

## PART C – Decision under Appeal

The decision being appealed is the Ministry of Social Development and Social Innovation (the “Ministry”) September 24, 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 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 and in the opinion of a medical practitioner his impairment is likely to continue for at least 2 years.

## 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:
  - His self-report dated December 15, 2011.
  - A physician's report first completed on December 15, 2011, reviewed and updated January 14, 2013 by a doctor who indicated he had seen the Appellant between 2-10 times in the past 12 months.
  - An assessor's report completed on April 30, 2014 by a registered clinical counselor who indicated that she has known the Appellant for 2 years and had seen him between 2-10 times in the last year. She wrote that she has been providing long term one on one counseling support to the Appellant for the past 2 years.
2. Appellant's September 15, 2014 request for reconsideration with a written statement summarized below.

At the hearing, the Appellant submitted that he only has severe physical disabilities and no mental impairments. Therefore, he is only appealing the Ministry's decision regarding his severe physical impairments and impacts on his functioning. This is consistent with his positions in his request for reconsideration and in his notice of appeal.

He described his physical disabilities and how they impact his daily functioning. He said that the doctor who completed the physician's report has been his family physician for about 7 years. He also submitted the following additional documents:

- Copies of medical reports for Persons with Persistent Multiple Barriers (PPMB) dated January 2013 and March 2011, completed by the same doctor who completed the physician's report. Most of the doctor's handwriting is illegible; however, the restrictions noted are pain with major joints and difficulty with carrying and lifting.
- February 13, 2013 letter from the Ministry advising the Appellant he qualified as a PPMB
- Copies of prescriptions and a letter from 2012 from the doctor requesting a second step prosthesis and high support footwear (minimum of 20 cm) for the Appellant; his leg length discrepancy is 7 cm. Both footwear are necessary for medical reasons.
- Fact sheets about various medications the Appellant takes, about shoulder trauma and a request for diet supplements.
- Letter dated April 14, 2012 from the same doctor to a specialist regarding the Appellant's left clavicle which appears to be a non union. Shoulder range of motion is normal. The letter also identified past medical history as: left femur shortening from an accident; chronic lower back and pelvis pain; upper thoracic spine deformity ? congenital and trauma.
- Radiology requests from 2012, 2013 for left clavicle non union assessment

In accordance with section 22(4) of the Employment and Assistance Act, the Panel admits the Appellant's testimony and the information in these documents because they are consistent with and therefore in support of the evidence the Ministry had at reconsideration.

At the hearing, the Ministry relied on and reaffirmed its reconsideration decision. In its reconsideration decision, the Ministry wrote that a registered clinical counselor is not a prescribed professional and therefore did not consider any of the information in the assessor's report. The Panel notes that a

registered clinical counselor is not a prescribed professional as defined in section 2(2) of the EAPWDR. However, because that counselor has regularly worked one on one with the Appellant for more than 2 years, the Panel will consider the information in the assessor's report regarding the Appellant's physical impairments and how they impact his functioning. The Panel will not consider the counsellor's report as a prescribed professional's opinion about restrictions to the Appellant's daily living activities or the help that he needs.

The Panel has summarized the evidence relevant only to the criteria being appealed and therefore at issue as follows.

### *Diagnoses*

In the physician's report the doctor, diagnosed the Appellant with chronic back and pelvis pain due to congenital back disorder and trauma, the 3 inch discrepancy in the lengths of the Appellant's legs. The Appellant also experiences chronic ankle pain. There is no diagnosis of any mental health condition.

### *Physical Impairment*

In his self-report, request for reconsideration, notice of appeal and at the hearing, the Appellant described his physical disabilities as follows:

- Has been disabled for many years since an accident and surgeries resulted in one leg being shorter than the other.
- His disabilities affect his life in a number of ways – chronic back and pelvis pain, upper thoracic spine deformity (congenital and trauma); two crushed vertebrae with chronic pain limiting bending; severe tailing in spine healed near center of back with chronic pain.
- Has a metal plate in his left hip and screw in his left ankle; plate is in place by 5 big screws through his bone making it hard to be on his feet for long periods.
- Even sitting puts pressure on his hip – chronic pain.
- Left shoulder trauma – non-union of left clavicle causes more chronic pain plus impairs use of his left arm.
- Has had major carpal tunnel and tendonitis flare ups in both wrists and chronic pain; makes it very hard to hold or lift anything.
- Has very severe back pain all the time even when he wears the back brace he made for himself; even lying down can be painful because of curvature of the spine worsened because of the difference in his leg lengths.
- Has a healed 8 cm cut on the left side of his face from lip to 2 cm below left eye.
- Major nerve damage in back of head from broken bottle.
- Left front bottom rib deformity – soft joint; major discomfort in his chest when breathing.
- Is on three different medications which help him with pain management; helps him function well enough to do daily things such as cooking, cleaning and self care, bathroom stuff; but some days is in so much pain he cannot get off the floor or even out of bed; cannot vacuum or clean on bad days.
- Side effects of the medications are nerve damage, imbalance, nausea, can't operate anything.
- Knees are starting to give out at times; has arthritis in all joints; has lots of pain in his fingertips due to arthritis.
- Could not wear a lift in his shoe until he rebuilt the one he uses today; before 2005 he walked

and worked which caused pinched nerves; there is a 3 inch difference in his leg lengths.

