

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated January 2, 2015 which found that the appellant did not meet three of the five statutory requirements of Section 2 of the *Employment and Assistance for Persons with Disabilities Act* for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that his impairment is likely to continue for at least two years. However, the ministry was not satisfied that the evidence establishes that:

- the appellant has a severe physical or mental impairment;
- the appellant's daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and,
- as a result of these restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

## PART D – Relevant Legislation

*Employment and Assistance for Persons with Disabilities Act* (EAPWDA), Section 2

*Employment and Assistance for Persons with Disabilities Regulation* (EAPWDR), Section 2

## PART E – Summary of Facts

The evidence before the ministry at the time of the reconsideration decision included the Persons With Disabilities (PWD) Application comprised of the applicant information and self-report dated September 11, 2014, a physician report (PR) and an assessor report (AR) both dated August 29, 2014 and completed by a general practitioner who has known the appellant for 8 years.

The evidence also included the appellant's Request for Reconsideration with reasons dated December 18, 2014, with attached list of medications and letter dated December 17, 2014 from the appellant's sister.

### ***Diagnoses***

In the PR, the appellant was diagnosed by the general practitioner with chronic sciatica, with an onset of 2007. 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's "chronic low back pain radiates into left leg. Had laminectomy in September 2010 but symptom relief was only temporary. No other treatments have been found helpful and he is on (illegible) analgesics. Pain seems to be increasing despite medications."
- The appellant requires an aid for his impairment, described as "cane as needed."
- 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 for 1 to 2 hours.

In the AR the general practitioner indicated that:

- The appellant's impairments that impact his ability to manage daily living activities are "chronic low back pain, leg pain, unremitting pain especially in bed at night and in morning."
- The appellant is assessed as independent with walking indoors, walking outdoors, climbing stairs and standing. The appellant uses an assistive device for lifting and carrying and holding, and the general practitioner commented that this is "limited by back pain."
- A cane was identified as an assistive device routinely used by the appellant to help compensate for his impairment, with a note: "cane, uses occasionally."
- For additional information, the general practitioner noted that the appellant's "low back problems are most likely permanent and will not improve."

In his self-report, the appellant wrote that:

- He has severe back pain and weakening of the legs.
- The impact of his medications is to his memory and slowness of thinking.
- Without the medication, he would not be functional and the pain is different from one day to the next.
- He needs a cane sometimes now and in the future he will likely need it more.
- He experiences severe pain on a daily basis and the pain fluctuates daily so he cannot take on a job that is physically demanding and he cannot take a job that involves too much sitting or walking.
- He feels that his physical and mental conditions are deteriorating and not improving, so he is looking for more support.

In his Request for Reconsideration, the appellant wrote that:

- He is suffering debilitating chronic pain from 3 major accidents between 1976 and 2001. As well, he has had osteoarthritis for 40 years and the accidents have worsened the condition.
- He has to take heavy medications to alleviate the pain, but these medications only alleviate half of the pain and cause side effects such as memory loss, drowsiness and slow thinking.
- He still feels pain throughout the day, even with medication.
- The combination of chronic pain and side effects makes it difficult to complete activities such as walking, climbing stairs and lifting heavy things.
- There are 4 prescription medications that he takes every day, described as “heavy medications.”

In the letter dated December 17, 2014, the appellant’s sister wrote that:

- The appellant lives with her and she knows first-hand about his disabilities.
- The appellant “hurts 24/7.”
- In her opinion, the appellant should be on disability.

### ***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.
- The sections of the report relating to impacts to cognitive, emotional and social functioning have been crossed out and marked “N/A”, or not applicable to the appellant.

In his Request for Reconsideration, the appellant wrote that:

- His quality of life is very painful, stressful and mentally taxing.

