

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of October 28, 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

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

1. The appellant's PWD Application dated June 22, 2014 consisting of:
 - the appellant's self-report ("SR") completed by the appellant who described his disability as follows: *"Since May 2013 I started having trouble walking all of a sudden. I then started having lots of pain through my neck, hands, and legs. I turned out to have spots on my brain and 3 bulging discs found through MRI. On Jan. 27th 2014 I had a C4 to C7 Laminoplasty and had some improvement with balance and pain. They do not know if I have M.S. for sure but that is also a possibility. I still have trouble walking, stiffness in legs, pain in legs, numbness in hands, pain in neck, and balance problems at times. I have had improvement and will still further improve but I am nowhere near normal or as I was a year ago. What I have is said to be rare. Now I can't stand for very long or walk well enough to carry anything of significant weight. I have a very tuff (sic) time sleeping because of pain and muscle spasms. I also have limited mobility in my neck and a lot of work to do on it."*
 - a doctor's report ("PR") completed by the appellant's general practitioner and dated June 24, 2014 which does not indicate how long he has known the appellant but does indicate that he has seen the appellant 11 or more times in the past 12 months.
 - an assessor's report ("AR") completed by the appellant's general practitioner and dated June 24, 2014 which indicates that he has known the appellant for 18 months and confirms that he has seen the appellant 11 or more times in the past 12 months.
2. The appellant's Request for Reconsideration, dated October 1, 2014 which states the following reason for requesting reconsideration: *"The doctor that filled out my PWD application is a walk in doctor that I see regulary (sic) There are no doctors in (name of city) that are taking on patients. As a walk in doctor he did not have the time to sit with me and fill it out. He had to take it and do it on his own time with the information he had. My condition has deteriorated since filling out the application and it was always severe. I could never walk up or down stairs without holding on to something. Sometimes I have to use two hands. I can not walk or stand longer than a minute or two and I can't walk normally, properly, or carry and walk with more than 10 pounds".*

Attached to the Request for Reconsideration was a note from the appellant's doctor dated October 7, 2014, and an undated letter from a friend of the appellant describing the appellant's condition and describing the various forms of assistance that she provides for him. The doctor's note states: *"This is to inform you that (the appellant's) condition has deteriorated from previously described and he has difficulty ambulating at all, cannot climb one flight of stairs without severe problems and needs help with all his household activities".* The undated letter from the appellant's friend stated: *"I am writing on behalf of (the appellant), I have seen him three times a week or more for the past six months. (The appellant) is unable to do many tasks without help; I drive him to the doctors and to the grocery store. When we do go to the store he requires help bringing the bags to and from the car as he cannot lift or carry much weight because of his strength and balance, I help him with some tasks around the house like dishes since he has trouble standing for long periods of time. On occasion I have taken him to my place so he can do his laundry, another task he is unable to do himself. While we are at my place he finds himself in pain as I do not have chairs that are not (sic) very back supportive. I drive him everywhere since he cannot walk far or for long period of time, even down the road to the bus stop is challenging for him. When I do see him walking around his house a bit, it is very obvious that his walk is not normal. When I do see him he is constantly complaining if*

(sic) pains in his legs, back and neck.

Since knowing (the appellant) he hardly leaves the house besides to run basic errands. The few times we have gone out it does not last long because his pain becomes so severe. I have seen him at different times of the day, and morning are challenging for him as his neurological problems. I honestly have seen firsthand how difficult of a time (the appellant) has been having over the past few months with simple tasks and the severe pain he is constantly in. Please do not hesitate to call if you require any additional information".

3. The appellant's Notice of Appeal was dated November 3, 2014. He lists his reasons for appealing as follows: "*I have gotten much worse since back then. I can Not perform my daily living activities. I can't walk normal. (The appellant's doctor) is wondering what the problem is here. I can't stand for longer than a minute or two. Look further into this please! I am in excruciating pain All day Every day!*
** I can't sit no longer than a minute or two.*
** I can't lift any weight and walk with it.*
** I need help with everything and I can't walk like a normal person.*
** I don't leave my house and I sit in a chair all day.*
** I am in excruciating pain all day everyday.*
Call my doctor and ask him. I can't believe I'm getting this answer when I'm this disabled. Call him and ask questions please.
4. Prior to the hearing the appellant submitted a letter from his doctor dated November 9, 2014 which states: "*At this point (the appellant) needs assistance with all his activities of daily living due to deterioration in his condition and he is unable to complete any normal tasks . . . takes an inordinate amount of time. He is at present unable to walk a single block due to pain and stiffness. Please contact me if you have any issues."*

The panel reviewed the medical evidence as follows:

Diagnoses

- In the PR the doctor diagnosed the appellant with "*Cervical spinal cord compression*" with onset of March 2013.

