

## PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Social Innovation (the ministry) dated 11 February 2015 denying the appellant designation as a person with disabilities (PWD). The ministry determined that the appellant did not meet all of the required criteria for PWD designation set out in the *Employment and Assistance for Persons with Disabilities Act*, section 2. Specifically, the ministry determined that the information provided did not establish that the appellant has a severe mental or physical impairment that in the opinion of a prescribed professional

(i) directly and significantly restricts his ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and,

(ii) as a result of those restrictions, he requires help to perform those activities.

The ministry determined that the appellant satisfied the other 2 criteria: he has reached 18 years of age and his impairment in the opinion of a medical practitioner is likely to continue for at least 2 years.

## 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 reconsideration consisted of the following:

1. The appellant's PWD Designation Application dated 07 August 2014. The Application contained:
  - A Physician Report (PR) dated 07 August 2014, completed by the appellant's general practitioner (GP) who has known the appellant for 35 years.
  - An Assessor Report (AR) dated 19 September 2014, completed by a registered nurse (RN) who had seen the appellant once.
  - A Self Report (SR) completed by the appellant.
2. The appellant's Request for Reconsideration, dated 13 January 2015.

In the PR, the GP lists the following diagnoses related to the appellant's impairment: sciatica and weakness secondary to spinal stenosis (onset January 2013), history of Hepatitis C (June 2010) and perforated peptic ulcer (March 2009). The GP reports that the appellant's impairment will likely continue for 2 years or more.

The panel will first summarize the evidence from the PR and AR relating to the appellant's impairments as it relates to the PWD criteria at issue.

### Severity/health history

#### *Physical impairment*

PR:  
Under health history, the GP writes:  
"January 2013 developed progressive right leg pain & weakness about right knee joint associated with back pain and reduced mobility.  
[Line unreadable]  
Investigation: CT shows degenerative disc disease, bulging and displacement of right S1 nerve root.  
His symptoms have persisted. This is a non-operative condition. He has been referred to pain clinic.  
He is unable to work and has limited mobility due to pain."

Under additional comments, the GP writes:  
"This man has multiple other problems including history of Hepatitis C infection, perforated septic ulcer; serious MVA causing rib fractures and chest tube in 1997; COPD & pneumonia impact; kidney stones; bilateral radial head fracture in 2009; ventral hernia repair in 2013; he is now waitlisted to have left groin hernia repaired."

The GP indicates that the appellant's height and weight are relevant to his impairment: 5'9" and 73.2 kg.

The GP indicates that the appellant has not been prescribed medication and/or treatments that interfere with his ability to perform DLA and that he does not require any prostheses or aids for his

impairment.

As to functional skills, the GP reports that the appellant can walk 1-2 blocks unaided, climb 2-5 steps unaided, is limited to lifting 5-15 lbs. and can remain seated for less than one hour.

AR:  
The RN writes:  
"This man's day to day functioning is severely limited by his health condition – his back and leg pain, Hep C, and the results of the peptic ulcer." His mobility is reduced & he has ongoing chronic pain which keeps him at home. His landlord & neighbour & family provide much help & support for his ADLs"

#### *Mental impairment*

PR:  
The GP does not diagnose any mental health condition.  
The GP indicates that the appellant has no difficulties with communication.

The GP does indicate that the appellant does not have any significant deficits with cognitive and/or emotional function.

AR:  
The RN assesses the appellant's ability for writing as good and his ability for speaking, reading and hearing as satisfactory. She comments that the appellant needs glasses.

With regard to cognitive and emotional functioning, the RN assesses the appellant's mental impairment as having the following degree of impacts on daily functioning (her comments in parentheses):

- Bodily functions – major (afraid to eat, abdominal pain with most foods; poor self care, sleeps 2-3 hours at a time – wakes with pain).
- Emotion – major (depressed, mood 4/10, social anxiety).
- Attention/concentration – major (loses track in a movie, poor focus, loses belongings frequently).
- Motivation – major (nil).
- Motor activity – major (on couch, bed a lot, 50% of time while awake).
- Consciousness – moderate (hyper alert, drowsy, always tired, poor sleep).
- Other neuropsychological problems – moderate (misses last step, falls a risk).
- Other emotional or mental problems – moderate (angry, irritable with little provocation).
- Executive – minimal
- Memory – minimal
- Impulse control, insight and judgment, language, psychotic symptoms – no impact

#### Ability to perform DLA

PR:  
The GP indicates that the appellant's impairment directly restricts his ability to perform DLA.