### ***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:

- The appellant is independent with moving about indoors and outdoors.
- The appellant’s “ADLs are impacted/ made more difficult by back pain.”
- The appellant is independent with all tasks of several listed DLA, namely: personal care, meals, paying for rent and bills, managing medications and transportation.
- For basic housekeeping, the appellant requires periodic assistance from another person with laundry and continuous assistance from another person with housekeeping.
- For shopping, the appellant is independent with reading prices and labels, making appropriate choices and paying for purchases and requires continuous assistance from another person with going to and from stores and carrying purchases home.
- For additional information, the appellant’s “ADLs are affected by back pain. Analgesics (morphine) does tend cause some drowsiness.”

In his Request for Reconsideration, the appellant wrote that:

- The pain makes it take a long time to accomplish things.

In the letter dated December 17, 2014, the appellant's sister wrote that:

- The appellant does what he can around home but would be unable to go to work.

***Need for Help***

- In the AR, the general practitioner reported that, with respect to the assistance provided by other people, the appellant's family helps him, with a note that he lives with his sister.

In his Notice of Appeal dated January 14, 2015, the appellant expressed his disagreement with the ministry's reconsideration decision and wrote that:

- He can verify a severe impairment with a new doctor's note, as attached.
- Since the last report, his condition has deteriorated further.
- Without his medications, he can barely get out of bed and would not be able to do those DLA such as personal care and chores.
- Without his medications, he would definitely need significant help to perform DLA.

In the letter dated January 14, 2015, the appellant general practitioner wrote that:

- The appellant suffers from chronic low back pain with radiation into his leg.
- Since the last report, his condition unfortunately has deteriorated further as has been expected.
- He is only able to walk a total of a block now before needing to rest for 10 to 15 minutes because of back pain. Following this period of rest, he is able to walk on further but again needs frequent periods of rest.
- The back pain itself is also increasing as is to be expected.
- The appellant's activity is limited in other aspects of daily living, including going up and down stairs and, more particularly, with bending. These restrictions are not expected to improve in the future.

Prior to the hearing, the appellant also provided a letter dated July 3, 2013 from Service Canada in which it was indicated that the appellant's application for Canada Pension Plan (CPP) retirement pension has been approved.

At the hearing, the appellant stated that:

- He has gone through so much. He has had some major accidents and sustained serious injuries. He was hit by an excavator at work, he tripped and injured himself, and he has also been hit by a dump truck.
- He feels that the doctor's reports did not communicate how severe and serious his condition is.
- He can walk ½ to 1 block and then he has to rest for 10 to 15 minutes before he can continue.
- He takes a long time to climb stairs.
- If he tries to bend over, the pain is excruciating.
- Without his medications, he would be "bent over like a 90-year-old man."
- His back was operated on 4 years ago, in September of 2010, and this improved his sciatica so that he no longer has the shooting pain.
- He agrees with the assessments that the general practitioner made in the reports.
- He feels that there should have been more emphasis in the reports on the injuries he

sustained from the 3 accidents. He has had osteoarthritis for many years and these accidents aggravated this condition and the pain is getting worse.

- The doctor does not know what he can and cannot do at home.
- He has lived with his sister for the past 11 years since he cannot afford his own place. She helps him day-to-day. He is not sure if he could live independently if he had the financial resources, but he thinks probably not.
- The list of prescription medications includes both pain medications and anti-inflammatory medication that he takes every day. He has gone to a pain clinic in another community and they put him on morphine.
- He is not seeing a back specialist at this time.
- He uses his cane “when it’s really bad,” usually when he is “tired and worn out and afraid of falling.”

At the hearing, the advocate stated that:

- She spoke to the general practitioner and he said that there has been no improvement in the appellant’s condition and it is deteriorating. He provided an update to his assessment in the letter dated January 14, 2015.
- The appellant’s back pain is severe and the general practitioner is concerned about his mental condition because he is trying to cope with this significant pain and is struggling daily.
- She has seen the appellant struggle when he is walking.
- The general practitioner is looking into a referral to mental health services for the appellant since the degree of pain leads to an ongoing mental struggle for the appellant.

