

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the Ministry) reconsideration decision dated June 12, 2014 in which the Ministry found that the Appellant was not eligible for designation as a Person With Disabilities (PWD) because he did not meet all 5 of the requirements for PWD designation in Section 2(2) of the *Employment and Assistance for Persons with Disabilities Act (EAPWDA)*. The Ministry was satisfied that the Appellant has reached 18 years of age and that his impairment is likely to continue for at least 2 years. However, based on the information provided in the PWD Designation Application, the Ministry was not satisfied:

- That the Appellant has a severe mental or physical impairment; and
- That the impairment, in the opinion of a prescribed professional, directly and significantly restricts the Appellant's ability to perform daily living activities (DLAs) either continuously or periodically for extended periods; and,
- As a result of these restrictions, the Appellant requires help to perform those activities.

## 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 the time of the reconsideration decision included the following:

- 1) A Person With Disabilities (PWD) Designation Application comprised of the Applicant Information and self-report completed by the Appellant on November 21, 2013, a Physician Report (PR) dated March 31, 2014 and an Assessor Report (AR) dated April 1, 2014, both completed by the Appellant's family physician who has known the Appellant since 2003, and has seen him 2-10 times in the past year.
- 2) The Appellant's Request for Reconsideration dated June 6, 2014 in which he asked the Ministry for "a little consideration...maybe a temporary disability for a certain period of time" and stated that his health situation prevents him from finding work.

The Ministry's background information indicated that no additional medical information was forwarded with the Request for Reconsideration.

### ***Diagnoses:***

In the PR, the Appellant was diagnosed with recurrent small bowel obstruction, onset in 2001, and colon cancer, also in 2001.

### ***Physical or Mental Impairment:***

In the PR, under Health History, the Appellant's physician reported "This patient suffers from recurrent small bowel obstruction since his surgery – 2001 requiring repeated hospitalizations since then." The physician indicated the Appellant has not been prescribed any medications and/or treatments that interfere with his ability to perform DLAs and he does not require any prostheses or aids for his impairment

In the PR, under Degree and Course of Impairment, the physician wrote "Partial small bowel obstructions usually managed by conservative treatment at the hospital. Future surgery may be considered or elective (illegible) of adhesions but no guarantee if this will cure the problem." Under Additional Comments, the physician wrote "This patient has been having recurrent admissions secondary to bowel obstruction for many years now. He also has recurrent exacerbation of his asthma condition."

In the AR, in reply to the question: "What are the applicant's mental or physical impairments that impact his/her ability to manage Daily Living Activities", the physician commented "He gets quite short of breath with asthma exacerbation. He also gets fatigued easily."

In his self-report, the Appellant indicated he was diagnosed with colon cancer in 2001 and underwent major surgery the same year. Since then he has been hospitalized almost every 2 months or so because "parts of my intestine has been clogged and needs to get cleaned up and needed an emergency treatment."

**Functional Skills:**

In the PR, the physician indicated:

- The Appellant can walk 4+ blocks unaided on a flat surface.
- He can climb 5+ steps unaided.
- He is limited to lifting weights of 15 to 35 lbs., and
- He has no limitation in remaining seated.
- There are no difficulties with communication, and
- No significant deficits with cognitive and emotional function.

In the AR, under Ability to Communicate, the physician check marked:

- Good - in all aspects: Speaking, Reading, Writing, and Hearing.

In the AR under Mobility and Physical Ability, the physician indicated that the Appellant is independent in 1 of the 6 areas: Walking Indoors; and he takes significantly longer than typical in the other 5 areas with comments noted as follows:

- Walking outdoors, "needs rest every 2-3 blocks of walking;
- Climbing stairs, "needs rest after 5-6 steps";
- Standing, "needs rest after 30 minutes";
- Lifting, "unable to lift more than 20 lbs.";
- Carrying and holding, "unable to carry or hold more than 20 lbs."

In the AR under Cognitive and Emotional Functioning, the physician indicated "No impact" for any of the 14 listed items.

**Daily Living Activities (DLAs):**

In the PR, the physician indicated that the Appellant's medical conditions impair him because he required repeated hospitalizations since his surgery in 2001.