The GP indicates that the appellant's ability to do basic housework is restricted on a periodic basis and mobility outside the home is restricted on a continuous basis. The GP indicates that the appellant's activity is not restricted in the areas of personal self care (though periodic restriction with dressing is noted), meal preparation, management of medications, daily shopping, mobility inside the home, use of transportation, management of finances, and social functioning.

The GP comments that the appellant has some difficulty getting dressed due to body pain/leg pain, and that mobility is always restricted – the appellant uses an electric scooter. He takes extra time to do ADLs.

The GP further comments: "This man is disabled due to back and leg pain caused by spinal stenosis."

AR:

The RN reports that the appellant lives alone in a 28 foot 5<sup>th</sup> wheel on a friend's property.

The RN lists the appellant's mental or physical impairments that impact his ability to manage DLA as follows:

- SOB when walking more than 50 yards – is gasping for air.
- MVA – fractured skull, leg; previous back injury all lead to sciatica, severe pain and reduced mobility.
- Injury right knee, severe pain; now left knee painful with overuse.
- Worst days from weather, increased activities, 50% of time in bed or on couch.
- Peptic ulcer, abdominal pain, frequent black stools, diet restricted.
- Depression.

Regarding mobility and physical ability, the RN assesses assistance required as follows (her comments in parentheses):

- Walking indoors – periodic assistance from another person, uses a cane (limps, cannot manage in a mall).
- Walking outdoors – periodic assistance from another person, uses a cane (50 yards, needs to rest, SOB, increased knee pain).
- Climbing stairs – continuous assistance from another person or unable (pulls up with arms, his RV has 2 rails or on hands and knees).
- Standing – periodic assistance from another person (5-7 minutes - +++ pain, leaves).
- Lifting – periodic assistance from another person (back often blocks, 5 lbs. with handles).
- Carrying and holding – continuous assistance from another person or unable (2 light grocery bags, knees & back flare up).

The RN comments: "cannot manage slopes, gravel, uneven ground. Uses motorized scooter to get around."

The RN assesses the assistance required for managing DLA as follows (the RN's comments in parentheses):

- Personal care: dressing – independent, takes 3x longer (uses slip-on shoes, very poor support, sits to dress); grooming – independent; bathing – periodic assistance from another person

(uses landlord's shower, someone home for safety); toileting – independent, uses raised toilet seat; feeding self – independent; regulating diet – continuous assistance from another person or unable (very restricted diet, no fat, no acidic food, no raw food; high-quality protein – not enough money); transfers in/out of bed – periodic assistance from another person, very slow (cannot at times, sciatica); transfers on/off of chair – independent, uses arm of chair.

- Basic housekeeping: laundry – independent (goes to neighbors – very small loads only); basic housekeeping – continuous assistance from another person or unable (cannot look after small apartment, daughter helps).
- Shopping: going to and from stores – periodic assistance from another person, uses scooter (needs help to get groceries home); reading prices and labels – periodic assistance from another person (needs glasses); making appropriate choices – independent; paying for purchases – periodic assistance from another person (5 minutes line up only, leaves, someone else pays); carrying purchases home – continuous assistance from another person or unable (needs help).
- Meals: meal planning, food preparation, safe storage of food – independent (quick and easy only, many dietary restrictions make any meal success infrequent); cooking – periodic assistance from another person (problems standing).
- Paying rent and bills: banking – periodic assistance from another person (no account, [pay day loan company]); budgeting -- periodic assistance from another person (cannot buy food he needs for diet).
- Medications: filling/refilling prescriptions, taking as directed, and safe handling and storage – independent
- Transportation: getting in and out of vehicle – periodic assistance from another person (cannot manage very small, very large vehicle); using public transit – continuous assistance from another person or unable (cannot stand while waiting, walk to and from bus stops - back/knee pain).

