeeping, the doctor indicated in the AR that the appellant could independently perform his laundry, but takes significantly longer to perform basic housekeeping, writing, "pain with heavier work." For the DLA of shopping, the doctor indicated that the appellant could independently perform 4 of the 5 tasks (going to and from stores, reading prices and labels, making appropriate choices and paying for purchases) but that the appellant takes significantly longer to carry purchases home (although the physician did not say how much longer) writing, "minimal carrying/weight."

The appellant told the panel that after his 2010 injury he broke up with his girlfriend and moved back in with his parents because he was not working and could not afford to rent a place himself. The appellant told the panel he tries to help his mother with dishes, but he can't do housework such as vacuuming as it hurts him too much to bend and push the vacuum.

Help with Daily Living Activities

In the AR, the doctor indicated that the appellant receives assistance from family and friends, but did not provide any commentary, and in the PR, the doctor wrote that the appellant "requires help from others to do any physical work." The appellant told the panel that his mother does the grocery shopping for the family.

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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 the Appellant does not have a severe mental or physical impairment that in the opinion of a medical practitioner is likely to continue for 2 or more years and, 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 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.

Duration of Impairment

The appellant told the panel that his severe lower back pain has not improved since his injury in 2010 and although he acknowledges that his physicians have not been able to identify the source of his chronic back pain, he says that the medical information supports that his impairment has continued for 2 or more years as required by the legislation.

The ministry in its reconsideration decision noted that the appellant's physician had written "unknown" in answer to the question whether the appellant's impairment was likely to continue for two years or

more and, as the physician has known the appellant for 13 years, he would be able to provide an accurate assessment in answering the question.

Panel's Findings

The legislation requires that a medical practitioner provide an opinion that the appellant's impairment is likely to continue for at least two years (subs 2(2)(a) of the EAPWDA). The only information provided by the appellant's physician regarding the anticipated duration of his impairment is the information in the PR – that the duration is "unknown." Although the appellant has submitted medical reports from the treating physicians at the pain management clinic where he is an ongoing out patient, there is no confirmation in any of these reports regarding the duration of the impairment. The appellant acknowledges that the origin of his chronic back pain is unknown and that this contributes to the inability of his physicians to determine the duration of his impairment. The panel finds that the ministry's determination that the information provided by the appellant's physician does not substantiate that the appellant's impairment is likely to continue for two years or more is reasonable based on the evidence.

Severity of Impairment

The appellant submitted that his chronic and severe lower back pain significantly impairs his ability to perform his daily living activities. The medical reports from the outpatient pain clinic show that the appellant has continued to seek treatment for chronic pain. The appellant told the panel the reports from his family physician and the doctors at the outpatient pain clinic don't convey the extent of his back pain and the degree to which it limits his ability to function and has changed his life. Although the appellant said that his chronic pain has caused him to be depressed, he did not assert that he suffers from a severe mental impairment.

The ministry, in its reconsideration decision, considered the information in the PR and AR and in the February 2013 reports from the outpatient pain clinic. The ministry noted that the appellant's physician in the PR wrote that the appellant's pain prevents him from doing any significant physical activities without severe pain and he has problems sitting and standing for significant periods of time. In the PR, the physician indicated that the appellant was continuously restricted in basic housework and mobility outside the home, but in the AR, indicated that the appellant takes significantly longer to perform these DLA (without indicating how much longer). The ministry noted that the physician indicated in the AR that the appellant is able to independently perform a large majority of his DLAs. It determined that the physician's usage of words in the narrative provided was more in keeping with a moderate physical impairment and found that the information did not establish a severe physical impairment. The ministry also found that the information did not establish a severe mental impairment.

The Panel's Findings

The diagnosis of a medical condition is not in and of itself evidence of the severity of impairment. To satisfy the requirements in section 2(2) of the EAPWDA, evidence of how and the extent to which a medical condition restricts daily functioning must be considered. This includes the evidence from the appellant and from a prescribed professional regarding the nature of the impairment and its impact on the appellant's ability to manage the daily living activities listed in section 2(1) of the EAPWDR.

In this case, information about the appellant's circumstances was provided by his family physician in the PWD application and supported by the information in reports from consultations at the outpatient pain clinic. In the PR, the doctor diagnosed the appellant with severe musculoskeletal back pain and the reports from the outpatient clinic indicate that the appellant has had treatment for chronic lower back pain (medication and injections). The physician wrote in the PR that the appellant is "unable to do any significant physical activity without severe pain and has problems with sitting or standing for significant periods of time." He wrote further in the PR in his commentary about the restrictions to the appellant's DLA that the appellant is "unable to do prolonged or heavy exertion and prolonged walking, sitting etc." The panel finds that the ministry's determination that the physician's narrative is more indicative of a moderate impairment, as opposed to a severe impairment, is reasonable based on the information set out in the PR.

The panel finds that there is no diagnosis of a mental health condition in the PWD application or the additional medical information and the appellant did not assert that he suffers from a severe mental impairment. Accordingly, the panel finds that the Ministry reasonably determined that the evidence does not establish a severe mental impairment.

Restrictions to Daily Living Activities

The appellant submitted that because his back pain is so severe and constant, his ability to manage daily living activities is also significantly restricted. The appellant told the panel that he helps his mother with the housework – washing dishes, for example – but cannot vacuum because it hurts his back too much. The appellant told the panel he had difficulty walking any distance and would use his car. The appellant's physician indicated in the PR that the appellant required continuous assistance performing the DLA of basic housework and mobility outside the home as he is unable to do prolonged or heavy exertion and prolonged walking, sitting etc. In the AR, the appellant's physician indicated that the appellant took significantly longer than typical to perform the tasks of basic housekeeping "pain with heavier work" and carrying purchases home "minimal carrying weight."

The ministry determined that because the appellant's physician reported that a large majority of the appellant's DLA are performed independently and did not specify how much longer the other DLAs take him, the ministry was not satisfied that the appellant's impairment in the opinion of a prescribed professional directly and significantly restricts his ability to perform the DLA.

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. DLAs are defined in section 2(1) of the EAPWDR and are also listed in the PR and in the AR.

In the PR, the doctor indicated that the appellant required continuous assistance performing the DLA of basic housework and mobility outside the home because he is unable to do prolonged or heavy exertion and prolonged walking. However, the physician also indicated in the AR completed at the same time that the appellant took significantly longer with the tasks of basic housekeeping because of pain with heavier work, and with carrying purchases home ("minimal carrying/weight"). In the AR,

the appellant's physician indicated that the appellant could independently perform all of the other listed tasks of all of the DLAs – none of the DLAs require continuous or periodic assistance to be performed. The panel notes that none of the additional medical information (the reports from the outpatient pain clinic and the imaging reports) provide information about the restriction in the appellant's DLA caused by his chronic back pain.

Based on the information provided by the appellant's physician, the panel finds that the Ministry was reasonable in determining that the appellant's impairment does not significantly restrict his daily living activities either continuously or periodically for extended periods.

Help with Daily Living Activities

The appellant said that his mother helps with his grocery shopping and performs house keeping that he can't do because of his pain. In the PWD application, the physician wrote in the PR that the appellant requires help from others to do any physical work.

The ministry's position is that because the evidence does not establish that daily living activities are significantly restricted, it cannot be determined that significant help is required from other persons.

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 the appellant's physician wrote that the appellant requires help to do physical work, but in the AR did not indicate that the appellant required continuous or periodic assistance to perform any of the listed DLAs. Accordingly, the panel finds that the Ministry reasonably concluded that it could not determine that the appellant needs significant help from other persons to manage 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.