#### ***Admissibility of New Information***

The ministry did not object to the admissibility of the July 3, 2013 letter from Service Canada or the January 14, 2015 letter from the appellant’s general practitioner. 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 ongoing pain as a result of sciatica. The appellant argued in his Request for Reconsideration that he is suffering debilitating chronic pain from 3 major accidents which was worsened by the osteoarthritis he has had for 40 years. The appellant argued that he has to take heavy medications, which alleviate some of the pain, but these medications cause side effects such as memory loss, drowsiness and slow thinking. The appellant argued that the combination of chronic pain and side effects makes it difficult to complete activities such as walking, climbing stairs and lifting heavy things.

The ministry's position is that the appellant's functional skill limitations are not significantly restricted and are more in keeping with a moderate level of physical impairment. The ministry argued that the general practitioner indicated that the appellant is able to manage most activities requiring mobility and physical ability, including walking indoors and outdoors, climbing stairs and standing. The ministry argued that the appellant's sister wrote in her letter that the appellant would be unable to work and pointed out that the PWD application is not intended to assess employability or vocational abilities.

### ***Panel Determination***

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 8 years, diagnosed the appellant with sciatica, with an onset of 2007. The general practitioner wrote in the PR, in terms of health history, that the appellant's "chronic low back pain radiates into left leg. Had laminectomy in September 2010 but symptom relief was only temporary. No other treatments have been found helpful and he is on (illegible) analgesics. Pain seems to be increasing despite medications." In the AR, the general practitioner described the appellant's impairment as "chronic low back pain, leg pain, unremitting pain especially in bed at night and in morning." For additional information, the general practitioner noted

that the appellant's "low back problems are most likely permanent and will not improve."

At the hearing, the appellant stated that his back was operated on 4 years ago and this improved his sciatica so that he no longer has the shooting pain but he also sustained serious injuries from 3 previous accidents. He has had osteoarthritis for many years and these accidents aggravated this condition and the pain is getting worse. The appellant stated that without his pain and anti-inflammatory medications, he would be "bent over like a 90-year-old man." The appellant wrote in his self-report that without his medication, he "would not be functional." In a letter dated December 17, 2014, the appellant's sister wrote that the appellant lives with her and she knows first-hand about his disabilities and that the appellant "hurts 24/7." In his Request for Reconsideration, the appellant wrote that he has to take heavy medications to alleviate the pain, but these medications only alleviate half of the pain and cause side effects such as memory loss, drowsiness and slow thinking. The appellant wrote that the combination of chronic pain and side effects from the medications makes it difficult to complete activities such as walking, climbing stairs and lifting heavy things.

In terms of functional skills, the general practitioner reported in the PR 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 for 1 to 2 hours. In the AR, the appellant is assessed by the general practitioner as independent with walking indoors, walking outdoors, climbing stairs and standing. The appellant uses an assistive device for lifting and carrying and holding, and the general practitioner commented that this is "limited by back pain." A cane was identified as an assistive device routinely used by the appellant to help compensate for his impairment, with a note: "uses occasionally" and "as needed." In his self-report, the appellant wrote that he needs a cane sometimes now and, in the future, he will likely need it more.

The advocate stated at the hearing that the appellant's condition is deteriorating and the general practitioner provided an update to his assessment in the letter dated January 14, 2015. In the letter, the appellant general practitioner wrote that the appellant's condition has deteriorated further, as expected, since his last report. The general practitioner wrote that the appellant is only able to walk a total of a block now before needing to rest for 10 to 15 minutes because of back pain. Following this period of rest, he is able to walk on further but again needs frequent periods of rest. The appellant's activity is limited in other aspects, including going up and down stairs and, more particularly, with bending. The appellant stated at the hearing that he agreed with the general practitioner's assessments regarding his functional skills, but he feels that there should have been more emphasis in the reports on the aggravation of his osteoarthritis as a result of the 3 accidents.