The RN further comments that the appellant's slip-on shoes are poor support for knee problems and that he should wear better shoes, which he cannot afford. He needs a shower seat for safety because of poor balance.

With respect to social functioning the RN assesses the appellant as independent for making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others and securing assistance from others; she assesses the appellant as requiring periodic support/supervision for being able to deal appropriately with unexpected demands, commenting: “very stressful, copes poorly.”

The RN describes the impact of the appellant's mental impairment on his immediate and extended social networks as marginal functioning, commenting that he is isolated by disability and by where he lives.

Help provided/required

PR:

The GP indicates that the appellant does not require any prostheses or aids for his impairment

AR:

The RN indicates that the appellant is provided help for his DLA by family and friends and health authority professionals. She writes that the appellant would probably benefit from physiotherapy treatment, but that he cannot pay for it.

The RN indicates that the appellant routinely uses a scooter and a raised toilet seat to help compensate for his impairment. She writes that he would also benefit from a shower seat.

### Self report

In his SR, the appellant describes his disability as very limited mobility – severe constant pain, with degenerative discs and pain constant – right flank severe as well as lower back. He has a severe hernia which needs repair.

In describing how his disability affects his life, the appellant writes that he has extreme limited mobility and walking is very painful. There has been no reflex response in his right leg for years. He has constant digestive issues, which are severe. He is unable to work.

His right leg barely supports him and is in severe pain and has atrophied severely. Walking is painful and very limited. He is not able to lift objects – too painful. He is unable to use anti-inflammatories.

He is unable to function normally due to pain so severe at times that he is totally immobilized for periods of hours at a time until muscle spasms stop.

He also lists the following: severe digestive issues; hernia – awaiting surgery (one of several repaired); degenerative discs; spinal arthritis; extreme pain issues daily; uses electric scooter transportation due to very limited mobility; constant sciatic pain issues daily; is on the waiting list at a pain clinic; and has 4 – 6 bowel movements daily.

In his Request for Reconsideration, the appellant provides no new information regarding his impairments, requesting instead an extension so he has time for consultation with his doctor.

In his Notice of Appeal, dated 07 February 2015, the appellant writes that he disagrees with the ministry's reconsideration decision because he is a person with severe physical disabilities.

At the hearing the appellant was assisted by an advocate, who is also his landlord/neighbour/friend. The appellant submitted copies of the following documents:

- An 11 February 2015 letter from the office of the MLA including a photograph of the appellant's right knee and another of a herniated area at groin level.
- An undated letter from an associate of the appellant's physician indicating that the appellant's mobility is limited such that he requires mobility assist devices for traveling any extended distance, and noting multiple pending specialist assessments.
- The front and back of a card belonging to a ministry representative with the hand-written notation "Feb 11(Wednesday) get your reconsideration into office".
- A signed consent (06 March 2015) for a pending left inguinal hernia repair with mesh.
- A 06 March 2015 letter from a surgeon stating that the appellant has a painful left inguinal hernia and won't be able to work because of this and other medical issues.
- A document from the office of a surgeon confirming a colonoscopy booked for Thursday, 10

September 2015.

- A signed consent (06 March 2015) for the September 10, 2015 colonoscopy.
- A laboratory requisition for blood tests dated 06 March 2015.
- A two page hand written document from the appellant's advocate stating that the appellant lives in a trailer located 40 feet from his front door, and that since residing there the appellant has gone through various medical problems.
- A two page hand written document from the appellant summarizing the additional written evidence and stating is unable to work.

