

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of November 7, 2014, which found that the appellant did not meet three of five statutory requirements of section 2 of the *Employment and Assistance for Persons With Disabilities Act* (“EAPWDA”) for designation as a person with disabilities (“PWD”). The ministry found that the appellant met the age requirement and that in the opinion of a medical practitioner the appellant’s impairment is likely to continue for at least two years. However, the ministry was not satisfied that:

- the evidence establishes that the appellant has a severe physical or mental impairment;
- the appellant’s daily living activities (“DLA”) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and that
- as a result of those restrictions, the appellant requires the significant help or supervision of another person, an assistive device, or the services of an assistance animal.

## PART D – Relevant Legislation

EAPWDA, section 2

Employment and Assistance for Persons with Disabilities Regulation (“EAPWDR”), section 2

## PART E – Summary of Facts

The appellant did not attend the appeal hearing. Having confirmed that the appellant was notified, the panel proceeded with the hearing in accordance with section 86(b) of the Employment and Assistance Regulation.

The information before the ministry at the time of reconsideration included the following:

- The appellant's PWD application form consisting of the appellant's self-report dated August 18, 2014; a physician's report ("PR") completed by the appellant's general practitioner (the "physician") on July 17, 2014; and an assessor's report ("AR") completed by the appellant's second general practitioner ("second GP") on September 8, 2014.
- The appellant's Request for Reconsideration form with attached two-page handwritten reconsideration submission dated October 27, 2014.
- A consultation report from a consulting specialist dated August 22, 2011.

### Diagnoses

- In the PR the appellant's physician (who has seen the appellant 11 or more times in the past 12 months) diagnosed him with degenerative disc disease, facet joint osteoarthritis, and disc prolapse L5.

### Physical Impairment

- In the PR the physician indicated that the appellant's impairment is a "chronic condition – not for surgery." He also commented that the appellant has recurrent episodes of severe back pain, that he experiences numbness in his right leg, and that he has a limited range of movement with pain.
- In describing the appellant's functional skills, the physician indicated that the appellant can walk 4+ blocks unaided on a flat surface, can climb 5+ stairs unaided, can lift 15 to 35 pounds, and can remain seated for less than one hour.
- The second GP (who has known the appellant for two years and has seen him two to ten times in the past year) indicated in the AR that the appellant independently manages most aspects of mobility and physical ability including standing, but that it takes him significantly longer than typical walking indoors and outdoors, and climbing stairs. She also indicated that the appellant requires periodic assistance with carrying/holding. With respect to lifting, the second physician commented "unable to [illegible]". She also commented "lower back pain + sciatic nerve pain [right] leg + degenerative disc disease in lower spine/lumbar."

In his consultation report of August 22, 2011 the consulting specialist reported that:

- A CT scan of the lumbar spine showed disc bulges at L4-5 and L5-S1, with no evidence of any significant nerve root compromise and no spinal stenosis.
- The chronic back pain is likely secondary to disc degeneration and facet joint osteoarthritis.
- The appellant does not have any neurological deficit, and although there is a small disc prolapse that could conceivably irritate the L5 nerve root, he would not recommend any surgery at this time.
- Consideration should be given to the use of epidural steroids if the appellant gets an exacerbation of back pain, but he would do more for his condition if he were to get in shape

and lose some weight.

In his self-report the appellant wrote that:

- His sciatica is extremely painful and can persist for up to three weeks at a time when the nerve is pinched.
- The consulting specialist recommended no surgery until the nerve damage gets worse.
- At its worst and most painful the appellant has trouble walking, sitting, standing and laying down, making tasks and chores for himself and his children difficult and time consuming.
- Numbness is due to nerve damage and contributes to loss of bowel and bladder control.
- His condition has disrupted both past and current employment, causing a reduction in hours and wages.
- He is currently on a waiting list to see the consulting specialist about an issue with his forearm, and he was recently diagnosed with a blood-clotting issue called Von Willebrand disease.

#### Mental Impairment

- In the PR the physician reported that the appellant has no difficulties with communication. He indicated that the appellant has a significant deficit in cognitive and emotional functioning in the area of emotion, commenting "Domestic problems – custody battle."
- In the AR the second GP confirmed that the appellant's ability to communicate is good in all respects.
- In terms of cognitive and emotional functioning, the second GP reported moderate impacts in two of fourteen categories: bodily functions and motivation. She reported minimal impacts in the areas of emotion and attention/concentration, and no impacts in the remaining ten categories.

