

## PART C – Decision under Appeal

The Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated 7 November 2014 determined that the appellant did not meet 4 of the 5 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 but that his impairment was not likely to continue for at least 2 years. Additionally, the ministry was not satisfied that the appellant had a severe mental or physical impairment and that the appellant's mental or physical conditions, in the opinion of a prescribed professional, directly and significantly restricted his daily living activities (DLA) either continuously or periodically for extended periods. The ministry was also not satisfied that as a result of those restrictions, in the opinion of a prescribed professional, the appellant required help 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 following evidence was before the ministry at the time of reconsideration:

- A 3 page PWD Application – Applicant Information dated 24 July 2014 and signed by the appellant before a witness indicating that he suffers from depression and that he cannot stand for lengthy periods of time or lift many objects. He lost all motivations in doing anything and all ambition. He suffers from back and knee pain and was unable to work and stated that he “can see and feel progress being made in the sense [he didn’t] require help doing anything.”
- A 8 page Physician Report (PR) dated 28 July 2014 completed and signed by the appellant’s physician indicated the following:
  - Specific diagnosis: Major depression since 2007 and back pain post MVA (motor vehicle accident) in 2012.
  - Health history: Moderate to severe depression, poor mood, insomnia, lacks motivation, suicidal ideations. Had 2° disc chronic back pain “but was/is recovering slowly”.
  - No medication or treatment interfere with the appellant’s ability to perform daily activities but physician expected medication / treatments to continue for 6 to 12 months.
  - The appellant did not require prostheses or aids for his impairment.
  - The impairment was not likely to continue for 2 years or more from that date. No explanation provided.
  - In terms of functional skills the appellant did not have any identified limitation other than not being able to walk unaided on a flat surface for more than 4 blocks and lift more than 16 kg.
  - In terms of significant deficits with cognitive and emotional functions, the physician identified 2 areas: emotional disturbance and motivation but did not provide any further comments.
  - In terms of general additional comments, the physician stated that the appellant was receiving medication for depression and was referred for psychiatric consultation.
  - The appellant had been his patient for 21 years and he had seen him 2 to 10 times during the previous 12 months.
- An 11 page Assessor Report (AR) undated, completed and signed by the same physician as the PR, indicated the following:
  - The appellant lived with family, friends or caregiver.
  - The appellant has been chronically depressed since middle school and injured his back in a MVA in 2012.
  - The appellant’s ability to communicate by speaking, reading, writing and hearing was good.
  - In terms of mobility and physical ability, he was independent walking indoors but took significantly longer than typical for:
    - Walking outdoors: “Stops frequently due to pain”.
    - Climbing stairs: “Pain & must use banister, slow”.
    - Standing: “Pain after standing more than 10 minutes”.
    - Lifting: “Less than 35lbs lift”.
    - Carrying and holding: No comment.
    - No further comment was provided.
  - In terms of cognitive and emotional functioning when there is an identified mental impairment or brain injury, his mental impairment restricted or impacted his daily functioning as a major impact for motivation; moderate impact for emotion and executive (planning and organizing); minimal impact for attention / concentration and motor activity (decreased goal-oriented activity). There

were no impacts on other areas and the physician did not add any comments.

- In terms of daily activities, he was independent except for the following activities where he took significantly longer than typical:
  - Basic housekeeping and laundry: “Lacks motivation”.
  - Going to and from stores: “rarely drives himself since the MVA”.
  - Carrying purchases home: “only lifts less than 35 lbs”.
  - No additional comment was provided.
- And periodic support / supervision for:
  - Able to develop and maintain relationships: “unmotivated to do so”.
  - Able to deal appropriately with unexpected demands: “like this form!!”.
- His mental impairment was described as impacting his relationship with his immediate and extended social networks as marginal functioning with no further comments.
- The appellant had assistance from family and friends for his daily activities but no further comment was offered.
- In terms of assistance provided by assistive devices, the physician indicated a stair lift and knee wrap and commented that there was an electric stair chair where he resided that he used “occasionally”.
- The appellant did not have an assistance animal.
- No additional information was provided other than that the information used by the physician to complete the AR came from office interview with him and medical records.
- The physician had known the appellant for 21 years and had seen him 2 to 10 times during the previous year.
- He described the type and duration of service provided by him or his organization as providing prescriptions for antidepressants and exercise and physiotherapy.

