

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated December 16, 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 dated July 25, 2014, a physician report (PR) dated and an assessor report (AR) both dated July 25, 2014 and completed by a general practitioner who has known the appellant for 3 years.

The evidence also included:

- 1) Progress Note dated March 17, 2014 by a physician with a pain clinic;
- 2) Continuation of a Supplemental Medical Opinion dated December 11, 2014; and,
- 3) Request for Reconsideration dated November 6, 2014.

Diagnoses

In the PR, the appellant was diagnosed by the general practitioner with low back pain, degenerative disc disease at L5-S1, with onset in 2003. There is no diagnosis of a mental health condition.

Physical Impairment

In the PR, the general practitioner reported that:

- In terms of health history, the appellant has chronic low back pain which started in 2003 and he had disc surgery in 2004 and was helped until 2010 when he slipped on ice and re-injured his back. "Due to stiffness and pain, his range of motion in the lower back is limited. This makes laboring work or long distance driving a problem."
- The appellant does not require any prosthesis or aid for his impairment.
- In terms of functional skills, the appellant can walk 4 or more blocks unaided, can climb 5 or more steps unaided, lift 2 to 7 kg. (5 to 15 lbs.), and remain seated 1 to 2 hours.
- The appellant has been referred to the local pain clinic and is having the relevant treatments, injections, etc.

In the AR the general practitioner indicated that:

- The appellant is assessed as being independent with walking indoors and outdoors, climbing stairs, and standing. The appellant requires periodic assistance from another person with lifting and carrying and holding. The general practitioner commented: "occasional help required if lifting or carrying over a certain weight."
- No assistive devices are indicated in the section of the AR relating to assistance provided, which is marked "N/A," or not applicable to the appellant.

In the Progress Note dated March 17, 2014, the physician from a pain clinic reported that:

- The appellant reports that he slipped on the ice in 2010 and, since then, has had chronic low back pain.
- The pain radiates down his legs, mostly on his left and mostly posterior, down to his knee; rarely goes down to his foot. The radiation down his leg is not a jolt or electrical-type pain; it is more of an ache and it is an inconsistent pattern. He describes his low back pain as being like a migraine. There is no one particular position that makes it worse and he wakes up after twisting in the night.
- He has not tried any other therapies. He takes one prescription medication a few times a day to help his pain.
- Upon examination, there is some moderate tenderness to his buttocks, SI joint, lower paralumbar spine area; he has full range of motion.

- Testing revealed degenerative disc disease of L5-S1 and sclerosis of the same facet joints; therefore, the appellant was given bilateral L5-S1 joint blocks as the physician's opinion is that the pain is more of a radiation from his arthritic facet joint as opposed to a true radiculopathy from nerve root pain.
- It will be determined in a month if further facet blocks will help the appellant.

In the Continuation of a Supplemental Medical Opinion dated December 11, 2014, the general practitioner indicated:

- Yes, in response to the question whether, in his professional opinion, the appellant has a severe physical and/or mental impairment. The general practitioner wrote: "he has severe back pain, but I have seen him relatively pain free also."

Mental Impairment

In the PR, the general practitioner reported:

- The appellant has no difficulty with communication.
- The appellant has no significant deficits with cognitive and emotional function.

In the AR, the general practitioner indicated that:

- The appellant has a good ability to communicate in all areas.
- There are no impacts to the appellant's cognitive and emotional functioning.
- 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.
- Regarding the appellant's functioning in his immediate social networks, the general practitioner wrote "N/A" or not applicable, and the appellant has good functioning in his extended social networks.

Daily Living Activities (DLA)

In the PR, the general practitioner indicated that:

- The appellant has not been prescribed any medications and/or treatments that interfere with his ability to perform daily living activities.

In the AR, the general practitioner reported that:

- "His impairments are physical, only impact his work ability, not his activities of daily living."
- The appellant is independent with moving about indoors and outdoors.
- The appellant is independent with all tasks of all listed DLA, namely: personal care, basic housekeeping, shopping, meals, paying for rent and bills, managing medications and transportation, and social functioning.