At the hearing the appellant stated:

- All but one of the documents submitted at the hearing was offered to the ministry at 1pm on 11 February 2015; these were not considered by the ministry at reconsideration, despite his being told that he had until 11 February 2015 to submit additional evidence.
- He is waiting for hernia and back surgery.
- Every time he eats, his stomach hurts.
- His stool is black and bleeding, and he has 3 bowel movements in the first hour and ½ of the day.
- His advocate/landlord does grocery shopping for him.
- He was with his physician when the PR was completed, and this took about 8 minutes.
- He told his doctor he was depressed.
- He has no reflex response in his right knee, no feeling in his lower calf, can't take anti-inflammatories, and previously had a bad experience with the hospital when he suffered from a perforated ulcer requiring surgical repair.
- He was told he has COPD in his right lung due to scarring from pneumonia.
- He was involved in a serious MVA involving a skull fracture in the 1990's but recovered "100%".

The appellant described in detail his experience 7 years ago when he suffered a ruptured ulcer at work and had to be hospitalized.

At the hearing the advocate/landlord stated:

- He drives the appellant when he needs a ride, helps with his shopping, and sometimes does his laundry.
- The balance of the advocate's submission went to argument (see Part F, Reasons for Panel Decision, below).

The appellant's father appeared as a witness. He stated:

- He has observed the physical and mental deterioration of his son over the past 7 years.
- He and his wife are in their 80's, and his wife has health issues; as such, they are not able to help their son very much.
- The advocate/landlord is the appellant's main source of assistance.

The appellant's former employer also appeared as a witness. He stated:

- When the appellant last worked for him about 6 years ago, because of his medical conditions, he was unable to work more than 5 to 6 hours in a day, but could get the same amount work done as a less skilled worker could do in a full day.
- He has visited the appellant's trailer, noting it is small and a little messy but livable.

The ministry stood by its position at reconsideration.

### **Admissibility on new Information**

The ministry did not raise an objection to the admissibility of the oral testimony presented on the appellant's behalf, or to the admissibility of the documents submitted.

The panel finds that the documents relating to a scheduled colonoscopy and the requisition for blood tests do not tend to substantiate or corroborate the information before the ministry at reconsideration regarding the identified impairments and their severity and impact on daily functioning.

As to the balance of the documents submitted and the testimony of the appellant and the witnesses at the hearing, the panel finds these are in support of the information on the appellant's impairments as addressed in the original PWD application as they tend to corroborate assessments and comments made by the appellant, GP and RN. The panel therefore admits this information as evidence in accordance with Section 22(4) of the *Employment and Assistance Act*.



## PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry reasonably determined that the appellant is ineligible for PWD designation because he did not meet all the requirements in section 2 of the EAPWDA.

Specifically the ministry determined that the information provided did not establish that the appellant has a severe mental or physical impairment that in the opinion of a prescribed professional

- (i) directly and significantly restricts his ability to perform daily living activities either continuously or periodically for extended periods; and,
- (ii) as a result of those restrictions he requires help to perform those activities.

The ministry determined that he met the 2 other criteria in *EAPWDA* section 2(2) set out below.

The following section of the *EAPWDA* applies to this appeal:

**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.

The following section of the *EAPWDR* applies to this appeal:

**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.

### **Preliminary matters**

At the hearing, the appellant's advocate argued that the appellant had not been given a fair reconsideration of the original denial of PWD designation. The appellant had been advised by a ministry worker that he had until 11 February 2015 to submit further documentation to be included as evidence at reconsideration. He submitted a package of documents to the local ministry office in the early afternoon of the 11th February 2015. (This includes some of the material the appellant submitted at the hearing.) However, the reconsideration decision, dated 11 February 2015, was made without considering this new information. He asked whether the panel would direct the ministry to make a new reconsideration decision taking into account the new information.

The appellant's advocate also pointed out that the appellant spent 2 ½ hours with the RN providing her the information required for completing the AR. In comparison, the GP took less than 10 minutes with the appellant in completing the PR. The advocate argued that, considering that the information provided in the PR was so vague compared to the detail in the AR, the ministry, before it made its reconsideration decision, should have contacted the GP to confirm that the assessments made by the RN were justified. It was unfair for the ministry not to recognize the professional background of the RN by minimizing her assessments and to place the onus on the appellant to find a way to reconcile the differences between a vague PR and a detailed AR.

