

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 2, 2014 denying the appellant's application for 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*, section 2. The appellant has met the criteria of being 18 years or older and a medical practitioner has confirmed his impairment is likely to continue for at least 2 years. However, the ministry determined that, based on the information provided, the appellant had not met the following criteria:

- the appellant has a severe mental or physical impairment;
- the appellant's impairment, in the opinion of a prescribed professional, significantly restricts his ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and
- the appellant requires significant help 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 completed May 29, 2013;
 - The Physician Report (PR) dated May 27, 2013, completed by a specialist in Physical Medicine and Rehabilitation (rehabilitation specialist) at a provincial rehabilitation centre. The appellant had been referred to the centre by his family physician, and the rehabilitation specialist had met with him once at the time the PR (and AR) was completed; and
 - The Assessor Report (AR) dated June 10, 2013, completed by the rehabilitation specialist.
2. The appellant's Request for Reconsideration, dated December 16, 2013, in which his advocate wrote: "... There is sufficient information in the application for the ministry to determine" that the appellant meets the eligibility requirements for PWD designation.

Subsequent to filing his notice of appeal on January 8, 2014 and prior to the hearing, the appellant submitted a 3-page written submission prepared by his advocate, together with a one-page letter dated January 20, 2014 from the appellant's rehabilitation specialist physician who completed the PR and AR sections of the appellant's PWD application. At the hearing, the ministry's representative did not object to the admission of the appellant's 3-page submission on appeal, or the one-page letter from the appellant's rehabilitation specialist dated January 20, 2014.

The appellant's written submissions on appeal refer to the reconsideration decision and the information before the ministry set out in the PWD application. The January 20, 2014 letter from the appellant's rehabilitation specialist refers to the information set out in the PR and AR of the PWD application, providing elaboration of the earlier information. The panel therefore admits as evidence the appellant's written submission on appeal and the January 20, 2014 letter from the appellant's rehabilitation specialist as written testimony in support of the information and records that were before the minister when the decision being appealed was made pursuant to subs. 22(4)(b) of the *Employment and Assistance Act*.

The following is a summary of the evidence from the PR and AR, together with the evidence provided in the appellant's rehabilitation specialist's letter of January 20, 2014, regarding the appellant's impairments as they relate to the three PWD criteria at issue. The panel has also included reference to the appellant's self report in the PWD application, as well as his submissions on appeal and at the hearing.

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

In the PR completed in late May 2013, the appellant's rehabilitation specialist confirmed the appellant has poliomyelitis (polio) in his right leg, which he contracted in July 1964 as an infant, "resulting in pain limiting functional abilities from abnormal biomechanics." In describing the severity of the appellant's disability in the PR, the rehabilitation specialist wrote, "[right] leg almost complete paralysis [secondary] to polio – [right] hip flexion grade 215, toe flexors only remaining causes significant abnormalities with gait and abnormal biomechanics [causing increased] stress lower back, [right] knee and [with increased] use of left leg is now having [left] knee pain from overuse. Limb ambulation previously unlimited distance, now only able to walk 2-3 blocks. Pain limits sitting

tolerance and disrupts sleep.” In the PR, the rehabilitation specialist indicates that the appellant had been prescribed a right leg knee-ankle-foot orthosis and 2-inch shoe lift, as well as pain medications. In assessing the appellant’s functional skills in the PR, the rehabilitation specialist indicated that the appellant could walk 2-4 blocks, could climb 5+ steps “very slow with railing,” could lift 2-7 kg, and could remain seated less than 1 hour.

In the AR, the rehabilitation specialist indicated that the appellant uses an assistive device and takes significantly longer than typical for walking indoors and outdoors and climbing stairs, writing “uses cane and ambulates slowly.” She check marked that the appellant uses an assistive device for standing and check marked that the appellant requires periodic assistance with carrying and holding, writing “if standing cannot utilize both arms.” The rehabilitation specialist has written in this section of the AR beside lifting, “difficulty with lifting secondary to weakness even when standing – ok sitting.” She has also written the comment, “profound weakness in [right] leg limits mobility and impacts use of arms when standing.” Further in the AR, the rehabilitation specialist wrote, “this individual has been trying to cope for years with his paralyzed [right] leg. Abnormal biomechanics during walking have led to severe joint degeneration in the [right] leg causing pain [and increased] weakness to the point where he previously was able to walk unlimited distances/sit unlimited time, now walking is severely limited and sitting tolerance is [less than half an] hour.” She concluded the AR with the comment, “As a rehabilitation specialist, I will continue to see the [appellant] every 2-4 months to assist in managing pain and increasing function. Referrals have been made to community occupational therapy, physiotherapy and ortho. However, this disability is permanent and will continue to severely limit function.”