In his request for reconsideration dated 3 November 2014, the appellant indicated he suffers from chronic pain in his lower back and knee and is unable to climb stairs and must always take an elevator or chairlift. He stated he could not walk 4 blocks and had problems getting up and walking to the bathroom. He stated he must always have a heating pad on his back and that standing is hard for him, having to support himself on something. He needs help taking his dishes and drinks to the table and back and can hardly lift 2 lbs. He indicated his landlord installed bath bars in the bathroom and he got a bath chair to avoid slipping. He needs help to get from lying down or sitting and can't put on his socks or shoes as bending his back causes too much pain and he must wear a knee brace. A family member makes his lunch and dinner, she cleans his room and does his laundry. Since he cannot drive a vehicle because of his physical condition, a member of his family must drive him when needed. He takes daily medications for depression that he qualifies as major and he suffers from insomnia. Back and knee pain have made his depression worse to the extent is constantly under someone's watch for fear of suicide. He cannot be left alone and needs constant help with his daily activities, in particular to get dressed, prepare meals, cleaning, laundry, getting up and lying down.

In his Notice of Appeal dated 18 November 2014, the appellant states: “My back is worse, I am not able to do my own cleaning, laundry, shower. My [family member] has to always remind me to eat, take my pills etc... I see my [doctor] this week, I am getting an update done. I am on a high dose of meds for depression and I have insomnia so bad that I can be awake for 24-36 hrs at a time. My [family member] comes and cooks & cleans for me as I can't do it. I have tried and the pain is so bad I cry in pain.”

The panel determined the additional documentary evidence provided by the appellant in the Notice of Appeal was admissible under s. 22(4) of the Employment and Assistance Act (EAA) as it was in support of the records before the minister at reconsideration, confirming, updating and completing the evidence provided by the appellant in his application for PWD designation and his request for reconsideration.

## PART F – Reasons for Panel Decision

The issue under appeal is whether the ministry's determination that the appellant has not met all of the eligibility criteria for designation as a PWD because it was not satisfied that his impairment was likely to continue for at least 2 years, that the appellant had a severe physical and/or mental impairment that, in the opinion of a prescribed professional, directly and significantly restricts his ability to perform DLA either continuously or periodically for extended periods resulting in the need for help to perform DLA was either a reasonable application of the legislation or reasonably supported by the evidence. The ministry determined that the age requirement had been met.

The criteria for being designated as a person with disabilities are set out in s. 2 of the EAPWDA and s. 2 of the EAPWDR. Section 2 of the EAPWDA states:

**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;

**"health professional"** repealed

**"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 of the EAPWDR provides further clarification:

**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.

The ministry acknowledged that the appellant meets 1 of the conditions for PWD designation in that he is at least 18 years of age. However, the ministry argued that he does not meet the other 4 criteria.

*Likely duration of at least 2 years:*

The ministry argued that the medical practitioner did not confirm that the appellant's impairment would continue for at least 2 years from the date of the reports and that he did not meet that condition.

The appellant argued that his condition was chronic and getting worse. For instance his depression has already lasted for several years and is getting worse because of his physical impairment caused by a MVA in 2012.

