

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated October 9, 2014 which found that the appellant did not meet three of the five statutory requirements of Section 2 of the *Employment and Assistance for Persons with Disabilities Act* for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that his 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,
- as a result of these restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

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 Persons With Disabilities (PWD) Application comprised of the applicant information and self-report dated May 8, 2014, a physician report (PR) and an assessor report (AR) both dated May 9, 2014, and completed by a general practitioner who has known the appellant for 7 months. The general practitioner noted that there have been 7 consultations in the past 7 months due to low back pain. The approaches and information sources used to complete the AR consisted of an office interview with the appellant, a phone interview, file/chart information from previous visits and information from the appellant's sister.

The evidence also included the appellant's Request for Reconsideration dated September 29, 2014 with attached written explanation by the appellant to queries as outlined in the denial letter.

Diagnoses

In the PR, the general practitioner diagnosed the appellant with degenerative disc disease and low back pain, facet joint arthritis and spondylosis. No dates of onset were provided. The general practitioner did not diagnose a mental health condition.

Physical Impairment

In the PR, the general practitioner reported that:

- In terms of health history, the appellant has had low back pain since the early 1980's. The appellant reported that ten years prior to consult, the back pain had gradually increased in severity to 6/10, sharp and radiating to the right buttocks area. He tried massage therapy which gave him relief for 2 weeks and the pain eventually returned. The pain increased to 10/10, sharp, continuous, radiating to the right knee. This was characterized as pins and needles and electricity down his right leg to the knee area. A plain film x-ray was done in May 2012 showing multi-level degenerative disc disease with spondylosis L2-L3. There is also facet joint arthritis throughout the lumbar spine.
- The appellant does not require any prosthesis or aid for his impairment.
- In terms of functional skills, the appellant can walk less than 1 block unaided on a flat surface, he can climb 2 to 5 steps, lift under 2 kg (under 5 lbs.) and remain seated less than 1 hour.

In the AR the general practitioner indicated that:

- The appellant is assessed as being independent with walking indoors and outdoors, and standing. He requires periodic assistance from another person with climbing stairs and lifting. He requires continuous assistance from another person with carrying and holding, with a comment added: "The patient can walk less than 1 block and can tolerate a few steps. He can lift light objects but not in a prolonged time span."
- For assistive devices, the general practitioner indicated a walker, with the comment: "uses shopping cart as a walker when shopping."
- The appellant was referred due to chronic low back pain. He has had 1 hydrocortisone injection to the L5-S1 facet and right sacroiliac area. He has also had 3 sessions of prolotherapy injections to L4-S1.

In his self-report, the appellant indicated that:

- His lower back and right leg tingles hip to knee. His stomach gets upset when he is in pain. When he walks, he gets pain in his hips which goes into his back and lots of muscle spasms in

his leg, arm and chest. He is in pain from the time he wakes up until he goes to bed. The pain is "24/7."

- It usually takes about an hour before the pain killers start to work and he feels able to move about and get started with the day.
- Standing in one place causes extreme pain in his lower back.
- He can only walk about 1 block and back before it causes extreme back pain.
- He takes pain medication regularly to try to control the pain and he has not found anything that takes the pain down to 3/10. He has found very little relief. He takes a narcotic medication daily that helps bring the pain down to 8/10.

In his Request for Reconsideration, the appellant wrote:

- For climbing stairs, periodic assistance only helps with balance. Extreme pain from lifting his legs to go up stairs makes him have to stop frequently and he can usually manage 5 stairs before he needs to stop and rest so the pain subsides. He has had to turn and go back down and try again another day.
- He can lift 20 lbs. for a very brief time- a few seconds to move an item only.

Mental Impairment

In the PR, the general practitioner reported:

- The appellant has no difficulty with communication.
- The appellant has significant deficits with cognitive and emotional function in the areas of motivation and motor activity, with a comment added: "the patient has lost interest in doing daily activities due to pain. He cannot do things he used to do and enjoy."

In the AR, the general practitioner indicated that:

- The appellant has a good ability to communicate in all areas.
- The section of the AR assessing impact to cognitive and emotional functioning for those with an identified mental impairment or brain injury is marked "N/A", or not applicable.
- With respect to social functioning, the appellant is assessed as being independent in all areas, namely: with making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others, dealing appropriately with unexpected demands, and securing assistance from others.
- The appellant has good functioning in both his immediate and extended social networks.
- Asked to describe the support/supervision that would help to maintain the appellant in the community, the general practitioner wrote: "patient would need to lie down on the street due to the pain. Lying down would help relieve it."

Daily Living Activities (DLA)

In the PR, the general practitioner indicated that:

- In terms of health history, the appellant finds pretty much every activity of daily living makes his pain worse.
- The appellant has not been prescribed any medication and/or treatments that interfere with his DLA.