Severity of Impairment:

Physical Impairment

- The doctor commented in the Health History portion of the PR that "*(the appellant) has persistent severe pain in his neck and legs, as well as leg cramps and spasms. He has difficulty walking and has difficulty carrying anything of weight. His symptoms limit the distance he can walk to a few blocks at a time."*
- The doctor reported that the appellant's impairment is likely to continue for two years or more and states; "*It is difficult to estimate how long he will be disabled. He has improved moderately since his neurosurgery but remains far from normal at this time. He could be impaired for a few years or indefinitely."*
- In regard to Functional Skills the doctor reports that the appellant can walk 2-4 blocks unaided on a flat surface, climb 5+ steps unaided, lift under 2 kg. and remain seated for 1 to 2 hours.
- In regard to "Additional Comments", the doctor states: "*At this time it is unclear whether (the appellant) has been suffering solely from cervical disc protrusion, given that he had some features of Multiple Sclerosis on his MRI. He has improved significantly since his Laminectomy (C4 and C7) and*

C5 and C6 Laminoplasty, but continues to have significant impairments. I suspect that he will eventually have complete recovery, but this appears will be a few years away."

- In the AR the doctor reports that the appellant has "*difficulty ambulating, impaired sensation in arms, weakness in arms and hands, stiffness and pain in neck.*" He reports that the appellant is independent in walking indoors, walking outdoors, and standing. The appellant needs periodic assistance with climbing stairs ("*with more than 1-2 flights of stairs*"). He also needs periodic assistance and takes significantly longer than typical when lifting, and carrying and holding ("*unable to lift more than light objects and has to do so slowly*"). The doctor comments "*Can only walk and stand for short periods due to pain and weakness*".
- the doctor's note of Oct 7, 2014 reports that the appellant's condition has deteriorated and he needs help with all his household activities. He has difficulty ambulating and cannot climb one flight of stairs without severe problems.
- the doctor's letter of November 9, 2014 reports that the appellant needs assistance with all his activities of daily living due to deterioration in his condition. He is at present unable to walk a single block due to pain and stiffness.

Mental impairment

- In the PR The doctor indicates that the appellant has no difficulties with communication and confirmed that there are no significant deficits with cognitive and emotional function. He assesses as "good" the appellant's ability in speaking, reading, writing, and hearing. The doctor has written "*N/A*" in response to "an identified mental impairment or brain injury". Similarly, he has stroked through the section concerning Social Functioning (which is only to be completed if the appellant has an identified mental impairment, including brain injury) and written "*N/A*". In addition, the sections inviting a description of how any mental impairment might impact the appellant's relationships with his immediate social network and extended social networks are also stroked through.

Restrictions in performing DLA

- In the PR the doctor indicates that the appellant has not been prescribed any medication and/or treatments that interfere with his ability to perform daily living activities.
- In the AR the doctor has noted that the appellant is "independent" in regard to dressing, grooming, bathing, toileting, feeding self, regulating diet, transfers in/out off bed, transfers in/out of chair, laundry and basic housekeeping. He indicates that the appellant requires periodic assistance going to and from stores ("*needs help/transport at times*") and carrying purchases ("*needs help with heavier objects/purchases*"). The doctor assesses the appellant as "independent" for meal planning, food preparation, cooking, safe storage of food (ability, not environmental circumstances), banking, budgeting, pay rent and bills, filling/refilling prescriptions, taking (medications) as directed, safe handing and storage (of medications), getting in and out of a vehicle, using public transit, and using transit schedules and arranging transportation.
- the doctor's note of October 7, 2014 reports that the appellant needs help with all his household activities, and his letter of November 9, 2014 report that the appellant needs assistance with all his activities of daily living and is unable to complete any normal tasks without taking an inordinate amount of time.

Help requires/provided

- In the PR the doctor indicates that the appellant does not require any prostheses or aids for his impairment.
- In the AR the doctor states "*Assistance may only be needed for heavier/larger purchases*". As noted

previously, the doctor indicated that the appellant needs periodic assistance with going to and from stores, and carrying purchases home. The doctor notes that the appellant relies on family and friends to provide assistance when needed and comments that when help is required but none is available, necessary assistance would be "*Possibly for shopping when purchasing heavier objects*". The doctor does not identify any assistive devices as being routinely used by the appellant to compensate for his impairment, and indicates that the appellant does not have an assistance animal.