The panel notes that the legislation is specific as to the duration of the impairment; s. 2(2)(a) of the EAPWDA requires the minister to be satisfied that in the opinion of a medical practitioner, the impairment is likely to continue for at least 2 years. The evidence presented to the reconsideration officer and to the panel is from one medical practitioner, the appellant's physician, who answered "No" to the question in the PR: "Is the impairment likely to continue for two years or more from today?" When asked to explain the answer, the physician did not provide any explanation. Further, in the same PR, in the section dealing with the appellant's health history, the physician commented that his back pain "is chronic but was / is recovering slowly". The panel finds that in the absence of any evidence from a medical practitioner that the appellant's impairment is likely to last more than 2 years, the ministry reasonably determined this condition for a PWD designation was not met.

*Severe physical impairment:*

The ministry argued that the evidence did not demonstrate the appellant suffered from a severe physical impairment because, according to the physician, while he had some difficulties with his physical abilities, he could still walk up to 4 blocks unaided, climb more than 5 stairs, lift up to 35 lbs. While the physician noted that it would take significantly longer to perform many of the physical abilities, the ministry argued that no information was provided on how much longer it takes and that, based on all the information provided, there was not enough evidence to establish a severe physical impairment.

The appellant argued that his situation has deteriorated and that he could not anymore perform most of those physical activities like walking, getting up and using the bathroom, doing daily chores and meals and that he needs the assistance of a family member to do them. He uses railings in his residence as well as a shower chair and must take an elevator or chair lift to climb stairs.

The panel notes that the appellant's physician is of the opinion that his impairments are not likely to last more than 2 years and that the appellant is recovering, that the anticipated duration of medication / treatment was at the time of the PR 6 to 12 months and that while he stated the appellant took significantly longer for a number of physical activities, he did not provide much information on how much longer even though he was asked to indicate it in his report. Further, the physician stated that the appellant was independent for most of his daily activities and needed periodic support / supervision for only 1 activity: "able to deal appropriately with unexpected demands", like completing this form which does not provide much information as to how often such assistance would be required. While the physician mentioned the use of assistive devices in the AR, he referred to a stair lift that the appellant used "occasionally" and a knee brace. While the panel notes the appellant's physical condition may have worsen and that he has a number of limitations to what he can physically do now, the ministry reasonably based its findings mostly on the physician reports as required by the legislation. Thus, the panel finds the ministry reasonably determined that, based on the evidence provided, it was not satisfied the appellant had demonstrated he suffered from a severe physical impairment.

*Severe mental impairment:*

The ministry argued that while the appellant faces a number of challenges in terms of mental issues, in particular deficits with cognitive and emotional functioning in the areas of emotional disturbance and motivation, there is only one area, motivation, where the physician identified a major impact. Only 2 other areas have a moderate impact: emotion and executive while the others are either minimal or no impact. There are no difficulties identified in terms of communications and speaking, reading, writing and hearing are good. The ministry argued that the appellant had not provided enough evidence to establish a severe mental impairment.

The appellant argued that his mental condition is deteriorating and his depression has gotten worse to the extent he must consult with a counsellor and take strong medication that make him feel numb and disconnected with everyone. He argued he is stuck in his head with constant negative thoughts and that he has to rely on others for everything, including being constantly watched for his own safety and suicidal ideations.

The panel notes that the appellant's physician described his mental impairment as "moderate to severe major depression", suggesting the appellant suffered from a severe mental impairment. However, the description of the impact of the appellant's mental impairment seems to suggest otherwise. For instance, the duration of the medication / treatment was then estimated at 6 to 12 months and that would not interfere with the appellant's daily activities according to the physician. Further, the only one area where the appellant suffered a major impact because of his mental impairment was "motivation" and only 2 areas were moderately impacted - emotion and executive - while all the other areas had minimal and for the majority no impact; the physician did not comment on what those impacts could be. Further, the physician did not mention any difficulties in terms of communication but noted "marginal functioning" for his relationship with his immediate and extended social networks, without providing any comment as to what it entailed. The panel acknowledges that the appellant faces challenges in terms of mental impairment, yet, given the evidence provided the ministry reasonably determined it was not satisfied the appellant had demonstrated he suffered from a severe mental impairment.