The ministry's response at the hearing was that, although there may have been process issues, the adjudicator was only able to look at the available information and consider this in the light of the legislation.

### ***Panel findings***

Under section 24(2) of the *Employment and Assistance Act*, the panel's jurisdiction is limited to confirming or rescinding the outcome of a request for the reconsideration of a ministry decision. The panel does not therefore have the jurisdiction to direct the ministry to make a new reconsideration decision, as proposed by the appellant. The panel notes that the appellant submitted his request for

reconsideration on 13 January 2015. Section 72 of the EAPWDR requires the ministry to make a reconsideration decision within 10 business days after receiving the request or, if the ministry considers it necessary in the circumstances and the person consents, within 20 business days after receiving the request. The appellant requested an extension and the ministry met its legislative obligation to complete a reconsideration decision within the 20 day timeframe.

Regarding what the appellant's advocate submits is an unfair burden on the appellant, the panel notes that it is a general principle in administrative law that it is the responsibility of an applicant for a public benefit to provide the information required to establish eligibility.

The panel has admitted as evidence material that included documents that the appellant had hoped to be considered at reconsideration. The panel notes that in many of these documents, and in the testimony of the witnesses, it was stated that as a result of his medical conditions, the appellant is unable to work. In the reconsideration decision, the ministry stated that employability is not an eligibility criterion for PWD designation.

Section 2 of the *EAPWDA* states that "The minister may designate a person .... as a person with disabilities..... 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." Daily living activities (DLA) are listed in section 2(1) of the EAPWDR. Ability to work, or other language related to employability, is not listed as a DLA in section 2(1) of the EAPWDR. The panel therefore finds that the ministry was reasonable in determining that employability is not an eligibility criterion for PWD designation.

The panel will consider each party's position regarding the reasonableness of the ministry's decision under the applicable PWD criteria at issue in this appeal.

### **Severity of impairment**

#### **Physical impairment**

In the reconsideration decision, the ministry reviews the functional skills limitations reported by the GP: the appellant can walk 1-2 blocks unaided, climb 2-5 steps, lift between 5-15 pounds and remain seated less than one hour. The ministry also reviews the RN's assessment of the appellant's mobility and physical ability: he requires continuous assistance with climbing stairs and carrying and holding; periodic assistance with walking indoors and outdoors (uses a cane and walks at half speed), standing (maximum 5-7 minutes due to back pain) and lifting (back seizes up); the ministry notes however that no information is provided on how often he requires assistance. In the ministry's opinion, the impacts described by the GP and the RN are more in keeping with a moderate degree of impairment. The position of the ministry is that, based on the information provided by the GP and the RN, there is not enough evidence to establish a severe physical impairment.

The appellant's position is that his sciatica and weakness due to inoperable spinal stenosis and degenerative disc disease, right leg and knee pain, COPD and associated shortness of breath, his

history of hepatitis C and perforated peptic ulcer, together with the history of hernia repair and awaiting further hernia repairs, all constitute a severe physical impairment.

*Panel findings*

A diagnosis of a serious medical condition does not in itself determine PWD eligibility. Under the legislation, eligibility for PWD hinges on “an impairment” and its severity. An “impairment” is more than a diagnosed medical condition. An impairment is a medical condition that results in restrictions to a person’s ability to function independently, appropriately, effectively or for a reasonable duration.

To assess the severity of an impairment one must consider the nature of the impairment and the extent of its impact on daily functioning as evidenced by functional skill limitations and the degree to which the ability to perform DLA is restricted. The legislation makes it clear that the determination of severity is at the discretion of the minister, taking into account all of the evidence. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a medical practitioner and a prescribed professional – in this case, the GP and RN.

The legislation requires that for PWD designation, the minister must be “satisfied” that the person has a severe mental or physical impairment. For the minister to be “satisfied” that the person’s impairment is severe, the panel considers it reasonable for the ministry to expect that the information provided presents a clear and complete picture of the nature and extent of the impacts of the person's medical conditions on daily functioning.