#### DLA

- In the PR the physician indicated that the appellant has not been prescribed any medication or treatments that interfere with his ability to perform DLA.
- The physician reported that the appellant is unrestricted in his performance of the DLA of *meal preparation, management of medications, daily shopping, management of finances, and social functioning*. He also reported that the appellant is unrestricted with the indoors portion of the DLA *mobility indoors and outdoors*.
- The physician indicated that the appellant requires periodic assistance with the DLA *personal self-care, basic housework, use of transportation*, and the outside aspects of *mobility indoors and outdoors*. He explained his use of the term "periodic" as meaning "intermittent, severe exacerbations of pain."
- The second GP reported the appellant independently manages all aspects of the DLA of *personal self-care* (though requiring periodic assistance from another person), *meal preparation, manage personal finances, manage personal medications, and social functioning*.
- The second GP reported that the appellant requires periodic assistance with the DLA *daily shopping*, and that he requires continuous assistance with the DLA *basic housekeeping and use of transportation* (using an assistive device for getting in and out of a vehicle.)

In his reconsideration submission the appellant wrote that:

- To perform functional skills he has to fight through the pain or face the consequences of inaction.

- Tasks such as eating, showering, getting dressed, going to doctor or work, laundry, cooking, and doing dishes take twice as long as typical.
- Showering and dressing can take up to an hour and a half, and he mostly eats microwaveable foods.
- He has to keep working as he needs rent to avoid eviction. He has been subject to discipline at work because his condition impairs his performance on the job.
- He walks for an hour to get to work to save taxi fare (there are no buses at night), a distance which would take a normal person a half hour.
- The best pain killer his physician has prescribed is a heavy sedative which he can't use when he's got his children and affects his performance at work.
- He avoids sitting as it makes his back lock up. His back pain makes bowel control difficult and painful.
- He has lost about 100 pounds since seeing the consulting specialist, but his back has not improved.
- His back can go out from tasks as small as picking up an item of clothing or as big as buying groceries.

#### Help

- In the PR the physician reported that the appellant does not require any prostheses or aids for his impairment, and that he gets assistance with DLA from family and friends.
- In the AR the second GP reported that the appellant routinely uses a cane, he does not have an assistance animal, and assistance is provided to the appellant by his family.

Neither party provided any additional information on appeal.

## PART F – Reasons for Panel Decision

The issue on this appeal is whether the ministry's decision to deny the appellant 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. In particular, was the ministry reasonable in determining that the appellant does not have a severe physical or mental impairment, and that in the opinion of a prescribed professional the appellant's impairments do not directly and significantly restrict him from performing DLA either continuously or periodically for extended periods, and that as a result of those restrictions the appellant does not require help to perform DLA.

The relevant legislation is as follows:

### EAPWDA:

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.

**EAPWDR section 2(1):**

- 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.
- (2) For the purposes of the Act, "**prescribed professional**" means a person who is
- (a) authorized under an enactment to practise the profession of
    - (i) medical practitioner,
    - (ii) registered psychologist,
    - (iii) registered nurse or registered psychiatric nurse,
    - (iv) occupational therapist,
    - (v) physical therapist,
    - (vi) social worker,
    - (vii) chiropractor, or
    - (viii) nurse practitioner, or
  - (b) acting in the course of the person's employment as a school psychologist by
    - (i) an authority, as that term is defined in section 1 (1) of the *Independent School Act*, or
    - (ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the *School Act*,
- if qualifications in psychology are a condition of such employment.

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**Severe Physical Impairment**

The appellant's position is that his back pain and associated difficulties such as numbness, when coupled with anxiety and depression, constitute a severe physical impairment. He argued in his reconsideration submission that his original application form had been misplaced, so when the medical practitioners filled them out for the second time they were in a hurry and weren't as detailed as they were the first time. He also argued that though he has taken steps to lose weight and get in

shape, his back has not improved as it is a degenerative condition which can go out at any time with minimal exertion.