In the January 20, 2014 letter, the appellant's rehabilitation specialist writes that the appellant “has a severe impairment with right leg polio” which “causes severe mobility and other functional restrictions.” The rehabilitation specialist notes that the appellant has “severe chronic pain because of gait problems and this necessitates the use of other parts of the body, such as the right hand, to support functions.” The January 20, 2014 letter also notes that “because of the severity of this impairment and its significant attendant functional restrictions” an occupational therapist at the provincial rehabilitation centre had prescribed the appellant a cane “which he purchased himself and must now use for all ambulation,” as well as bathroom grab bars and bath bench, an orthopedic bed and a scooter, as well as a right knee-ankle-foot orthosis and a 2.5 inch shoe lift (the last two items were noted in the PR).

In the January 20, 2014 letter, the rehabilitation specialist wrote that the appellant can only walk “one block maximum with cane, as his condition continues to deteriorate.” At the hearing, the appellant told the panel that he requires his cane for all of his movement – walking indoors and outdoors and getting into and out of chairs and his bed – and that he cannot function without it. The appellant told the panel that his condition is deteriorating and has worsened since the rehabilitation specialist completed the PR and AR in May and June 2013. This is confirmed by the rehabilitation specialist in her January 20, 2014 letter.

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

The appellant's rehabilitation specialist completed the DLA sections in both the PR and AR. In the PR, she indicated that the appellant's impairment directly restricts his ability to perform the following listed DLA (personal self care, meal preparation, basic housework, daily shopping, mobility inside and

outside the home and use of transportation). The rehabilitation specialist indicated that the appellant was not restricted in his management of medications, management of finances and social functioning. In this section of the PR, the appellant's rehabilitation specialist indicated that the appellant's impairment periodically restricted the DLA of personal self care, writing the comment, "sometimes is able to do own dressing." The rehabilitation specialist noted in this section of the PR that the appellant required continuous assistance to perform the other noted DLA, commenting, "needs help in and out of tub, dressing, ambulating [more] than 3 blocks, household chores, meal preparation."

In the section of the AR indicating the degree of restriction to DLA that the appellant's impairments cause, the appellant's rehabilitation specialist indicated that the appellant was independent in 6 of the 7 tasks of the DLA of personal care. She check marked that the appellant requires periodic assistance bathing writing, "needs help from partner for toileting/[illegible] due to limited mobility in the bathroom." The appellant's rehabilitation specialist indicated that he required continuous assistance in performing the 2 tasks of the DLA of basic housekeeping.

In the AR, for the 5 listed tasks under the DLA of shopping, the rehabilitation specialist check marked that the appellant was independent for reading prices and labels, making appropriate choices, and paying for purchases, but that he uses an assistive device and takes significantly longer to perform the tasks of carrying purchases home and going to and from stores, writing "cane, slow ambulator." The appellant's rehabilitation specialist has also written, "requires one person assist for household chores and shopping [due to] weakness in [right] leg." For the tasks listed under the DLAs of meals, pay rent and bills, medications and transportation, the appellant's physician indicated in the AR that the appellant was independent for most of the listed tasks, but that he required periodic assistance with food preparation and cooking (2 tasks for meals) and that he uses an assistive device for getting in and out of a vehicle and using public transit (tasks under transportation). The appellant's rehabilitation specialist wrote the comments, "limited standing [secondary] to [right] leg weakness and pain" and "uses a cane to access public transit."

In the letter of January 20, 2014, the rehabilitation specialist wrote that the appellant "has significant ongoing restrictions and needs significant ongoing help with the following activities of daily living." She indicates that for the DLA of personal self care, the appellant needs help dressing and needs a bathroom grab bar and shower chair. The rehabilitation specialist has written that the appellant can walk only one block maximum with his cane and for the DLAs of housework, shopping and mobility inside and outside the home, she has written "see prescribed equipment above and needs significant ongoing help from his partner." For the DLA of transportation, the rehabilitation specialist has written, "needs a seat on transit. Cannot stand and hang on."