In the PR, the GP specified that the diagnoses related to the appellant's impairment were sciatica and weakness secondary to spinal stenosis, a history of Hepatitis C and a perforated peptic ulcer. Under health history, where the medical practitioner is asked to indicate the severity of the medical conditions relative to the person's impairment, the GP wrote that that a CT scan showed some degenerative disc disease, with bulging and displacement of the right S1 nerve root. This is a non-operative condition. He has been referred to a pain clinic. The GP wrote that: “he is unable to work and has limited mobility due to pain.” The panel notes that employability is not PWD eligibility criteria (see above). The GP did not explain to what extent the appellant's mobility is limited, though in assessing the appellant's functional skills, the GP indicated that the appellant can walk 1-2 blocks unaided on a flat surface and climb 2-5 steps unaided.

In the AR, the RN states that the appellant requires periodic assistance with walking indoors and outdoors, noting that the appellant limps, walks at ½ speed with a cane, and that after 50 yards he is short of breath, has knee pain and requires a rest. The RN also reports that periodic assistance is required for standing (5-7 minutes) and lifting (5 lbs with handles) and that the appellant requires continuous assistance with climbing stairs (pulls up using RV rails or on hands and knees) and for carrying and holding (2 light grocery bags). The RN also reports the use of a scooter to get around.

In assessing the appellant's ability to perform DLA, the GP indicated that the appellant is restricted in 2 areas: mobility outside the home on a continuous basis and basic housework on a periodic basis. The GP indicated that the appellant is not restricted in the DLA of personal self care (though indicating that the appellant is periodically restricted with getting dressed), meal preparation, management of medications, daily shopping, mobility inside the home, use of transportation,

management of finances, and social functioning. While the GP indicated that the appellant has not been prescribed any prostheses or aids for his impairment, he commented that "Mobility always restricted – uses electric scooter," without explaining how often, for what distances, for what purposes the scooter is used and to what extent it is required for moving about indoors or outdoors.

The RN provided somewhat different assessments relating to the appellant's ability to perform DLA which included the identification of restrictions and the need for assistance that do not appear to directly relate to the medical conditions diagnosed by the physician. The panel will address those assessments in more detail under "Direct and Significant restrictions in the ability to perform DLA" below.

The GP provided additional comments relating to the appellant having "multiple other problems" including COPD and pneumonia, kidney stones, referral to a pain clinic and a history of hernia repair and awaiting a left groin hernia repair. However the GP has not provided any description or explanation as to how these "other problems" impact his daily functioning.

In the undated letter from an associate of the appellant's GP, submitted at the hearing, the physician wrote that the appellant "is suffering from a number of active medical issues which prevent him from being able to secure or search for employment at this time. The status is not expected to change within the next year at least. His mobility is limited such that he requires mobility assist devices for traveling an "extended distance." Again, the panel notes that employability is not a PWD eligibility criteria and the physician does not explain what constitutes an "extended distance."

The panel finds that the physical functional skills reported by the physician, including an ability to walk 1-2 blocks unaided, climb 1-2 steps unaided, and lift at least 5 lbs are for the most part consistent with the information from the RN who reports the ability to stand for 5-7 minutes, walk 50 yards before needing a rest and the ability to manage light grocery bags. Further, the appellant's physician provided no explanation of the appellant's use of a scooter despite stating that no aids had been prescribed and the most recent information from the associate of the appellant's GP is that mobility assistive devices are required for extended distances. In view of this information and that the appellant's physician assessed the appellant as not restricted in his ability to perform all DLA except basic housework and the ability to get dressed on a periodic basis and moving about outdoors on a continuous basis, the panel finds the ministry was reasonable in determining that there was not enough evidence to establish a severe physical impairment.

#### *Mental impairment.*

In the reconsideration decision the ministry notes that the GP indicates that the appellant does not have any deficits with cognitive and emotional functioning, while the RN indicates that he has major impacts with five areas of daily functioning. However as the GP indicates that the appellant does not have any deficits with cognitive and emotional functioning, the ministry finds it difficult to develop a clear and cohesive picture of the degree of restrictions he has with cognitive and emotional functioning. In addition the GP indicates that the appellant does not have any difficulties with communication and RN indicates that he is either good or satisfactory for speaking reading, writing and hearing. Based on the information provided, the ministry's position is that there is not enough evidence to establish a severe mental impairment.