In the AR, the general practitioner reported that:

- The appellant is independent with moving about indoors and outdoors.
- The appellant is independent with all tasks of the DLA personal care, basic housekeeping,

prepare own meals, manage personal finance (pay rent and bills), and manage personal medications.

- For shopping, the appellant is independent with going to and from stores, reading prices and labels, making appropriate choices and paying for purchases and requires periodic assistance from another person with carrying purchases home, with no further explanation or description provided by the general practitioner.
- Regarding use of transportation, the appellant is independent with getting in and out of a vehicle and requires periodic assistance from another person with using public transit and using transit schedules and arranging transportation.
- Any prolonged activity is not possible due to pain.

In his self-report, the appellant indicated that:

- His back pain affects his daily routine and living. The pain makes it difficult to get out of bed in the morning.
- Driving the car for more than a half hour is very painful. He needs someone to drive him for periods longer than a half hour. Getting in and out of a vehicle causes a great increase in his back pain.
- Constant bending and movement for housework is very painful. He cannot vacuum or wash the floors.
- He cannot walk in any store with cement floors. He has to leave.

In his Request for Reconsideration, the appellant wrote:

- Using the bus system in his community is not a possibility. The bus stops are too far for him to walk to where he needs to go. Walking more than a block is not possible without extreme pain in his back and his leg going numb. Almost all the bus stops are many blocks away from businesses.
- The last time he tried to walk from his car to the grocery store, in the summer of 2013, he got to the store but could not walk to get groceries. He made it part way back to his car and had to lie in the parking lot, between two cars, to take the pressure off his back and reduce the pain before he could drive home.

Need for Help

- In the AR, the general practitioner reported that, with respect to the assistance provided by other people, the appellant's family and friends assist him. The general practitioner wrote: "Lying down would help his back pain." The section of the report indicating assistance provided through the use of assistive devices identifies a walker, with the note: "uses shopping cart as a walker when shopping."

In his Notice of Appeal dated October 9, 2014, the appellant expressed his disagreement with the ministry's reconsideration decision and wrote that:

- The ministry's interpretation of the doctor's report is not accurate. While the doctor indicates that the appellant can independently manage the list of DLA, he can only manage a few at a time. The report makes it seem like he is able to do all of them on a daily basis, which is not the case at all. The weather changes limit him even more.

At the hearing, the appellant and his advocate stated that:

- Requests were made of the general practitioner to provide additional information in support of

the appellant's appeal and the hearing was previously adjourned to allow more time for this information to be provided. Despite these efforts, and having provided a summary to the general practitioner to review and sign, nothing has been forthcoming from the general practitioner, which is frustrating.

- The Request for Reconsideration sets out some clarifications regarding the periodic assistance that is required and what it would be like for the appellant to try to use the public transportation system in his community. The system covers a large area and is very spread out, taking a long time to get anywhere and requiring long walks from bus stops.
- The appellant has had to lie down in a parking lot to get relief from the pain in his back.
- For shopping, he cannot walk on concrete floors and he is good for one round of the grocery store and then he has to leave.
- For housekeeping, he cannot get all his chores done in one day. He might do the dishes and a bit of sweeping, for example, and be done for the day and have to sit on the couch. It takes him 3 days to do the chores that should take one day.
- He has had 7 to 8 consultations in a period of 7 months for the pain in his back. He has been given 3 shots in his back to relieve the pain. A long needle is used and it takes two days before the pain from the needle is gone and he gets some relief. He was willing to have the injections if they provided lasting relief from the pain, but they did not.
- It has been about 3 months since his last shot, which he believes he received in September 2014.
- His brother will provide assistance if he needs something done in his house, if something needs to be repaired on his roof, for example. His brother and sister-in-law will check in every week to see if there is something he needs done such as vacuuming or tidying up.
- He does his own laundry. He has to walk about 50 feet to the Laundromat to do his laundry.
- For meals, he makes meals that he can have the following day or buys items that he can just heat up and he sometimes uses paper plates so that he will have fewer dishes to wash.
- He has 4 steps to get into his residence.
- For shopping he uses a shopping cart to lean on. His doctor has not prescribed a walker for him.
- His doctor is not aware of the restrictions he experiences at home.

Admissibility of New Information

The ministry did not raise an objection to the appellant's oral testimony or the information provided in his Notice of Appeal. The appellant's testimony regarding his physical impairments and how they impact his ability to function is consistent with and tends to corroborate the information that the ministry had at reconsideration. The panel admitted this additional information as being in support of information and records that were before the ministry at the time of reconsideration, in accordance with s. 22(4)(b) of the *Employment and Assistance Act*.

The ministry relied on its reconsideration decision.

PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry's reconsideration decision, which found that the appellant is not eligible for designation as a person with disabilities (PWD), was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. The ministry found that the appellant does not have a severe mental or physical impairment based on the information provided and that his daily living activities (DLA) are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods. Also, as a result of those restrictions, it could not be determined that the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

The criteria for being designated as a person with disabilities (PWD) are set out in Section 2 of the EAPWDA as follows:

Persons with disabilities

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.

(4) The minister may rescind a designation under subsection (2).

Section 2(1)(a) of the EAPWDR defines DLA for a person who has a severe physical or mental impairment as follows:

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 Physical Impairment

The appellant's position is that the evidence of his chronic low back pain due to degenerative disc disease, facet joint arthritis and spondylosis establishes a severe physical impairment. In his self-report, the appellant wrote that when he walks, he gets pain in his hips and into his back as well as muscle spasms in his leg, arm and chest. He is in pain from the time he wakes up until he goes to bed. The appellant argued that he can only walk about 1 block and back before it causes extreme back pain. He takes a narcotic medication daily that helps bring the pain down to 8/10. The appellant stated that he tried injections in his back but that this did not provided lasting relief from the pain.

The ministry's position is that there is not enough information from the general practitioner to establish that the appellant has a severe physical impairment. The ministry acknowledged that the appellant has a significant physical impairment but argued that it is difficult for the ministry to confirm the severity of the impairment given the assessment by the general practitioner indicated that the appellant can independently manage almost all of his DLA.

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 the ministry 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. In making its determination the ministry must consider all the relevant evidence, including that of the appellant. However, the legislation is clear that the fundamental basis for the analysis is the evidence from a prescribed professional – in this case, the appellant's general practitioner.

The general practitioner, who had known the appellant for 7 months, diagnosed the appellant with degenerative disc disease and low back pain, facet joint arthritis and spondylosis. The general practitioner reported that the appellant described his pain as 10/10, sharp, continuous, radiating to the right knee. An x-ray was done in May 2012 showing multi-level degenerative disc disease with spondylosis L2-L3 and facet joint arthritis throughout the lumbar spine. In terms of functional skills, the appellant can walk less than 1 block unaided on a flat surface, he can climb 2 to 5 steps, lift under 5 lbs. and remain seated less than 1 hour. Despite these limitations, the general practitioner indicated in the PR that the appellant does not require any prosthesis or aid for his impairment. Although a walker was identified in the AR as an assistive device that the appellant routinely uses,

the comment by the general practitioner is that a shopping cart is used as a walker when the appellant is shopping. The appellant stated at the hearing that a walker has not been prescribed for him.

In the AR, the general practitioner assessed the appellant as being independent with walking indoors and outdoors, and standing. He requires periodic assistance from another person with climbing stairs and lifting. He requires continuous assistance from another person with carrying and holding, with a comment added: "The patient can walk less than 1 block and can tolerate a few steps. He can lift light objects but not in a prolonged time span." In his Request for Reconsideration, the appellant clarified that when climbing stairs he experiences extreme pain from lifting his legs to go up stairs and he can usually manage 5 stairs before he needs to stop and rest so the pain subsides. The appellant wrote that he can lift 20 lbs. for a very brief time- a few seconds to move an item only.

The panel finds that the evidence demonstrates that while the appellant experiences significant pain in his lower back which impacts his mobility, according to the general practitioner he remains independent with mobility and with most of his DLA, including those that require considerable physical effort as set out in more detail under "*restrictions in the ability to perform DLA.*" Although the appellant provided information in his self-report, Request for Reconsideration and at the hearing that he requires assistance from another person with some of the DLA assessed as independent by the general practitioner, there was no further information provided by the prescribed professional to indicate an update or correction to the initial assessment. Considering all of the evidence, the panel finds that the ministry reasonably determined that there is not sufficient evidence to establish that the appellant has a severe physical impairment under Section 2(2) of the EAPWDA.

Severe Mental Impairment

The appellant did not maintain a position that he has a severe mental impairment.

The ministry's position is that there is insufficient evidence to establish that the appellant has a severe mental impairment.

Panel Decision

The general practitioner did not diagnose a mental health condition but indicated in the PR that the appellant has significant deficits with cognitive and emotional function in the areas of motivation and motor activity, with an explanation that the appellant "has lost interest in doing daily activities due to pain. He cannot do things he used to do and enjoy." The general practitioner marked the section of the AR for assessing the degree of impact to cognitive and emotional functioning for those with an identified mental impairment as not applicable to the appellant. The appellant is assessed as independent in all areas of social functioning and with a good ability to communicate in all areas. Given the absence of a mental health diagnosis or evidence of impacts assessed to the appellant's mental or social functioning, the panel finds that the ministry reasonably determined that a severe mental impairment was not established under Section 2(2) of the EAPWDA.