At the hearing, the appellant told the panel that he cannot perform any of his DLA without assistance from his partner – he is unable to dress himself and because he relies constantly on his cane, must receive assistance with bathing and toileting from his partner. The appellant told the panel he cannot shop for groceries anymore as he cannot lift and carry items while he uses his cane, which is now constant.

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, completed June 10,

2013, the appellant's rehabilitation specialist indicated that the appellant received help from family writing, "has a supportive partner who assists with chores, food preparation and shopping, bathing." The rehabilitation specialist check marked in the AR that the appellant uses a cane, writing, "uses cane in his [left] hand to offload [right] leg during gait" and "is being assessed for power wheelchair for outdoor ambulation."

In the January 20, 2014 letter, the appellant's rehabilitation specialist wrote that "because of the severity of this impairment and its significant attendant functional restrictions" an occupational therapist at the provincial rehabilitation centre had prescribed the appellant a cane "which he purchased himself and must now use for all ambulation." The occupational therapist has also prescribed bathroom grab bars and bath bench, an orthopedic bed and a scooter, as well as a right knee-ankle-foot orthosis and a 2.5 inch shoe lift. In this letter, the rehabilitation specialist wrote that the appellant needs help dressing and needs a bathroom grab bar and shower chair, that he needs significant help from his partner for housework, shopping and mobility inside and outside the home with the assistance of the prescribed equipment.

At the hearing, the appellant told the panel that his partner helps him with all of his personal self care and that she prepares their meals and does the shopping as he cannot perform these DLAs himself. The appellant told the panel that he now uses his cane constantly for all of his walking and getting around both inside and outside and that the use of his cane restricts his ability to shop, carry groceries and other items, do his laundry (he cannot carry the basket), and use transit (as noted by his rehabilitation specialist in the January 20, 2014 letter – he must sit down as he cannot stand up and hang on). The appellant told the panel that the occupational therapist has prescribed a wheelchair for him, but he is waiting to find out if and when he will get the wheelchair. He is also waiting for further medical assessment at the provincial rehabilitation centre to determine whether he will require surgery.

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 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:

(i) make decisions about personal activities, care or finances;

(ii) relate to, communicate or interact with others effectively.

Severity of impairment (subs 2(2))

In order to meet this criterion, the minister must be satisfied that the person has a severe mental or physical impairment.

Mental impairment

The appellant does not challenge the ministry's determination that his physician (rehabilitation specialist) has not provided enough evidence to confirm that he has a severe mental impairment and the panel notes the comment "no mental impairment or brain injury" written by the rehabilitation specialist in the AR.

Physical impairment

In the reconsideration decision, the ministry determined that, based on the information provided by the appellant's physician (his rehabilitation specialist), the ministry does not have enough information to establish that the appellant has a severe physical impairment. The reconsideration decision states "it is difficult for the ministry to obtain a concise and accurate picture of your present physical limitations situation as [the appellant's rehabilitation specialist] indicates that you do have physical limitations, however, the severity of these physical impairments are not reflected in your ability to manage all of your daily living activities."

In the PR and the AR, the rehabilitation specialist has stated that the appellant has "almost complete" paralysis in his right leg as a result of his polio, and that this is causing severe pain in both his legs, knees and lower back due to the abnormal gait. She describes his impairment in the AR: "this disability is permanent and will continue to severely limit function." In the PR completed in late May 2013, the rehabilitation specialist indicated that the appellant's functional skills were limited to walking 2-4 blocks, climbing 6+ steps "very slow with railing", lifting 2-7 kg, and remaining seated less than 1 hour.

In the January 20, 2014 letter, the rehabilitation specialist acknowledges that the appellant's impairment has continued to deteriorate, such that he can now only "walk one block maximum with cane." She also writes in January 2014 that the appellant "has a severe impairment with right leg polio. The impairment causes severe mobility and other functional restrictions. He has severe chronic pain because of gait problems and this necessitates the use of other parts of the body ... to support functions." At the hearing, the appellant confirmed that his condition is deteriorating and has become worse since the PWD application was completed in late May/early June 2013. The appellant confirmed that he now requires a cane for all of his movement and he cannot walk any distance or climb stairs without the use of the cane, and that as a result, his ability to lift items is greatly restricted (could only do it when he was sitting down).