The position of the appellant is that, as reported by the RN, and substantiated by witnesses at the hearing, he suffers from depression. As a result, as the RN has reported, he experiences major impacts on daily functioning in five areas: bodily functions (he is afraid to eat as it causes abdominal pain and he sleeps 2-3 hours at the time), emotion (due to depressed mood and social anxiety), attention concentration, motivation (nil) and motor activity. The RN has also identified several other moderate impacts affecting his emotional well-being. He submits that there is more than enough evidence to establish a severe mental impairment.

*Panel findings*

The appellant argues that he suffers from depression – he did not realize this until he was told that was the case by the RN when she interviewed him. The witnesses at the hearing confirmed that the appellant's medical conditions and history have had serious emotional impact on his well-being. In the AR, the RN identifies depression as an impairment and indicates 5 areas of major impact on his cognitive and emotional functioning, and several other areas of moderate and minor impact. However, the panel notes that in the PR, the GP has not specified a diagnosis of depression or any other mental health condition as a medical condition relating to the appellant's impairment. Nor has the GP reported that the appellant has any cognitive or emotional deficits, difficulties with communication or restrictions in social functioning. Considering that the formal diagnosis of a mental health condition by a medical practitioner is the first step in establishing a severe mental impairment, the panel finds that, despite the RN's diagnosis and assessments, the ministry was reasonable in determining that a severe mental impairment had not been established.

**Direct and Significant restrictions in the ability to perform DLA.**

The ministry found that the information provided by the RN in the AR indicates that the appellant requires assistance with many DLA. However the ministry found that the degree of impairment and restriction reported in the information from the RN, who has seen the appellant once, is not reflected in the reports completed by the GP, who has known the appellant for 35 years. No explanation is provided regarding the differences between the GP's and the RN's reports. The ministry acknowledges that the appellant has serious medical issues; however, considering all the information provided by the GP and the RN, the position of the ministry is that it is not satisfied that the information demonstrates a severe mental or physical impairment that in the opinion of a prescribed professional significantly restricts his ability to perform DLA either continuously or periodically for extended periods.

The position of the appellant is that his multiple medical conditions, ranging from sciatica and leg, knee and back pain and leg weakness to hernia and ulcer problems, together with depression, significantly restrict his daily functioning, particularly anything that requires mobility, such as moving about indoors and outdoors, shopping and housekeeping.

*Panel findings*

The legislation – section 2(2)(b)(i) of the *EAPWDA* – requires the minister to assess direct and significant restrictions of DLA in consideration of the opinion of a prescribed professional, in this case the appellant's GP and the RN. This doesn't mean that other evidence shouldn't be factored in as

required to provide clarification of the professional evidence, but the legislative language makes it clear that the prescribed professionals' evidence is fundamental to the ministry's determination as to whether it is "satisfied".

As noted above under severity of physical impairment, the assessments of the GP and the RN differ as they relate to the ability of the appellant to perform DLA. The appellant argues that this can be accounted for by the GP taking less than 10 minutes with the appellant in completing the PR, while the RN spent 2 ½ hours in a detailed interview in preparing the AR. The ministry notes that the GP has known the appellant for 35 years while the RN had met the appellant only once.

In the AR, the RN assesses the appellant as requiring periodic assistance from another person in sub-activities of the following DLA:

- Moving about indoors and outdoors (mobility and physical ability) – walking indoors, walking outdoors, standing and lifting.
- Personal care – bathing, transfers in/out of bed.
- Shopping – going to and from stores, reading prices and labels and paying for purchases.
- Meals – cooking.
- Paying rent and bills – banking, budgeting.
- Transportation getting in and out of vehicle

The panel notes that for these sub-activities where periodic assistance from another person is required, while there is commentary as to why the assistance is required (e.g. for going to and from stores: "needs help to get groceries home"), no information is provided as to how often, in what way or to what extent this assistance is required. Further, it appears that for some activities the periodic assistance is financial in nature such as for banking and budgeting or for other reasons not related to his impairment (e.g. for reading prices and labels: "needs glasses")

The RN assesses the appellant as requiring continuous assistance from another person or unable in sub-activities of the following DLA:

- Moving about indoors and outdoors (mobility and physical ability) – climbing stairs, carrying and holding.
- Personal care – regulating diet.
- Basic housekeeping – basic housekeeping.
- Shopping – carrying purchases home.
- Transportation – using public transit.