*Daily Living Activities:*

The ministry argued that while the appellant faces difficulties with a number of daily activities, like taking significantly longer with basic housekeeping, going to and from stores, carrying purchases heavier than 35 lbs, no information was provided on how much longer it takes the appellant. He is independent in all the other daily activities. While the physician indicated the appellant required periodic assistance to deal with unexpected demands, he did not provide any information as to how often such assistance is required. Thus, despite some difficulties, the ministry argued that there was not enough evidence from the physician confirming that the appellant's impairment restricted his ability to perform daily activities continuously or periodically for extended periods.

The appellant argued that his situation has deteriorated and that he cannot perform any daily activity by himself and that he needs continuous assistance from a family member, in particular to drive to stores, for housekeeping, laundry, meals, to get up from lying down or sitting. He also argued that he needed assistive devices like railings, bath chair, stair lift or elevator to climb stairs and he could not walk much because of constant pain.

The panel notes that there are significant discrepancies between the appellant's physician evidence and the appellant's in terms of the impact of impairments on his daily activities but the legislation clearly states that the ministry must make its determination based on the opinion of a prescribed professional (s. 2(2)(b) of the EAPWDA). Thus, the ministry correctly relied mostly on the opinion of the prescribed professional who completed the AR, the appellant's physician who knew him for over 21 years. While the appellant's position is that he basically cannot do any daily activity without the assistance of another person, the physician, who based his assessment on interview with the appellant and his medical record, described a much different situation. Basically, he described the appellant as "independent" for the vast majority of his daily activities but taking significantly longer for basic housekeeping because he lacked motivation, going to and from store because he rarely drove himself since the MVA and he was limited to lifting no more than 35 lbs. In the physician's opinion, there was no need for any assistance for all daily activities other than being able to deal with unexpected demands and for a stair lift (occasionally) and a knee brace.

The panel cannot speculate as to the reason for such a discrepancy between the appellant's and his physician's description of the impact of his impairment on his daily activities, particularly taking into account that the physician's information came in part from interview with the appellant, but finds that based on the evidence provided in particular by the prescribed professional, the ministry reasonably determined there was not enough information to establish that the appellant's impairments significantly restricted his daily living activities either continuously or periodically for extended periods.

*As a result of those restrictions, help required to perform DLA:*

The ministry argued that since DLA are not significantly restricted, it cannot be determined that significant help is required from other persons and that even if the appellant uses a stair lift and a knee wrap, they are no indication *per se* of a severe impairment and that he does not require an assistance animal.

The appellant argued that he needs the assistance of a family member to perform most of his daily activities and must use a stair lift and knee wrap to be able to move around his residence.

Given the evidence as described above, the panel finds that based on the opinion of a prescribed professional, the ministry reasonably determined the appellant did not meet the legislative test for the need for help arising from significant restrictions to perform daily living activities either continuously or periodically for extended periods. In fact the only evidence that would support such assistance was solely provided by the appellant while for the prescribed professional, the appellant did not need any assistance other than dealing with unexpected demands (offering no evidence as to how often that could happen), using a knee brace and occasionally using a stair lift.

*Conclusion:*

The panel realizes that the appellant's medical condition is difficult and that it does have an impact on his daily functioning. However, based on the above analysis and evidence, the panel comes to the conclusion that the ministry reasonably determined that based on the opinion of a medical practitioner, his impairment was not likely to continue for at least 2 years, the appellant does not have a severe physical or mental impairment and that the prescribed professional did not establish that an impairment directly and significantly restricted his ability to perform daily living activities either continuously or periodically for extended periods and that, as a result of those restrictions he required help to perform those activities under s. 2(2) of the EAPWDA. Consequently, the panel finds the ministry's decision was reasonably supported by the evidence and was a reasonable application of the enactment in the circumstances of the appellant and confirms the decision.