

## 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 January 13, 2014 denying the appellant designation as a person with disabilities (PWD). The ministry determined that the appellant did not meet three of the five criteria required for PWD designation as set out in the *Employment and Assistance for Persons with Disabilities Act* (EAPWDA) section 2. The ministry found that the appellant meets the criteria of being 18 years of age or older (criterion 1) and that in the opinion of a medical practitioner, his impairment is likely to continue for two or more years (criterion 2). However, the ministry determined that, based on the information provided, the following criteria as set out in section 2(2)(b) of the EAPWDA were **not** met:

- The minister is satisfied that the appellant has a severe mental or physical impairment.
- In the opinion of a prescribed professional, the appellant's impairment significantly restricts his ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and
- As a result of the restrictions, the appellant requires the significant help or supervision of another person to perform the DLA restricted by his impairment.

## 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 reconsideration consisted of the following:

1. The appellant's PWD Designation Application, containing the following three parts:
  - The appellant's Self Report (SR) completed July 15, 2013;
  - The Physician Report (PR) completed by the appellant's family physician who indicates he has known the appellant for 2 years and had seen him 11 or more times in the previous year. The PR is not dated by the physician but the panel assumes he signed it on July 23, 2013 at the same time he completed the AR; and
  - The Assessor Report (AR) dated July 23, 2013 also completed by the appellant's family physician.
2. The appellant's request for reconsideration dated December 16, 2013 on which he wrote the following:

"Unable to lift, unable to work @ any labouring job, can't sleep properly, can't sit for any length of time due to osteoarthritis. Elbow 5 times (left) normal and so much inflammation eventually the elbows get infected. Then have to go get antibiotic @ hospital IV drip. They are getting infected 3-5 times a year. Can't kneel down huge bump on right knee and osteoarthritis in both legs. Lots of depression and stress, very hard to go up or down stairs. Lots of life's little things I have a real hard time to do them."

The appellant completed his notice of appeal on January 24, 2014, and on it he wrote that he "should be entitled to disability" writing that he "can't work for even ½ hr any job, can't kneel down, elbows get infected have 2 go to hospital antibiotic IV. Intense pain elbows + knees can't sleep."

The panel had confirmation that the Notice of Hearing had been delivered to the appellant. The panel delayed the hearing for 20 minutes to account for late arrival but the appellant did not attend the hearing. The panel held the hearing in the appellant's absence under the authority of s. 86(b) of the *Employment and Assistance Regulation*.

The following is a summary of the evidence from the PR and the AR as they relate to the PWD criteria at issue. The panel has also included reference to the appellant's SR in the PWD application, as well as his submissions on reconsideration and in his Notice of Appeal.

### Severity of impairments (criteria set out in subs. 2(2) EAPWDA)

The appellant's physician diagnosed him in the PR as having gout with an onset of 2002, osteoarthritis onset in 2008 and hypothyroid onset in 1998. The physician wrote that the appellant has "severe gout" which is widespread over his elbows, knees, ankles and toes and that this "limits his mobility/ability to exercise and he is in pain on a daily basis." The physician also wrote that the appellant has bilateral osteoarthritis in his knees and his mobility is limited. The physician indicated that the appellant has not been prescribed any medication that interferes with his ability to perform DLA, and does not need any prostheses or aids for his impairment. In the AR, the physician identified the appellant's impairments as, "due to joint pain [secondary] to arthritis/gout he has difficulty bending, pushing, lifting, carrying, pushing, pulling [and] sitting."

In the functional skills assessment in the PR, the appellant's physician indicated that the appellant could walk 2-4 blocks unaided on a flat surface, that he could climb 5+ steps unaided, that he could lift 2-7 kg (5-15 pounds), and could remain seated for less than 1 hour. In the AR, the appellant's physician indicated that the appellant takes significantly longer than typical to perform 5 of the 6 listed aspects of mobility and physical ability (walking indoors, walking outdoors, standing, lifting, and carrying and holding) writing the comment, "has difficulty with basic activities, takes significantly longer to complete tasks." The physician indicated that the appellant uses an assistive device to climb stairs, writing, "uses grab rails to climb stairs."

In the PR, the physician checked that the appellant has significant deficits with cognitive and emotional function in the areas of executive, emotional disturbance, motivation, and attention or sustained concentration but did not write any commentary. In the AR, the physician indicated that the appellant had good ability to communicate in all areas. Further in the AR in the assessment of the appellant's mental impairment on his cognitive and emotional functioning, the physician indicated that his mental impairment had a moderate impact in the areas of bodily functions, emotion, attention/concentration, executive, memory, and motivation and other emotional or mental problems, with the comment, "[the appellant] has [illegible] anxiety/depression [secondary] to gout/health issues. He has difficulty coping in these areas."