The appellant's rehabilitation specialist who completed the PR and AR is a physician at a provincial rehabilitation facility to which the appellant was referred by his family physician and which specializes in assisting persons with physical impairments in their rehabilitation. In the PR and AR, she indicates that at the time she completed the forms (May 27, 2013 and June 10, 2013), she had met the

appellant once, but she had reviewed his medical chart at the rehabilitation centre. At the hearing, the appellant also told the panel that the rehabilitation facility had his file from his family physician at the time he was referred to the facility. She also wrote that she would see the appellant every 2-4 months, so by the time she wrote the letter on January 20, 2014, she would have seen the appellant a few more times.

The panel places significant weight on the commentary set out in the rehabilitation specialist's letter of January 20, 2014, completed 8 months after the PR and AR, as she is a specialist in rehabilitation medicine and her comments in the January 2014 letter directly address her previous information. The panel notes that in the PR, the rehabilitation specialist had indicated that the appellant's impairment restricted his functional skills and that his impairment was deteriorating and that by the time of the January 20, 2014 letter, the physician has confirmed that the appellant's impairment has deteriorated to the point where its impact on his functional skills is severe. The panel therefore finds that, based on the information provided by the appellant's rehabilitation specialist in the PR, AR and the January 20, 2014 letter, the ministry was not reasonable in its application of the legislation to the appellant's circumstances and that the information provided by the appellant's physician – a specialist in rehabilitative medicine – establishes that the appellant's impairment as a result of his polio is severe.

Significant restrictions in the ability to perform DLA.

In the reconsideration decision, the ministry determined that "based on all available information provided by you and [the rehabilitation specialist] the ministry finds there is not enough evidence to establish that your impairment directly and significantly restricts daily living activities continuously or periodically for extended periods." The reconsideration decision states that the appellant's rehabilitation specialist reported in the PR that the appellant was periodically restricted in his ability to manage his personal self care, "sometimes is able to do own dressing" and continuously restricted in his ability to manage his meal preparation, basic housework, daily shopping, mobility inside the home, mobility outside the home and use of transportation. The reconsideration decision also notes that in the AR, the rehabilitation specialist reported that the appellant "can manage the majority of your personal care with periodic assistance required for bathing" and that the appellant requires continuous assistance with laundry and housekeeping, but "no narrative is included to explain why you require this level of assistance."

The panel notes the rehabilitation specialist wrote in the comment section of the AR "requires one person assist for household chores ... [secondary to] weakness in [right] leg" and this was reproduced in the reconsideration decision. The reconsideration decision stated that the rehabilitation specialist indicated in the AR that the appellant can independently manage most areas of shopping, but requires the use of his cane when going to and from stores and carrying purchases home, and that he requires periodic assistance with food preparation and cooking due to limited standing. The reconsideration decision also states that the rehabilitation specialist indicated that the appellant uses a cane when getting in and out of a vehicle and using public transit.

The legislation requires that in the opinion of a prescribed professional (such as the appellant's rehabilitation specialist), the appellant's severe impairment directly and significantly restricts his ability to perform daily living activities either continuously or periodically for extended periods. In the reconsideration decision, the ministry wrote that it "relies on the expert medical opinions and assessments provided by [the rehabilitation specialist] in determining PWD eligibility. Evidence that

confirms [the appellant's] impairments impacts [his] ability to manage [his DLA] and whether [he] requires assistance with these activities is also assessed by [the appellant's] physician." The ministry concluded there was not enough evidence to establish the appellant's impairment directly and significantly restricts his DLA continuously or periodically for extended periods.

The panel notes that in the PR completed in late May 2013, the appellant's rehabilitation specialist indicated the appellant is restricted continuously in the following DLA: personal self care, meal preparation, basic housework, daily shopping, mobility inside and outside the home, and use of transportation. In the AR completed in early June 2013, the appellant's rehabilitation specialist indicated that the appellant required continuous assistance for both tasks of the DLA of basic housekeeping, and that he required periodic assistance for the two tasks of food preparation and cooking under the DLA of meals. In the AR, the rehabilitation specialist indicated that the appellant uses an assistive device (his cane) and takes significantly longer to perform the tasks of going to and from stores and carrying purchases home under the DLA of shopping, and the tasks of getting into and out of a vehicle and using public transit under the DLA of transportation. The commentary provided in the AR indicates that the appellant needs help from his partner for toileting due to limited mobility in the bathroom, assistance from another person for household chores and shopping, has limited standing because of right leg weakness and pain, and needs to use his cane to access public transit.