In the Continuation of a Supplemental Medical Opinion dated December 11, 2014, the general practitioner indicated:

- The appellant's ability to perform listed DLA is periodically restricted. The general practitioner wrote: "flare up of pain on occasion, not continuously restricted."
- Regarding the frequency or duration of these restrictions, the general practitioner wrote: "is well enough to walk to his appointments over 4 blocks."
- No, in response to the question whether, in his professional opinion, the appellant requires

help to perform his DLA. The general practitioner wrote: "as in previous PWD, no. Voiced to me that he does not require help." He cannot assess how many times per week help is required since the appellant "is not receiving help at present."

Need for Help

- In the AR, the general practitioner reported that, with respect to the assistance provided by other people, "no assistance" is required.

In his Notice of Appeal stamped received by the ministry on December 17, 2014, the appellant expressed his disagreement with the ministry's reconsideration decision and wrote that:

- He feels that he meets the PWD requirements.

At the hearing, the advocate stated that:

- The appellant is a recipient of income assistance with Person with Persistent Multiple Barriers to employment (PPMB) status with the ministry.
- His doctor has referred him to the pain clinic to manage his low back pain caused by degenerative disc disease.
- As set out in the Progress Note dated March 17, 2014, the appellant is taking 4 different medications for pain. The physician wrote that the appellant's pain radiates down his leg, his low back pain is like a migraine and he wakes up in the night if he has twisted.
- As set out in the Supplemental Medical Opinion dated December 11, 2014, the appellant's doctor wrote that the appellant has flare ups of pain on occasion. The doctor also confirmed that the appellant has a severe physical impairment and wrote that he has severe back pain.
- The appellant's condition has been deteriorating, especially in the last few months.

At the hearing, the appellant stated that:

- He could use some help when he goes shopping. He takes a cab to the store, but that cuts into his finances.
- He cannot carry groceries well, "just into the car, that's all."
- Going up stairs has been difficult because his hips are a problem. He does not know what is wrong. He has 30 steps up to his room and he has almost given up smoking because he cannot go up and down the stairs every time to get outside.
- He does not sleep well and only got one hour of sleep last night. He is lucky if he gets 4 hours of sleep because his back is so uncomfortable.
- His pain is usually about 6 to 7 [out of 10] but on his bad days he cannot even leave his room. A couple of times a week he will have a bad day.
- He lives in a room that is about 10' X 10' so vacuuming "only takes 5 seconds" because there is not much floor. Wiping down the dress and television cabinet is all that is required for his housekeeping.
- He does not have a kitchen so he goes down to a soup kitchen for meals. He has a microwave so he can heat things up.
- He does not have anyone to help him. He would not feel comfortable having someone help him with bathing and other personal care.
- He has had 3 injections for pain relief but the last one did not work as he got no relief. There is no more surgery that can be done. When the surgery was done in 2004, the doctor said that the condition is progressive and he will likely be in a wheelchair within 10 to 15 years.
- In the last few months his pain has been getting worse. He legs feel "heavier" and it takes

longer and takes more energy to do things. He wonders how he is expected to find work.

- The ongoing pain is “having a mental affect “on him.

Admissibility of New Information

The ministry did not raise an objection to the oral testimony on behalf of the appellant. The additional information related to the impact of the appellant’s impairment as diagnosed in the PWD application, and is in support of information that was before the ministry at reconsideration. Therefore, 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 as summarized at the hearing.

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 a severe physical impairment is established by the low back pain as a result of degenerative disc disease at L5-S1. The advocate argued that the physician at the pain clinic reported that the appellant's pain radiates down his legs, the pain is described by the appellant as being like a migraine, and he takes 4 different pain medications. The advocate argued that the general practitioner confirmed in the Supplemental Medical Opinion that the appellant has a severe physical impairment as he has "severe back pain." The advocate argued that the appellant's condition is degenerative and the appellant's functioning has deteriorated, especially in the last few months.

The ministry's position is that the appellant's functional skill limitations are not significantly restricted aside from lifting over 15 lbs. and are more in keeping with a mild to moderate physical impairment. The ministry argued that the general practitioner reported that the appellant is independent in most aspects of mobility and physical ability, with occasional help to lift/carry/hold over a certain weight. The ministry argued that no assistive devices are routinely used to help compensate for impairment and the information provided does not establish that he has a severe physical 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 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 the ability to perform 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 general practitioner.