In his Notice of Appeal and submissions on reconsideration, the appellant wrote that he can't walk for "even ½ hour," he can't kneel down and he has intense pain in his elbows and knees and can't sleep. He also said that his elbows will get infected and he has to go to the hospital for an IV drip of antibiotics when this happens (3-5 times per year). He wrote that it is very hard to go up and down stairs. In his SR, the appellant set out that he can't go up and down stairs without great difficulty, can't walk more than 2-3 blocks without resting, can't lift, bend, kneel, push or pull or sit. He indicated in the SR that he has difficulty sleeping and he is suffering from mental stress and depression, particularly when people notice his swollen elbows.

Ability to perform DLA (criteria set out in subs. 2(2)(b) EAPWDA)

As directed by the PWD application, the physician did not complete the DLA section of the PR. In the AR, the physician indicated that the appellant is independent in performing all aspects of the DLAs of paying rent and bills, and medications. The physician indicated that the appellant requires continuous assistance in performing all of the 5 listed tasks of the DLA of shopping, writing, "his ex-wife does the shopping and brings him groceries." The appellant's physician indicated the appellant takes significantly longer than typical to perform both tasks of the DLA of basic housekeeping, but did not provide any commentary. The physician indicated the appellant could independently perform the tasks of toileting, feeding self and regulating diet under the DLA of personal care, but indicated that the appellant takes significantly longer than typical in performing 5 of the 8 tasks of the DLA of personal care (dressing, grooming, bathing, transfers in/out of bed, and transfers on/off of chair) commenting, "his [DLA] take significantly longer to complete due to his health issues."

In the AR section regarding the appellant's social functioning, the appellant's physician indicated that the appellant was independent in 4 of the 5 aspects, and wrote, "does not have many social contacts" beside the area "able to develop and maintain relationships." The physician indicated that the appellant had marginal functioning with his immediate and extended social networks, but did not provide any commentary.



In his submissions on reconsideration and in the Notice of Appeal, the appellant wrote that he is unable to work at any labouring job, can't work for even ½ an hour. He said that because of the pain in his elbows, he can't carry his shopping and his ex-wife does his shopping for him.

Assistance required/provided (criteria set out in subs. 2(2)(b)(ii) EAPWDA)

In the section of the AR describing the assistance provided for the appellant, the physician indicated that the appellant received help from family, writing, "his ex-wife does help him w/ shopping, and prescriptions." The physician did not indicate that the appellant required any assistive devices, but wrote, "may require these in the future."

## 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 and/or physical impairment and that the information provided did not demonstrate that his impairments in the opinion of a prescribed professional directly and significantly restricts his ability to perform daily living activities either continuously or periodically for extended periods, and, as a result of those restrictions he requires help to perform those activities.

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:

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- (i) make decisions about personal activities, care or finances;
  - (ii) relate to, communicate or interact with others effectively.

### Severity of physical impairment

The appellant sets out in his submissions that he believes his impairments are severe – because he suffers from constant pain in his elbows and his knees, his elbows are greatly swollen and get infected so that he requires an IV antibiotic. He says that as a result of his condition, he suffers from depression and anxiety and finds it hard to do “life’s little things.”

In its reconsideration decision, the ministry determined that although the appellant has some limitations due to his gout and osteoarthritis and it appears to take him longer to do most basic living tasks, the minister was not satisfied that the information provided is evidence of a severe physical impairment. The reconsideration decision notes that the appellant’s physician did not elaborate on how much longer it takes the appellant to perform the tasks which take him significantly longer than typical, nor did the appellant’s physician indicate the level of pain the appellant experiences on a daily basis. In its reconsideration decision, the ministry noted that there are no medical reports or referrals to specialists included in the appellant’s PWD application to help indicate the level of severity of his physical medical conditions. The ministry representative at the hearing noted that the appellant has not provided any medical information to support that his impairments are severe with his request for reconsideration or with his notice of appeal.

### Analysis and decision

The legislation provides that the minister may designate a person as a PWD if the minister is satisfied that the person has a severe mental or physical impairment that in the opinion of a medical practitioner is likely to continue for at least 2 years (subs. 2(2)(a) of the EAPWDA).

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 the PWD application form, the ministry has provided a definition of “impairment” which, although it is not set out in the applicable legislation, offers guidance in considering the existence and severity of an applicant’s impairment. The ministry states, “impairment” is a “loss or abnormality of psychological, anatomical or physiological structure or functioning causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration.” To determine the severity of impairment, there is both a cause – the impairment itself – and an effect – the degree to which it restricts the ability to function independently, effectively, appropriately or for a reasonable duration. The panel notes that the legislation provides that the determination of the severity of impairment is at the discretion of the minister, taking into account all of the evidence, including that of the appellant. However, the starting point must be the medical evidence - the information provided by the appellant’s physician in the PWD application.

In the PR, the appellant’s physician indicates that the appellant is able to walk 2-4 blocks, climb 5+

steps unaided, can remain seated for less than one hour, and can lift 2-7 kg. The physician described the severity of the appellant's medical conditions in the PR as follows: "Patient has severe gout, has widespread gout over the elbows, knees, ankles, toes, this limits his mobility/ability to exercise and he is in pain on a daily basis. He also had bilateral osteoarthritis in his knees. His mobility is limited." In the AR, the appellant's physician indicated that the appellant requires an assistive device to climb stairs, writing "uses grab rails to climb stairs" and takes significantly longer than typical to perform all other tasks of mobility (walking indoors and outdoors, standing, lifting and carrying and holding), writing, "has difficulty with basic activities, takes significantly longer to complete tasks."