In her letter of January 20, 2014, the appellant's rehabilitation specialist directly addressed the findings of the ministry in its reconsideration decision. In the appellant's physician's letter, she stressed that the appellant has "significant ongoing restrictions" with the DLA of personal self care ("needs help dressing and needs a bathroom grab bar and shower chair"), mobility outside the home ("one block maximum with cane, as his condition continues to deteriorate"), housework, shopping, mobility ("inside and outside the home – see prescribed equipment above – and needs significant ongoing help from his partner") and use of transportation ("needs a seat on transit – cannot stand and hang on"). The panel accepts the appellant's rehabilitation specialist's evidence in this respect and notes that the appellant confirmed this in his testimony before the panel at the hearing.

Accordingly, the panel finds that the information provided by the appellant's rehabilitation specialist (which includes the information before the ministry at reconsideration and the information in the January 20, 2014 letter) establishes that the appellant's impairment severely restricts his ability to perform several DLA continuously (meal preparation, housework, personal self care, mobility inside and outside the home and use of transportation). Accordingly, the panel finds the ministry's determination that there was not enough evidence from the appellant's physician – his rehabilitation specialist – to establish the appellant was significantly restricted in his ability to perform DLA as required under subs. 2(2)(b) was not a reasonable application of the legislation to his circumstances.

Help with DLA

In its reconsideration decision, the ministry acknowledged that the appellant's rehabilitation specialist indicates that he uses a cane. The ministry then determined that as it "has been established that [DLA] are not significantly restricted (criterion 4); therefore, it can be determined that significant help is not required from other persons." The ministry also wrote that the appellant does "not require the services of an assistance animal."

The legislation (section 2(2) of the EAPWDA) states that the minister may designate a person as a person with disabilities for the purposes of the Act if the person meets the criteria of having 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 directly and significantly restricts the person's ability to perform DLA either continuously or periodically for extended periods, **and as a result of those restrictions, the person requires help to perform those activities.** Further, subs. 2(3) of the EAPWDR provides that for the purposes of subs. (2), "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 assistive animal."

The panel notes the evidence before the ministry at the reconsideration as set out by the appellant's rehabilitation specialist in the PR indicated that the appellant "needs help in and out of tub, dressing, ambulating more than 3 blocks, household chores, meal preparation" and in the AR that he "needs help from partner for toileting [illegible] due to limited mobility in the bathroom," "uses a cane and ambulates slowly," "uses a cane to access public transit" and "requires one person assist for household chores and shopping." Further in the AR, the appellant's rehabilitation specialist has written that the appellant "has a supportive partner who assists with chores, food preparation and shopping, bathing" and check marked that the appellant uses a cane and is being assessed for a wheelchair. In the January 20, 2014 letter, the appellant's rehabilitation specialist wrote that "because of the severity of this impairment and its significant attendant functional restrictions" the appellant had been prescribed several assistive devices (in addition to the cane) – bathroom grab bars and bath bench, orthopedic bed, right leg orthosis and shoe lift and a scooter.

This panel notes that the rehabilitation specialist has provided information indicating that the appellant's impairments significantly restrict his DLA continuously or periodically for extended periods (personal care, meal preparation, basic housework, daily shopping, and use of transportation). The panel gives significant weight to the information provided by the appellant's rehabilitation specialist in her letter of January 20, 2014 because it clarifies the information set out in the PWD application and further stresses that the appellant requires "significant ongoing help" with the DLA of personal self care, housework, shopping, mobility inside and outside the home and using transportation. The panel therefore finds that the ministry's determination that "as it has been established that [DLA] are not significantly restricted (criterion 4); therefore, it can be determined that significant help is not required from other persons" is not 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 not a reasonable application of the legislation in the appellant's circumstances. The panel therefore rescinds the ministry's decision.