In the AR, the physician indicated the following under Daily Living Activities:

- The Appellant is independent in all 8 areas of Personal Care;
- He takes significantly longer than typical in both areas of Basic Housekeeping (Laundry and Basic Housekeeping) with the comment "needs assistance from his children";
- He is independent in 3 of 5 areas of Shopping: Reading prices and labels, Making appropriate choices, and Paying for purchases, but takes significantly longer in the other 2 areas: Going to and from stores with the comment "needs frequent stops", and Carrying purchases home, with the comment "unable to carry heavy grocery items." No Additional Comments were provided.
- With regard to Meals, the physician check marked that the Appellant requires Periodic assistance in all 4 areas including Meal planning, Food preparation, Cooking, and Safe storage of food. No explanation/ description are noted;
- With regard to the 3 DLAs: Pay Rent and Bills, Medications, and Transportation, the physician check marked that the Appellant is independent in all areas of these DLAs;
- With regard to Social Functioning, the physician check marked that the Appellant is independent in all 5 areas; and that he has "good functioning" with both his immediate and extended social networks.
- With regard to Additional Comments (including identification of any safety issues), the

physician did not provide any further information.

- The physician indicated the Appellant had not been prescribed any medications/ treatments that interfere with his ability to perform DLAs.

In his self-report the Appellant stated that his disability affects his life and his ability to take care of himself "tremendously" as follows:

- He develops low self-esteem "due to incapacibilities of making a source of living to take care of my own needs and pay my bills."
- His low self-esteem makes him depressed and socialization becomes even more difficult.
- His health condition makes his life miserable, mentally, physically, and emotionally.
- He also reported that he is unable to gain employment due to his frequent need for medical treatment.

### ***Need for Help:***

The physician check marked in the PR that the Appellant does not require any prostheses or aids for his impairment. In the AR, the physician commented that the Appellant "relies on his family to assist him with some of the activities of daily living." Under the DLA, Basic Housekeeping, the physician commented that the Appellant "needs assistance from his children" for both Laundry and Basic Housekeeping. Under the DLA, Meals, the physician check marked that the Appellant needs "Periodic assistance from another person" with Meal planning, Food preparation, Cooking, and Safe storage of food. The physician provided no explanation or description regarding the periodic assistance that is needed. The physician further check marked that the Appellant's family helps him with DLAs. Again, no comments were recorded. Lastly, the physician checked that the Appellant does not have an assistance animal.

### **Oral testimony at the hearing**

The Appellant brought an interpreter to the hearing. The Appellant stated that he is getting old, is diabetic, and has asthma. Since his colon surgery, his small intestine gets occasionally blocked and he has to rush to the hospital most of the time when it happens. He added that no one would hire him for employment.

In response to questions from the panel, the Appellant reported that he lives with 2 of his children and both of them are working, with a meager income. He stated that his intestinal blockage occurred twice last year, once in October and once in November, but he has not been hospitalized for the obstruction since the Fall of 2013. Although he sometimes has symptoms, he has been careful about his diet in order to avoid going to the Emergency.

With regard to his asthma, he reported that he has regular appointments with his doctor, had an appointment last month, and uses asthma medication in order to be able to walk. With regard to his diabetes, he stated that his doctor has referred him to a specialist whom he will see in September, and he takes 4 kinds of medication twice a day. With respect to his DLAs, he stated that he does his laundry inside, and he eats leftovers from previous meals which are prepared by his youngest child. He sometimes prepares noodles for himself, and his youngest child generally prepares the main meal.

The panel finds that the Appellant's testimony at the hearing relates to the current status of his medical conditions, and also included comments regarding 2 of his DLAs. The panel admits the Appellant's statements under section 22(4)(b) of the *Employment and Assistance Act* as testimony in support of the information and records that were before the ministry at the time the decision being appealed was made.

At the hearing, The Ministry relied on and reaffirmed its reconsideration decision and did not present any new evidence.

## PART F – Reasons for Panel Decision

The issue in this appeal is whether the Ministry's reconsideration decision, which found that the Appellant is not eligible for designation as a PWD, was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the Appellant. Based on the information provided in the PWD Designation Application, the Ministry was not satisfied that the following 3 criteria were met: the Appellant has a severe physical or mental impairment; and the impairment, in the opinion of a prescribed professional, directly and significantly restricts the Appellant's ability to perform (DLAs either continuously or periodically for extended periods; and, as a result of these restrictions, the Appellant requires help to perform those activities.

The eligibility criteria for PWD designation are set out in section 2 of the *EAPWDA* as follows:

- (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 the *EAPWDA* section 2(2)(b) are defined in section 2 of the *EAPWDR* as:

### Definitions for Act

- 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.