In describing the restrictions caused by the appellant's physical impairment on the ability to perform DLA, the appellant's physician indicated that the appellant takes significantly longer to perform 5 of the 7 listed task of the DLA of personal care, writing "his daily living activity take significantly longer to complete due to his health issues" but the physician does not provide detail about how much longer the appellant takes. The appellant's physician indicates that the appellant takes significantly longer than typical to perform all tasks of basic housekeeping, meals and transportation, but does not provide any commentary to explain and describe the restriction caused by the appellant's impairments. It is difficult to assess the severity of the appellant's physical impairment as set out in the information provided by the appellant's physician in the PWD without further description from the appellant's physician to describe the severity of the physical impairment. Accordingly, the panel finds the ministry's determination that the information provided is not evidence of a severe physical impairment is reasonable.

In considering whether the appellant has a severe mental impairment, the ministry determined that it was not satisfied that the information provided is evidence of a severe mental impairment because the appellant had not been diagnosed with a mental impairment in the PWD application, there are no major impacts reported on his cognitive and emotional functioning, there was no indication that the appellant had been referred to a mental health specialist, and the appellant's social functioning was considered marginal (not "very disrupted").

The panel notes that in the information in the PWD application, the appellant's physician did not diagnose him with a mental impairment or brain injury. The physician indicated in the PR that the appellant's impairments had an impact on cognitive and emotional functioning in 4 areas (executive, emotional disturbance, motivation and attention or sustained concentration), but did not provide any commentary. In the AR, the physician indicated that the appellant's impairment had a moderate impact on 7 areas of cognitive and emotional functioning (bodily functions, emotion, attention/concentration, executive, memory, motivation and "other") writing, "patient has [illegible] anxiety/depression [secondary] to gout/health issues, he has difficulty coping in these areas." The panel finds that based on the information from the appellant's physician set out in the PWD application, the ministry's determination that the information did not establish a severe mental impairment is reasonable.

*Direct and significant restrictions in the ability to perform DLA.*

In the reconsideration decision, the ministry noted that the physician indicated in the PWD application that the appellant takes significantly longer to perform several tasks of the DLAs, but does not specify how much longer. The ministry also noted that, other than the DLA of shopping, the physician did not indicate that the appellant requires significant help either continuously or periodically for extended

periods to perform the DLAs. In its reconsideration decision, the ministry noted that although the physician indicated that the appellant was continuously restricted in all tasks of the DLA of shopping, the physician did not explain why the appellant required continuous assistance with the specific tasks of reading prices and labels, making appropriate choices, or paying for purchases. The physician only wrote that the appellant's ex-wife does all his shopping and brings him his groceries as an explanation for all the listed tasks. The ministry noted that the only DLA that the appellant's physician indicated was continuously restricted was shopping and the ministry was not satisfied that, based on the other assessments the physician made in the PWD application (such as the appellant's ability to lift 5-15 pounds unaided and walk 2-4 blocks unaided), the appellant requires help on a continuous basis.

### *Analysis and decision*

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. In this case the appellant's doctor is the prescribed professional. Daily living activities are defined in section 2(1) of the EAPWDR and are also listed in the PR and in the AR.

The appellant's physician indicated that the appellant requires continuous assistance to perform all tasks of the DLA of shopping, but commented only that the appellant's ex-wife "does the shopping and brings him groceries." The panel finds the ministry's determination that this information does not satisfy it that the appellant's impairment directly and significantly restricts his DLA either continuously or periodically for extended periods reasonable based on the information provided by the appellant's physician in the PWD application. While other tasks of DLA are reported as taking significantly longer to perform, and as no further detail is provided, the panel finds the information provided by the appellant's physician in the PWD application does not establish that the appellant's impairments directly and significantly restrict his ability to perform any of his other DLA either continuously or periodically for extended periods.

### *Help with DLA*

In its reconsideration, the ministry noted that as it "had not been established that [DLA] are significantly restricted ... it cannot be determined that significant help is required from other persons. No assistive devices are required."

The legislation requires in subs. 2(b)(iii) that in the opinion of a prescribed professional, as a result of the appellant's restrictions, the appellant requires help to perform DLA. The panel notes the evidence before the ministry at the reconsideration as set out by the appellant's physician in the AR was that the appellant needs continuous assistance with all of the tasks of shopping and that his ex-wife performs these tasks for him. However, the panel notes the ministry's concern that the information from the physician that the physician requires continuous assistance for all tasks of shopping contradicts the information from the physician that the appellant has good communication skills (for the tasks of reading prices and labels, making appropriate choices and paying for purchases) and can lift lighter items. The panel finds that the ministry's determination that because 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, is reasonable.



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 is reasonably supported by the evidence. The panel therefore confirms the ministry's decision.