The ministry's position, as set out in its reconsideration decision, is that the evidence falls short of demonstrating a severe physical impairment. The ministry argued that the appellant is independently able to do most aspects of mobility and physical abilities with periodic help to carry/hold. It also argued the back pain is periodic with no information on frequency or duration of severe impairment.

### Panel Decision

A diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment. An "impairment" is a medical condition that results in restrictions to a person's ability to function independently or effectively.

To assess the severity of an impairment one must consider the nature of the impairment and the extent of its impact on daily functioning as evidenced by functional skill limitations and the degree to which performing DLA is restricted. A medical barrier to the appellant's ability to engage in paid employment is not a legislated criterion for severity. The legislation makes it clear that the determination of severity is at the discretion of the minister, taking into account all of the evidence. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a prescribed professional – in this case, the appellant's physician and second GP.

In terms of physical functional skills, the physician's observations put the appellant's abilities at the mid- to high end of the scale except for the ability to remain seated. This is consistent with the observations of the second GP and the appellant who indicated that the appellant independently manages his mobility, though it takes him longer than typical to walk outdoors. The appellant indicated that he walks up to an hour to and from work. There appears to be some inconsistency in the evidence of the physician and the second GP with respect to the appellant's lifting capacity, but the appellant provided no evidence to contradict the physician on this point.

The panel notes that section 2(2) of the EAPWDA requires a severe physical impairment to be diagnosed by a medical practitioner. There is no evidence from a medical practitioner with respect to the appellant's Von Willebrand disease or any restrictions it may impose on the appellant's functioning.

As discussed in more detail in the subsequent section of this decision under the heading Significant Restrictions to DLA, any limitations resulting from the appellant's impairments do not appear to have translated into significant restrictions in his ability to manage his DLA independently.

For the foregoing reasons, the panel has concluded that while the pain experienced by the appellant is a serious matter, the ministry reasonably determined that the evidence falls short of establishing that he has a severe physical impairment as contemplated by the legislation.

### **Severe Mental Impairment**

The appellant advanced no argument with respect to a mental impairment. He did point out, however, that he is experiencing depression and anxiety which diminishes his motivation to work and

perform DLA.

The ministry's position is that the evidence does not establish a severe mental impairment. The ministry argued that the medical practitioners provided no diagnosis of a mental impairment, and that the second GP identified only moderate impacts to two of fourteen categories of cognitive and emotional functioning.

### Panel Decision

The evidence from the health professionals provides no diagnosis of a mental impairment, though the physician and second GP each indicated that there are some impacts to cognitive and emotional function. The second GP described moderate impacts to two of fourteen aspects of cognitive and emotional functioning. Section 2(2) of the EAPWDA requires a severe impairment to be diagnosed by a medical practitioner. The lack of a diagnosis, along with the comments of the physician – linking the deficits in the appellant's emotional function to his domestic situation – tend to indicate that the appellant's depression and/or anxiety are situational rather than being the result of a mental disorder.

Section 2(1)(b) of the EAPWDR prescribes two DLA that are specific to mental impairment – make decisions about personal activities, care or finances (*decision making*), and relate to, communicate or interact with others effectively (*social functioning*).

The second GP's evidence indicates that the appellant is not significantly restricted with respect to *decision making* in that he independently manages the decision making aspects of *meal preparation* (meal planning), *manage personal medication* (filling/refilling/taking as directed), *social functioning* (making appropriate social decisions) and *manage personal finances* (budgeting). The second GP indicated that the appellant requires periodic assistance with making appropriate choices when shopping, but she has provided no explanation of why this is so and there is no evidence of what sort of assistance, if any, the appellant receives with this task.

The evidence of the physician and the second GP when read together indicates that the appellant independently manages all aspects of *social functioning*.

Considering that:

- there is no diagnosis from a medical professional as to a mental impairment,
- the appellant's ability to communicate is good in all respects,
- the appellant is not significantly restricted in terms of *decision making* and *social functioning*,  
and
- the evidence indicates limited impacts to cognitive and emotional functioning,

the panel concludes that the ministry reasonably determined that it does not demonstrate a severe mental impairment.