### **Severe mental or physical impairment**

#### **Appellant's position**

In his Notice of Appeal dated June 20, 2014 the Appellant argued that he "can't work due to my health condition." In his Request for Reconsideration, he stated that "My health situation stops employers to hire me and I cannot find any work" and he would like "a little consideration (that's all I ask) maybe a temporary disability for a certain period of time and if my health gets better, then you can cut off the help." In his self-report, the Appellant's position was that due to frequent hospitalizations for medical treatment, "I cannot keep my job, employer need to hold me off because they think I am sick enough and not capable in keeping a job." At the hearing, he again argued that "no one would hire me for employment"; he has diabetes, asthma, and is old. His children have meager incomes so "I can't really rely on them for daily living."

#### **Ministry's position**

##### ***Severe mental impairment:***

The Ministry's position is that no mental impairment has been identified or diagnosed. The Appellant's physician did not provide any evidence of a severe mental impairment; reported that the Appellant does not have any significant deficits in his cognitive or emotional functioning; and indicated that his impairments have no impact on his cognitive and emotional functioning.

##### ***Severe physical impairment:***

The Ministry's position is that based on the information provided, it has not been established that the Appellant is physically impaired to such a degree that his ability to function independently is severely limited. As a result, a severe physical impairment has not been established. The Ministry argued that the Appellant's impairments are not severe because his physician indicated he can:

- walk 4+ blocks unaided;
- climb 5+ stairs unaided;
- lift 15-35 lbs.; and
- has no limitations in remaining seated.

Moreover, the physician indicated the Appellant does not require any prosthesis or aids for his impairments, and assessed the Appellant as being able to walk indoors independently but takes significantly longer with walking outdoors, climbing stairs, standing, lifting, carrying and holding; he must take rest stops and is unable to lift, carry, or hold more than 20 lbs.

The Ministry further argued that a severe physical impairment is not established because although the Appellant relies on his family to assist him with some DLAs, his physician does not indicate that he requires any equipment or assistive devices to help compensate for his impairments. The Ministry submitted that the level of physical functioning described in the physician's assessments does not

demonstrate the existence of a severe physical impairment, and the physician has not provided enough information to confirm that the Appellant's physical impairments are severe.

Panel's decision:

The diagnosis of a serious medical condition does not in itself determine PWD eligibility or provide evidence of a severe 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 DLAs listed in section 2(1) of the *EAPWDR*. However, section 2(2)(b) of the *EAPWDA* clearly sets out that the fundamental basis for the analysis of restrictions is the evidence from a prescribed professional – in this case, the Appellant's physician. The panel notes that employability is not a criterion for PWD designation in section 2(2) of the *EAPWDA* nor is it listed among the prescribed DLAs in section 2 of the *EAPWDR*.

***Severe mental Impairment:***

The panel notes that the Appellant's physician has neither diagnosed nor identified any mental impairment in either the PR or the AR. In his self-report, the Appellant describes the psychological consequences of his disability including low self-esteem which makes him depressed and makes his socialization harder. However, he attributes his low self-esteem to "incapabilities of making a source of living to take care of my own needs and pay my bills", and not to any mental health condition. As stated above, employability (including earning a source of income) is not a criterion for PWD designation in section 2(2) of the *EAPWDA*. Moreover, the panel cannot find anything in the PWD Designation Application that would allow the Ministry to take the Appellant's reported employment barriers into consideration when determining whether he has a severe mental impairment.

The panel further notes that in the PR, the Appellant's physician check marked "No" in response to the question "Are there any significant deficits with cognitive and emotional function?" Moreover, there is no indication of deficits in other areas under cognitive and emotional function which would suggest a mental impairment (for example, deficits in Memory, Emotional disturbance, or Motivation). This is further evidence against the existence of a severe mental impairment.

Section 2(1)(b) of the *EAPWDR* prescribes 2 DLAs that are specific to mental impairment: make decisions about personal activities, care or finances; and relate to, communicate or interact with others effectively. In the PR, the physician indicated that none of the areas of cognitive or emotional function including Executive, Memory, and Attention or sustained concentration, which one would expect to be impacted if these DLAs were restricted, showed any deficits, and the Appellant has no difficulties with communication,

In the AR, the panel notes that the Appellant's physician indicated "No impact" for all 14 areas of Cognitive and Emotional Functioning; and that the Appellant is reported to be independent in all areas of Pay Rent and Bills and all areas of Social Functioning. Given this, the panel finds that the Ministry reasonably determined that the Appellant does not have a severe mental impairment.