- Feels 40 years older than his current age because of his conditions and chronic pain; trying to ensure that he can feed and clothe himself; he cannot do the physical work that he used to do.
- Does not have a driver's license so he rides his bike to do errands in town because he cannot walk that far; however, a scooter would be better.
- Takes time to do things so plans his day a few days in advance; can move about but only periodically; cannot bend over very much; needs a lot of help.

The counselor provided the following information about the Appellant's physical impairments:

- Difficulty with pain (chronic) due to shoulder and hip injuries; inability to stand or sit for long.
- Takes significantly longer with walking indoors and outdoors (shoe heel lift worn), with climbing stairs, with standing, and with lifting and carrying and holding; needs left leg lift on heel because leg is 7 cm shorter than the other, impacting overall pain throughout hip and spine.
- Takes significantly longer with dressing, with transfers in/out of bed and chair (varies).
- Takes significantly longer with going to/from stores – cannot walk or bike long distances; takes significantly longer carrying purchases home – cannot walk too long; cannot carry too heavy.
- Takes significantly longer getting in/out of vehicles, using public transit and transit schedules – needs to use heel lift due to pain.
- Independently manages all other daily living activities.
- Is in chronic pain and struggles with pain management on a daily basis.
- Can be overwhelmed with pain and pain management impacting his relationships.
- Struggles daily with moving without pain, freely and comfortably; cannot go any length of time without pain medications which are a narcotic, nerve medication and muscle relaxants, making it impossible for him to be employed successfully.
- Has been qualified as a PPMB for past 6 years.

In the physician's report, the doctor provided the following information about the Appellant's impairment:

- Can walk 4+ blocks unaided; climb 5+ stairs unaided; can lift 5-15 lbs. and can remain seated 1-2 hours.

#### *Daily Living Activities*

The physician indicated that the Appellant:

- Has not been prescribed any medication and/or treatment that interfere with his ability to perform daily living activities.
- Is continuously restricted in his ability to manage basic housework and in his mobility outside the home.
- Independently manages personal self care, meal preparation, management of medications, daily shopping, mobility inside the home, use of transportation and management of finances.
- Is periodically restricted in his social functioning – pain makes pleasant social interactions challenging; referred to Appellant's "chronic disability".

#### *Help with Daily Living Activities*

In the physician's report, the doctor reported that the Appellant needs a shoe lift for his impairment. In 2012 the doctor prescribed a second step prosthesis and high support foot wear because both are necessary for medical reasons. The Appellant described how he modified the shoe lift so that it fits.

The Appellant stated that he sees the counselor on a regular basis. That counselor provided the following information about the help the Appellant receives and needs:

- Family and friends help the Appellant; e.g., in/out of vehicles and up/down stairs.
- He receives counseling support to help manage pain, to develop pain coping skills and to strengthen his independence.
- He needs Handy Dart for easier transportation, a pool pass and physical therapy.
- He uses an orthoses – second step orthoses/heel lift to better support his hips and spine.
- Does not have an assistance animal.

## 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 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 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.

Prescribed professionals for the purposes of the EAPWDA are defined in section 2(2) of the EAPWDR as follows: medical practitioner, registered psychologist, registered nurse or registered psychiatric nurse, occupational therapist, physical therapist, social worker, chiropractor or nurse practitioner.

The Panel will consider the reasonableness of the Ministry's decision for each PWD criteria appealed and at issue in this appeal.

### **Severe Physical Impairment**

The Appellant's position is that he is severely disabled from all his physical health conditions. His ability to function physically is significantly restricted from the chronic, daily pain he experiences even

though he takes several medications, uses an orthoses and gets help from family and friends.

In its reconsideration decision, the Ministry wrote that the Appellant's functional skill limitations are more in keeping with a mild degree of physical impairment. Therefore, the Ministry was not satisfied that a severe physical impairment was established.