- the doctor's note of October 7, 2014 and his letter of November 9, 2014 report that the appellant needs assistance to perform his activities of daily living.

At the hearing the appellant stated that he was anxious to get the hearing over with as quickly as possible because of the extreme pain he was experiencing. The pain is worst in the morning when he feels a burning sensation. He has a rare condition in which his spinal cord is "pinched". He has spasticity in his legs that causes his legs to shake uncontrollably – especially when he is cold. He has had surgery but doesn't feel that he is much better as a result. Life is horrible for him at present – he would rather be working and have a life than be on a disability income but he is unable to do so. A friend drove him to the hearing but he has very few friends in (name of city) since he is not from here. Finally, he stated that he is on painkillers to lessen his pain.

The ministry representative asked if he understood the reasons why his application for the PWD designation had been rejected. The appellant responded that the doctor had "... filled the form out wrong".

The ministry representative explained that the decision to reject the appellant's PWD application was based on the doctor's comments in the PR and the AR. She stated that if the appellant disagrees with the doctor's assessment then a new application must be completed. The ministry found that the doctor assessed a very limited impact upon the appellant's ability to perform activities of daily living and consequently the adjudicator had no choice but to deny the application. The ministry had no objection to the letter dated November 9, 2014 from the appellant's doctor being admitted as evidence. The ministry noted that the doctor's note of October 7, 2014 and his letter of November 9, 2014 are at variance with the information in the PR and the AR but they do not provide sufficient detail to replace the PR and the AR.

The appellant invited his friend who had driven him to the hearing to describe his situation. The friend explained that she helps the appellant do grocery shopping and he can only carry very light bags – she carries the rest. She noted that she had filled a water jug for the appellant at his home but he was unable to handle it because he found it to be too heavy. She stated that the appellant has trouble standing so she often cooks for him and she does laundry for him. Occasionally he can do the dishes. In the mornings the appellant is especially "wobbly" and when shopping she has found that he is unable to be in the store for very long before he has to leave.

In response to a question from the panel the appellant explained that he thinks the doctor underestimated the severity of his condition when completing the PR and the AR. In addition, the appellant stated that his condition has gotten worse since the doctor completed those forms. The appellant explained that he has tried to exercise to improve his condition but that has only made things worse. He stated that he has been on medications for the past 1.5 years. The panel noted that in the PR the doctor stated that the appellant has not been prescribed any medications that interfere with his ability to perform activities of daily living and asked the appellant what medication(s) he was

presently taking. The appellant explained that he took hydromorphone and his friend confirmed that she has seen him taking this medication prior to June 2014 when the doctor completed the PR.

The panel admitted the oral testimony and the letter from the appellant's doctor dated November 9, 2014 as being in support of the information before the ministry at reconsideration, in accordance with section 22(4) of the Employment Assistance Act (EAA) as it provides more up to date information on the appellant's medical condition.

PART F – Reasons for Panel Decision

The issue in 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.

Severe Physical Impairment:

The appellant's position is that he is in excruciating pain all day everyday and this constitutes a severe physical impairment. He stated that he has been on painkillers for 18 months.

The ministry's position is that the doctor's evidence with respect to the appellant's physical functional skills is not sufficient to demonstrate a severe physical impairment.

Panel Decision

In the PR the appellant's doctor states that the appellant has been diagnosed with cervical spinal cord compression and states that the appellant has severe pain in his neck and legs, as well as leg cramps and spasms. He indicates that the appellant can walk 2-4 blocks unaided on a flat surface, climb 5+ stairs unaided, lift under 5 pounds, and remain seated for 1-2 hours. The doctor's note of October 7, 2014 states that the appellant's condition has deteriorated (from previously described) and he has difficulty ambulating and cannot climb one flight of stairs without severe problems. In his letter of November 9, 2014 the appellant's doctor repeats that there has been deterioration in the appellant's condition and is presently unable to walk a single block. At the hearing the appellant claimed that the doctor had underestimated the severity of the appellant's condition but also that his condition had deteriorated since the PR was completed.

The panel notes that the doctor reported having seen the appellant 11 or more times in the past year. In addition, the doctor reported in the AR that he used information from a consulting neurologist, a consulting neurosurgeon and a physiotherapist in completing the AR and PR. Accordingly, the panel considers that the frequency of the appellant's visits with the doctor over the past year, and the doctor's review of information sources from other medical professionals who have examined the appellant do make it unlikely that the doctor underestimated the severity of the appellant's condition at the time he completed the PR and AR. But the panel also notes that the doctor referred to the appellant's condition having deteriorated in both the note of October 7, 2014 and the letter of November 9, 2014. This information together with the appellant's testimony persuades the panel that the appellant's physical condition has deteriorated since the PR and the AR were completed.