**Severe physical Impairment:**

In the PR, the Appellant's diagnoses are Recurrent small bowel obstruction, and colon cancer that he was previously treated for. When indicating the severity of this condition under Health History, the physician wrote that the Appellant has had the recurrent small bowel obstruction since his surgery in 2001 and had required "repeated hospitalizations" since then. The Appellant indicated in his self-report that he had been hospitalized "almost every 2 months or so"; however, he reported at the hearing he had 2 hospitalizations last year, in the Fall, and none this year to date.

The panel notes that the PR was completed in March 2014, and the self-report is older, dated in November 2013. In the PR, the physician also indicated that the Appellant's condition is usually managed with conservative treatment. Although future surgery may be considered, there is no evidence that the Appellant will need surgery in the foreseeable future.

In the PR, the Appellant's physician reported that the Appellant also has "recurrent exacerbation of his asthma condition" and in the AR, the physician commented that the Appellant gets short of breath and is fatigued easily due to his asthma. In the AR, under Additional Information, the physician wrote that the Appellant has "frequent exacerbations of severe reactive airway disease." The panel notes, however, that the frequency and duration of the asthma attacks are not indicated. The Appellant reported at the hearing that he needs his asthma medication in order to be able to walk. He also has diabetes for which he takes 4 medications, and is being referred to a specialist. The panel notes that the Appellant's physician does not mention diabetes in either the PR or the AR.

With respect to functional limitations, the physician reported in the PR that physical skills such as walking, climbing stairs, and lifting are at or near the maximum level of capacity among the choices provided in the PR form. For example, the Appellant is reported as being able to walk 4+ blocks unaided, and lift 15-35 lbs. Although the physician also reported that the Appellant is unable to lift, carry, or hold more than 20 lbs., the panel notes that this is, logically, a moderate load.

Section 2(1)(a) of the EAPWDR lists the DLAs that are specific to a severe physical impairment including meal preparation, managing finances, shopping, using transportation, performing housework, mobility indoors and outdoors, personal self-care, and management of medications. The evidence in the AR regarding these DLAs suggests a significant level of independence as follows:

*meal preparation:* The physician reported that the Appellant requires periodic assistance only in all areas of Meals. The Appellant reported that while his youngest child does most of the cooking, he can prepare leftovers and noodles for himself.

*managing finances, using transportation, personal care, and management of medications:* The physician check marked independent for all areas.

*shopping:* The physician check marked independent for most areas of shopping, but the Appellant needs frequent stops when going to and from stores, and is unable to carry heavy grocery items. This suggests that he can still get to stores, and carry lighter weight purchases.

*housework:* The physician reported that the Appellant takes significantly longer and needs assistance from his children. However, there is no suggestion that he cannot perform this DLA.

*mobility indoors and outdoors:* The physician indicated that the Appellant is independent with Walking Indoors, and outdoors he needs to take rests every 2-3 blocks. The panel notes that being able to walk this many blocks in and of itself, is considered the second highest level of ability among the choices in the AR form.

In summary, while the medical evidence indicates that the Appellant gets quite short of breath, fatigues easily, and relies on his family to assist him with some of his DLAs, the only restrictions he has for any areas of Mobility and Physical Ability are that he takes significantly longer than typical, and needs rest stops. As noted, he can also lift and carry loads up to 20 lbs. and he does not require any equipment or devices to help compensate for his physical impairment. The panel therefore finds that the ministry reasonably determined that the information provided does not confirm a severe physical impairment.

***Restrictions in the ability to perform DLAs:***

Appellant's position

The Appellant's position is that his health conditions stop employers from hiring him and he cannot find or keep work due to frequent hospital admissions for his small bowel obstruction. His asthma leaves him short of breath and he needs his puffer medication in order to be able to walk.

Ministry's position

The Ministry's position is that based on the information provided by the Appellant and his physician, there is not enough evidence to establish that his impairment directly and significantly restricts his DLAs continuously or periodically for extended periods. The Ministry argued that the Appellant can manage most of his DLAs independently, and that in areas where he is reported to take significantly longer than typical (e.g., laundry and basic housekeeping), or where he requires periodic assistance from his children (e.g., shopping and meals), the physician has not indicated how much longer it takes him to complete these tasks, or how often he requires assistance from his children.