#### *The Panel's Findings*

The diagnosis of a serious medical condition does not in itself establish a severe impairment. To satisfy the requirements in section 2(2) of the EAPWDA, there must be evidence of how and the extent to which an impairment restricts daily functioning. This includes evidence from the Appellant as well as from a prescribed professional, such as the doctor who completed the reports. The Panel also notes that the ability to work and/or look for work are not criteria for PWD designation in the EAPWDA nor are they listed in the definition of daily living activities in section 2(1) of the EAPWDR.

The Appellant described several physical health conditions which cause daily, chronic pain and limitations in his physical functioning. These include spinal problems, discrepancy in the lengths of his legs, pelvis pain, arthritis, hip pain and shoulder restrictions. The doctor reported that the Appellant experiences joint pain, chronic ankle pain, and chronic back and pelvis pain due to congenital back disorder and trauma and the 3 inch discrepancy in the lengths of the Appellant's legs. The doctor also described the Appellant's conditions as "chronic disability". The counselor described similar conditions and symptoms.

The Appellant, the counselor and the doctor also provided information about how these conditions and symptoms affect the Appellant's daily physical functioning, but they are not quite consistent in those descriptions. The Appellant stated that his medications help with physical functioning; however, he does have bad days when he cannot get off the floor, out of bed or doing anything around the home. He also needs to use his shoe lift and back brace for mobility. The counselor reported that all mobility and physical ability activities take significantly longer, as do other activities such as dressing, transferring in/out of bed and chairs and carrying heavy items. The Appellant is unable to stand or sit for long. She also wrote about the assistive device and the help the Appellant receives, such as regular counseling for pain management.

The doctor did not report similar limitations in the Appellant's physical functioning. Although the doctor noted that the Appellant is continually restricted in managing basic housework and in mobility outside the home, the doctor also reported that the Appellant can walk 4+ blocks unaided, climb 5+ stairs unaided, can lift 5-15 lbs. and can remain seated 1-2 hours – all at the upper ranges of physical functioning. Also, the doctor noted that the Appellant independently manages personal care and referred only to the shoe lift as an aid the Appellant needs. The Panel acknowledges that the Appellant has serious physical medical conditions which restrict his functioning. However, when the whole of the evidence is considered, the Panel finds that the Ministry reasonably determined that there was not enough information to establish that the Appellant has a severe physical impairment as required for PWD designation.

#### **Restrictions to Daily Living Activities**

The Appellant submitted that his severe physical impairment restricts his ability to perform many daily tasks. He needs to use a lift in his shoe and a back brace. The medications he takes impact his

functioning. Also, he sees a counselor regularly for help with coping with the chronic pain. The Ministry considered the information from the Appellant's doctor and determined that the information did not establish that the Appellant's impairment significantly restricts daily living activities either continuously or periodically for extended periods.

#### *The Panel's Findings*

Section 2(2)(b) of the EAPWDA requires a prescribed professional's opinion confirming that the Appellant's severe physical impairment directly and significantly restricts his daily living activities, continuously or periodically for extended periods. Daily living activities are defined in section 2(1) of the EAPWDR and are also listed in the physician's and assessor's reports. As the Panel noted earlier, the only prescribed professional in this case is the doctor who completed the physician's report portion of the PWD application.

The doctor reported that basic housework is continuously restricted. The doctor also reported mobility outside the home as continuously restricted, but yet noted that the Appellant can walk 4+ blocks unaided and climb 5+ stairs unaided. There is no explanation for this inconsistency. The only comment from the doctor in all the reports is a note about the Appellant's chronic disability. All other daily living activities are managed independently according to the doctor, except for periodic restrictions with social functioning attributed to coping with pain. The Panel therefore finds that the Ministry reasonably determined that the information from the doctor did not establish that the Appellant's impairment directly and significantly restricts daily living activities either continuously or periodically for extended periods.

#### **Help with Daily Living Activities**

The Appellant submitted that he needs help with managing daily living activities and with being able to stand and walk. He uses a foot orthoses and back brace. He also relies on family and friends for help and regularly sees a counselor. The Ministry's position is that because the evidence does not establish that daily living activities are significantly restricted, it cannot determine that the Appellant requires significant help 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 direct and significant restrictions in his ability to manage daily living activities, the Appellant requires help with those activities. In this case, the doctor provided that opinion.

The doctor reported that the Appellant uses an assistive device, a shoe lift. The doctor provided no information about the Appellant's regular counseling sessions or the help he receives from family and friends. Therefore, based on the doctor's report, the Panel finds that the Ministry reasonably determined that the Ministry could not determine that the Appellant requires significant help with his daily living activities.

#### **Conclusion**

Having reviewed all of the evidence and the relevant legislation, the Panel finds that the Ministry's reconsideration decision was reasonably supported by the evidence and was a reasonable application of the applicable enactments in the Appellant's circumstances. Therefore the Panel confirms that decision.