Restrictions in the ability to perform DLA

The appellant's position is that his physical impairment directly and significantly restricts his ability to perform DLA on an ongoing basis to the point that he requires the significant assistance of another person, namely his family. In his Notice of Appeal, the appellant wrote that the ministry's interpretation of the doctor's report is not accurate. While the doctor indicated that the appellant can independently manage the list of DLA and makes it seem like he is able to do all of them on a daily

basis, he can only manage a few at a time. The appellant described the limitations he experiences with tasks of DLA due to his lower back pain, as set out in his self-report, Request for Reconsideration, and at the hearing.

The ministry's position is that the information from the prescribed professional does not establish that the appellant's impairments significantly restrict his DLA either continuously or periodically for extended periods of time. The ministry argued that although the general practitioner reported that the appellant requires periodic assistance with some tasks of DLA, the general practitioner did not provide any explanation or description of the frequency or duration of the assistance required to establish that the assistance is required for extended periods.

Panel Decision

Section 2(2)(b) of the EAPWDA requires that a prescribed professional provide an opinion that an applicant's severe impairment directly and significantly restricts his DLA, continuously or periodically for extended periods. In this case, the general practitioner is the prescribed professional. DLA are defined in Section 2(1) of the EAPWDR and are also listed in the PR and, with additional details, in the AR. Therefore, the prescribed professional completing these forms has the opportunity to indicate which, if any, DLA are significantly restricted by the appellant's impairments continuously or periodically for extended periods.

In the appellant's circumstances, the general practitioner reported in the PR that the appellant has not been prescribed any pain medication or treatment that interferes with his ability to perform DLA. Although the general practitioner wrote in the PR that the appellant finds pretty much every activity of daily living makes his pain worse, in the AR the general practitioner reported that the appellant independently performs all tasks of each DLA including moving about indoors and outdoors, with the exception of a requirement for periodic assistance with 3 tasks of DLA. The general practitioner indicated that the appellant requires periodic assistance from another person with carrying purchases home when shopping and using public transit and using transit schedules and arranging transportation. The general practitioner noted that any prolonged activity is not a possibility for the appellant due to pain, with no further explanations or descriptions added regarding the frequency or duration of the assistance required in order to allow the ministry to determine that the assistance is required for extended periods.

The appellant reported in his self-report, his Request for Reconsideration, and at the hearing that he experiences an increase in pain and limitations with his ability to complete various tasks of DLA. In his self-report, the appellant wrote that his back pain affects his daily routine and living and the pain makes it difficult to get out of bed in the morning. The appellant also wrote that getting in and out of a vehicle causes a great increase in his back pain. In his Request for Reconsideration, the appellant pointed out that using the bus system in his community is not a possibility since the bus stops are too far for him to walk to where he needs to go. Walking more than a block is not possible without extreme pain in his back and his leg going numb. The appellant stated at the hearing that for shopping, he cannot walk on concrete floors and he is good for one round of the grocery store and then he has to leave and he uses the shopping cart like a walker. For housekeeping, he cannot get all his chores done in one day and it takes him 3 days to do the chores that should take one day. For meals, he makes meals that he can have the following day or buys items that he can just heat up. The appellant expressed his frustration that these restrictions to DLA have not been confirmed by the general practitioner, as the prescribed professional, despite being provided an opportunity to update the initial assessment made in the AR.

Given the lack of evidence from a prescribed professional regarding the nature and extent of restrictions to the appellant's DLA, the panel finds that the ministry reasonably concluded that the evidence is insufficient to show that the appellant's ability to perform his DLA is significantly restricted either continuously or periodically for extended periods, thereby not satisfying the legislative criterion of Section 2(2)(b)(i) of the EAPWDA.

Help to perform DLA

The appellant's position is that his physical impairment significantly restrict his daily living functions to a severe enough extent that significant assistance is required from his family, specifically his brother and sister-in-law.

The ministry's position is that because it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required.

Panel Decision

Section 2(2)(b)(ii) of the EAPWDA requires that, as a result of direct and significant restrictions in the ability to perform DLA, 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.

In the AR, the general practitioner reported that, with respect to the assistance provided by other people, the appellant's family and friends assist him. The general practitioner wrote: "Lying down would help his back pain." While the general practitioner identified a walker as an assistive device used by the appellant, he noted that the appellant "uses shopping cart as a walker when shopping" and the appellant stated at the hearing that a walker has not been prescribed to him. The panel finds that the ministry reasonably determined that as direct and significant restrictions in the appellant's ability to perform DLA have not been established, it cannot be determined that the appellant requires help to perform DLA 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, and therefore confirms the decision.