The Ministry further argued that the physician's initial Functional Assessment in which the Appellant was reported as being able to walk 4+ blocks, etc., does not confirm that he is unable to manage these tasks due to functional limitations. The Ministry further noted that with regard to the Appellant's hospital admissions precluding him from working, employability is not a (DLA) component of a PWD designation.

Panel's decision

Section 2(2)(b)(i) of the *EAPWDA* requires that the Ministry be satisfied that a prescribed professional provide an opinion that an applicant's severe impairment directly and significantly restricts her DLAs, continuously or periodically for extended periods. In this case, the Appellant's physician is the prescribed professional. DLAs are defined in section 2(1) of the *EAPWDR* and are also listed in the PR and, with additional details, in the AR. Therefore, a prescribed professional completing these forms has the opportunity to indicate which, if any, DLAs are significantly restricted by the Appellant's impairments either continuously or periodically for extended periods.

In the Appellant's circumstances, the physician reported few or no limitations with the Functional Skills that are listed in the PR, with the higher ranges of functioning or no limitations check marked for all of the items. Although the physician commented that the Appellant has recurrent hospital admissions and recurrent exacerbations of his asthma, there is no evidence that these affect the listed Functional Skills. Furthermore, the Appellant reported that he has not been hospitalized since the Fall of 2013.

In the AR, the physician reported that although the Appellant gets quite short of breath and fatigued due to his asthma, and requires his family to assist him with some of his DLAs, the evidence is that he is able to perform all of his DLAs, mostly independently. While he requires assistance from his children with Basic Housekeeping, there is no information regarding how much assistance he needs or how frequently they assist him. The Appellant reported at the hearing that he does his laundry inside.

While the evidence indicates restrictions in 2 areas of Shopping: "needs frequent stops" in Going to and from stores; and "unable to carry heavy grocery items" under Carrying purchases home, there is no indication that the Appellant is directly and significantly restricted from shopping either continuously or periodically for extended periods. As well, although the physician reported that the Appellant requires periodic assistance in all areas of Meals, there are no comments regarding the type of assistance required. The evidence also indicates that the Appellant can do some meal related activities independently, as he is able to prepare leftovers and noodles when his youngest child isn't doing the cooking.

Further, while the Appellant's submission centred upon his inability to find or keep work, as noted earlier, employability is not a DLA under the EAPWDR. In addition, achieving financial independence from his family can also not be considered in determining eligibility for PWD designation under the legislation, and the panel cannot find any provisions in the *EAPWDA* or EAPWDR that allow the Ministry to provide a "temporary disability for a certain period of time" as requested by the Appellant.

With regard to the information from the Appellant's physician in the PR and AR, the panel finds that the ministry reasonably concluded that the Appellant is independent with performing almost all of his DLAs and there is not enough evidence to establish that his impairments significantly restrict his ability to manage DLAs either continuously or periodically for extended periods as required under section 2(2)(b)(i) of the *EAPWDA*.

### ***Help to perform DLAs:***

#### Appellant's position

The Appellant's position is that his children assist him with his DLAs, by doing most of the cooking, for example.

#### Ministry's position

The Ministry's position is that because it has not been established that DLAs are significantly restricted, it cannot be determined that significant help is required. The Ministry argued that there is no information regarding the type of assistance the Appellant's children provide with Basic housekeeping and Meals. The Ministry also noted that the Appellant does not require any assistive devices or the services of an assistance animal.

#### Panel's decision

Section 2(2)(b)(ii) of the *EAPWDA* requires that, as a result of direct and significant restrictions in the ability to perform DLAs, a person requires help to perform those activities. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of

another person, or the services of an assistance animal in order to perform a DLA. The evidence of the physician, as a prescribed professional, is that the help required with DLAs is provided by the Appellant's family; however, the type of assistance they provide is not described, and though the Appellant stated that his youngest child prepares most of the meals, he is able to prepare leftovers and noodles independently. In the AR, the physician did not indicate a need for Assistive Devices such as crutches, a scooter, or braces, nor did the physician indicate that the Appellant has an Assistance Animal.

On the basis of the above noted evidence, the panel finds that the Ministry reasonably determined that, as direct and significant restrictions in the Appellant's ability to perform DLAs have not been established, it cannot be determined that the Appellant requires help to perform DLAs as a result of those restrictions, as defined by section 2(3)(b) of the *EAPWDA*.

***Conclusion:***

Having reviewed and considered all of the evidence and 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. The panel confirms the reconsideration decision.