But are these two brief reports from the appellant's doctor sufficient evidence that the appellant has a severe physical impairment? The note of October 7, 2014 does not specify how much his condition has deteriorated although it does state that the appellant now has difficulty ambulating at all, and cannot climb one flight of stairs without severe problems. These comments do not specify how far the appellant can now walk unaided, nor what type of severe problems are experienced when the appellant climbs stairs. It does not specify whether the appellant can climb more than one flight of stairs. It is silent on the question of how long the appellant can remain seated. In short, it does not provide sufficient information to replace the more detailed assessment contained in the PR. Similarly, the letter of November 9, 2014 is a very brief statement. It does specify that the appellant is unable to walk a single block due to pain and stiffness. It states that the appellant's condition has deteriorated but provides no detail on how much, and in what ways the appellant's condition has deteriorated. It states that the appellant takes an inordinate amount of time to complete any normal tasks and requires assistance with all his activities of daily living. In short, these two reports from the appellant's doctor encourage the panel to believe that there has been a deterioration in the appellant's condition since the earlier assessment in the PR and the AR. Nonetheless, in the panel's view they fail to provide sufficient information to establish a clear picture of the appellant's physical functioning and therefore the panel finds the ministry reasonably determined that the appellant had not established a severe physical impairment.

Severe Mental Impairment:

The appellant advanced no argument with respect to a severe mental impairment.

The ministry's position, as set out in its reconsideration decision, is simply that there is not enough evidence to establish a severe mental impairment.

Panel Decision

The panel notes that in the PR the appellant's doctor indicated that the appellant had no difficulties with communication and had no significant deficits with cognitive and emotional function. In the PR the appellant's doctor wrote "N/A" at the top of the page 12 which is to be completed for an applicant with an identified mental impairment or brain injury, and similarly has written "N/A" at the top of page 21 of the AR which once again is only to be completed for an applicant with an identified mental impairment or brain injury. Accordingly, the panel concludes that the ministry reasonably determined that there is no evidence to substantiate that the appellant has a severe mental impairment.

Significant Restrictions to DLA:

The appellant's position is that his DLA are significantly restricted. He stated that he is limited by pain and that he relies on his friend to perform many of his DLA.

The ministry's position is that the appellant's doctor has not provided enough evidence to confirm that the appellant's impairment significantly restricts his ability to perform his daily living activities continuously or periodically for extended periods. The ministry notes the doctor's note of Oct 7, 2014 which accompanied the appellant's Request for Reconsideration but the ministry concluded that the note does not indicate what type of assistance, either periodic or continuous that the appellant requires.

Panel Decision

The panel notes that in the AR the doctor reported that the appellant was "Independent" in performing all DLA except going to and from stores (periodic assistance required), and carrying purchases home (periodic assistance required). He commented that "Assistance may only be needed for heavier/large purchases. The panel considers this assessment to reflect a modest level of restriction on the appellant's DLA. The doctor's note of October 7, 2014 states that the appellant needs help with all his household activities. Similarly, the doctor's letter of November 9, 2014 states that the appellant needs assistance with all his activities of daily living. These later reports appear to reflect a much different picture than that reported in the AR. Once again, this suggests that there has been deterioration in the appellant's condition since the PR and the AR were completed. But the panel finds that the ministry reasonably concluded that these brief comments do not indicate what type of assistance is required by the appellant and are therefore not sufficient to conclude that the appellant has significant restrictions to his DLA. Accordingly, the panel concludes that the ministry reasonably determined that the appellant's ability to manage his DLA independently is not significantly restricted either continuously or periodically for extended periods.

Help with DLA:

The appellant's position is that he relies on help from his friend to perform his 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.

Panel Decision:

On the evidence of the prescribed professional and the explanations given by the appellant and his witness, the panel cannot conclude that the help provided to the appellant constitutes "the significant help or supervision of another person" that is required by s. 2(3)(b)(ii) of the EAPWDA.

There is no evidence to indicate that the appellant requires an assistive device, or that he has an assistance animal.

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

Conclusion:

The panel acknowledges that the appellant's medical conditions have some impact on his ability to function and that the appellant's condition has deteriorated since the doctor completed the PR and the AR. However, having reviewed and considered all of the evidence and the relevant legislation, the panel concludes that the ministry's decision finding the appellant ineligible for PWD designation is reasonably supported by the evidence and confirms the ministry's decision.