For these sub-activities for which the appellant is assessed as requiring continuous assistance from another person or unable, the panel finds it difficult to assess how the ministry would consider the significance of these restrictions. For example, for basic housekeeping, the RN comments: "cannot look after small apartment, daughter helps," without providing information on what the daughter actually does when visiting, and how often. Regarding regulating diet, the RN comments: "Very restricted diet, no fat, no acidic food, no raw food. High quality protein not enough money," pointing to a financial restriction, not a restriction relating to his impairment. Also, respecting the DLA shopping, the RN indicates that the appellant can independently manage two light grocery bags.

The RN also assesses the appellant as using an assistive device for several DLA: a cane and a motorized scooter for walking indoors and outdoors, the use of handrails for climbing stairs, a raised toilet seat for toileting, use of the arms of chairs for transfers on/off chair, and the scooter for going to and from stores. The panel notes that neither chairs nor step rails are assistive devices as defined in

the legislation. The RN comments “SOB when walks more than 50 yd. – is gasping for air” and that the appellant “cannot manage slopes, gravel, uneven ground. Uses motorized scooter to get around.” This leaves the panel to wonder to what extent his use of a scooter stems from the shortness of breath he experiences due to COPD – not one of the medical conditions specified by the GP relating to his impairment.

Regarding the “social functioning” DLA applicable to a person with a severe mental impairment – not established in this appeal – as set out in section 2(1)(b) of the EAPWDR, namely make decisions about personal activities, care or finances and relate to, communicate or interact with others effectively, the GP assesses the appellant is not restricted. The RN assesses the appellant as independent for making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others, and securing assistance from others; she assesses the appellant as requiring periodic support/supervision for dealing appropriately with unexpected demands, but provides no explanation or description of the degree and duration of such support/supervision. She describes the appellant's relationship with his immediate and extended social networks as marginal functioning, commenting that he is isolated by his disability and by where he lives and yet the RN also reports that the appellant receives assistance from family and friends.

Based on the foregoing, and considering that a severe mental or physical impairment had not been established, the panel finds the ministry was reasonable in determining that there was not enough evidence from the prescribed professionals to establish that the criterion set out in 2(2)(b)(i) of the *EAPWDA* of being directly and significantly restricted in the ability to perform DLA either continuously or periodically for extended periods had been met.

### **Help with DLA**

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

The position of the appellant is that he needs help of his neighbour/landlord for shopping and driving him to appointments and the help of his daughter tidying his home. He also relies on a cane and scooter for mobility. He notes that when asked by ministry workers or medical professionals if he needs help, he realizes that he has misinterpreted the question and has answered no, because he already has the help he needs from other people and the use of his scooter and cane, but he emphasizes that the help he does have he cannot do without.

### ***Panel findings***

The panel notes that the legislation requires that in the opinion of a prescribed professional the need for help must arise from direct and significant restrictions in the ability to perform DLA that are either continuous or periodic for extended periods. While the evidence is that the appellant benefits from the help of his landlord/friend for shopping and from his daughter for housework around the home as well as the use of a scooter and cane for mobility, the panel finds that the ministry reasonably determined that since it has not been established that DLA are directly and significantly restricted, it cannot be determined that help is required as provided under section 2(2)(b)(ii) of the *EAPWDA*.

### **Conclusion**



Having reviewed and considered all of the evidence and the relevant legislation, the panel finds that the ministry's decision that the appellant was not eligible for PWD designation was reasonably supported by the evidence. The panel therefore confirms the ministry's decision.