The general practitioner, who had known the appellant for 3 years, diagnosed the appellant with low back pain due to degenerative disc disease at L5-S1. While the general practitioner wrote in the PR that "due to stiffness and pain, his range of motion in the lower back is limited," the physician at the pain clinic reported that, on examination, the appellant had full range of motion. In terms of functional skills, the general practitioner indicated that the appellant can walk 4 or more blocks unaided, can climb 5 or more steps unaided, lift 5 to 15 lbs., and remain seated 1 to 2 hours. At the hearing, the appellant stated that he has also recently experienced pain in his hips and going up stairs has been

difficult. He has 30 steps up to his room and he has almost given up smoking because it is so difficult for him to go up and down these stairs to get outside. The general practitioner reported that the appellant does not require any prosthesis or aid for his impairment.

In the AR the general practitioner assessed the appellant as being independent with walking indoors and outdoors, climbing stairs, and standing. The appellant is assessed as requiring periodic assistance from another person with lifting and with carrying and holding and the general practitioner wrote: "occasional help required if lifting or carrying over a certain weight." The panel considered that "over a certain weight" is additional information in keeping with the functional skills described, of lifting 5 to 15 lbs. No assistive devices are indicated in the section of the AR relating to assistance provided.

At the hearing, the appellant stated that his pain is currently about 6 to 7 [out of 10] but on his bad days he cannot even leave his room because of the pain. He will have a bad day a couple of times per week. The appellant also stated that when his disc surgery was done in 2004, the doctor said that, since the degenerative disc disease is progressive, he will likely be in a wheelchair within 10 to 15 years. In the Supplemental Medical Opinion dated December 11, 2014, while the general practitioner responded that, in his professional opinion, the appellant has a severe physical and/or mental impairment, he also qualified his opinion by writing: "he has severe back pain, but I have seen him relatively pain free also." However, the general practitioner did not describe these exacerbations in the appellant's condition in either the PR or in the AR and, as discussed in more detail in these reasons for decision under the heading "*Restrictions in the Ability to Perform DLA*", the limitations to the appellant's physical functioning do not appear to have translated into significant restrictions to his ability to manage DLA.

Considering all of the evidence currently available, including the assessment of the appellant's independent mobility and the mostly moderate level of impacts to the appellant's physical functioning, 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 suffers from 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 in the PR and reported that the appellant has no significant deficits with cognitive and emotional function. At the hearing, the appellant stated that the constant pain is having "a mental affect" on him. The general practitioner also reported in the AR that the appellant is being provided psychological support, but no other details are given. In terms of impacts to daily functioning, the general practitioner assessed no impacts to any of the listed areas of the appellant's cognitive and emotional functioning.

The general practitioner indicated that the appellant has a good ability to communicate in all areas. With respect to social functioning, the appellant is assessed as being independent in all areas and he has good functioning in his extended social networks. Given the absence of a mental health diagnosis and no significant 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.

The ministry's position is that the information from the general practitioner, as the prescribed professional, does not establish that the appellant's impairments significantly restrict his DLA either continuously or periodically for extended periods of time.

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 medication and/or treatments that interfere with his ability to perform DLA. In the AR, the general practitioner reported that the appellant is independent with moving about indoors and outdoors and is also independent with all tasks of all listed DLA, namely: personal care, basic housekeeping, shopping, meals, paying for rent and bills, managing medications and transportation, and social functioning. At the hearing, the appellant stated that he could use some help with shopping and that he has a limited ability to carry groceries. In the Continuation of a Supplemental Medical Opinion dated December 11, 2014, the general practitioner indicated that the appellant's ability to perform listed DLA is periodically restricted. The general practitioner wrote: "flare up of pain on occasion, not continuously restricted."

Regarding the frequency or duration of these restrictions, the general practitioner wrote: "is well enough to walk to his appointments over 4 blocks." The general practitioner indicated that the appellant does not require help to perform his DLA and that the appellant "...voiced to me that he does not require help." The general practitioner wrote that he cannot assess how many times per week help is required since the appellant "is not receiving help at present." In the PR, the general practitioner wrote that due to stiffness and pain, the range of motion in the appellant's lower back is limited and "this makes laboring work or long distance driving a problem." In the AR, the general practitioner wrote that the appellant's "...impairments are physical, only impact his work ability, not his activities of daily living."

Considering the evidence as confirmed by the general practitioner as the prescribed professional, the panel finds that the ministry reasonably concluded that the evidence is insufficient to show that the appellant's overall 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 restricts his daily living functions to a severe enough extent that significant assistance is required from another person.

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 does not require assistance. 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.