### Significant Restrictions to DLA

The appellant's position is that his back and leg pain, coupled with his depression and anxiety, significantly restrict his ability to perform his paid employment and his DLA. He argued that his back can "go out" at any time, and that the resulting pain can be exacerbated for up to three weeks after



one of these occurrences.

The ministry's position is that the evidence is not sufficient to demonstrate that the appellant's impairment significantly restricts his ability to perform DLA either continuously or periodically for extended periods. The ministry argued that the evidence of the medical practitioners shows that the appellant independently manages the majority of his DLA, and that there is no indication of the frequency or duration of the periodic assistance required by the appellant with other DLA. The ministry also argued that as the physician indicated the appellant can walk 4+ blocks and lift 15 to 35 pounds, the periodic assistance he requires for these activities must be for longer distances and heavier weights.

### Panel Decision

The legislation – s. 2(2)(b)(i) of the EAPWDA – requires the minister to substantially assess direct and significant restrictions of DLA in consideration of the opinion of a prescribed professional, in this case the appellant's physician and second GP. This doesn't mean that other evidence shouldn't be factored in as required to provide clarification of the professional evidence, but the legislative language makes it clear that the prescribed professional's opinion is fundamental to the ministry's determination as to whether it is "satisfied".

The legislation requires that a severe impairment directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods. The term "directly" means that there must be a causal link between the severe impairment and the restriction. The direct restriction must also be significant. Finally, there is a component related to time or duration. The direct and significant restriction may be either continuous or periodic. If it is periodic it must be for an extended time. Inherently, any analysis of periodicity must also include consideration of the frequency. All other things being equal, a restriction that only arises once a year is less likely to be significant than one which occurs several times a week. Accordingly, in circumstances where the evidence indicates that a restriction arises periodically, it is appropriate for the ministry to require evidence of the duration and frequency of the restriction in order to be "satisfied" that this legislative criterion is met.

The panel understands the appellant's frustration with what he perceives to be inadequate evidence from his physician and second GP which he feels does not accurately portray the extent of his restrictions. However, the panel is required to place significant weight on the professional evidence. In this case, the evidence of the physician and second GP is consistent that the appellant independently manages all aspects of five of the ten prescribed DLA: *meal preparation, management of medications, management of finances, decision making, and social functioning*. He also independently manages most aspects of *mobility indoors and outdoors*.

Considering the evidence as a whole, it indicates that the appellant is subject to episodic periods of severe pain when his back "goes out". The appellant indicated that it can go out at any time, and that the pain is exacerbated for up to three weeks after such an incident. There is, however, no evidence from the medical practitioners or the appellant as to how often the appellant experiences these episodes of exacerbated pain. There is also no evidence as to the type or frequency of assistance the appellant receives with DLA.

There are references in the evidence to the impact the appellant's medical conditions have on his ability to work at paid employment. The panel notes that employability is not a statutory criterion regarding PWD designation – the focus of the legislation is on the ability to perform DLA. In the panel's view, paid employment generally requires a higher level of functionality than DLA.

Based on the foregoing analysis, the panel concludes that the ministry reasonably determined that the evidence is insufficient to show on the balance of probabilities that the appellant's ability to perform his DLA is significantly restricted either continuously or periodically for extended periods.

### **Help with DLA**

The appellant advanced no argument with respect to requiring assistance with DLA.

The ministry's position is that since it has not been established that the appellant's DLA are significantly restricted, it cannot be determined that significant help is required from other persons. The ministry argued that no assistive devices are required.

### **Panel Decision**

A finding that a severe impairment directly and significantly restricts a person's ability to manage his DLA either continuously or periodically for an extended period is a precondition to a person requiring "help" as defined by section 2(3)(b) of the EAPWDA. For the reasons provided above, that precondition has not been satisfied on the balance of probabilities in this case.

Accordingly, the panel finds that the ministry reasonably concluded it could not be determined that the appellant requires help with DLA as defined by section 2(3)(b) of the EAPWDA.

### **Conclusion**

The panel acknowledges that the appellant's medical condition affects his ability to function. However, having reviewed and considered all of the evidence and the relevant legislation, the panel finds that the ministry's decision finding the appellant ineligible for PWD designation is a reasonable application of the legislation in the circumstances of the appellant. The panel therefore confirms the ministry's decision.