The appellant described in his self-report how the pain is different from one day to the next and that the pain also fluctuates daily. At the hearing, the appellant stated that he uses his cane when the pain is "really bad," usually when he is "tired and worn out and afraid of falling." However, the general practitioner did not describe these exacerbations in the appellant's condition in his reports or the letter 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 mostly independent mobility and the 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, although the advocate stated that a referral is being made to mental health services due to the impact to the appellant from coping with ongoing significant pain.

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

***Panel Determination***

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. In his Request for Reconsideration, the appellant wrote that his quality of life is very painful, stressful and mentally taxing. The advocate stated at the hearing that a referral is being made to mental health due to the impact to the appellant from coping with ongoing significant pain.

However, in terms of impacts to the appellant's to cognitive, emotional and social functioning the general practitioner crossed out and marked these sections of the AR as not applicable to the appellant. The general practitioner also indicated that the appellant has a good ability to communicate in all areas. Given the absence of a mental health diagnosis and no 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 Determination***

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.

Whereas the appellant emphasized the impact from the 4 different medications he takes daily, 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. For additional information in the AR, the general practitioner wrote that the appellant's "ADLs are affected by back pain" and that the morphine does cause "some drowsiness." The appellant wrote in his Notice of Appeal that without his medications, he can barely get out of bed and would not be able to do those DLA such as personal care and chores. Without his medications, he would definitely need significant help to

perform DLA. On the other hand, the appellant wrote in his Request for Reconsideration that the medications only alleviate “half of the pain” and cause side effects such as memory loss and slow thinking, as well as drowsiness. He wrote that the combination of chronic pain and side effects makes it difficult to complete activities such as walking, climbing stairs and lifting heavy things. The appellant wrote that the pain makes it take a long time to accomplish things.

In the AR, the general practitioner reported that the appellant is independent with moving about indoors and outdoors. In the letter dated January 14, 2015, the general practitioner wrote that the appellant’s condition has deteriorated since his last report and the appellant is only able to walk a total of a block now before needing to rest for 10 to 15 minutes, whereas he was previously able to walk 4 or more blocks unaided. While the general practitioner wrote in the AR that the appellant’s “ADLs are impacted/ made more difficult by back pain,” he also assessed the appellant as being independent with all tasks of several listed DLA, namely: personal care, meals, paying for rent and bills, managing medications and transportation. For the DLA of basic housekeeping, the appellant requires periodic assistance from another person with laundry and continuous assistance from another person with housekeeping. The general practitioner did not provide comments to explain how often or how long the appellant requires assistance with his laundry.

For shopping, the appellant is independent with reading prices and labels, making appropriate choices and paying for purchases and requires continuous assistance from another person with going to and from stores and carrying purchases home. The general practitioner noted in the AR that the appellant uses an assistive device for lifting and carrying and holding, and the appellant stated at the hearing that he uses his cane “when it’s really bad,” usually when he is “tired and worn out and afraid of falling.” The general practitioner did not describe any exacerbations in the appellant’s condition either in the PR or AR, or when given an opportunity to do so in the January 14, 2015 letter.

In his self-report, the appellant wrote that he experiences severe pain on a daily basis and the pain fluctuates daily so he cannot take on a job that is physically demanding and he cannot take a job that involves too much sitting or walking. The appellant’s sister, with whom he lives, wrote in her letter dated December 17, 2014, that the appellant “does what he can around home” but he would be unable to go to work. The appellant’s sister did not describe any assistance with DLA that she provides to the appellant. As for finding work and/or working, the panel notes that employability is not a criterion in section 2(2) of the EAPWDA nor is it listed among the prescribed daily living activities in section 2 of the EAPWDR.

Considering the evidence of the general practitioner as the prescribed professional which indicates that the appellant is independent with most of the tasks of his DLA, 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 and he requires the use of a cane as an assistive device.

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 Determination***

Section 2(2)(b)(ii) of the EAPWDA requires that, as a result of direct and significant restrictions in the ability to perform DLA, a person requires help to perform those activities. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

In the AR, the general practitioner reported that, with respect to the assistance provided by other people, the appellant's family helps him, with a note that he lives with his sister and he requires the use of a cane "as needed" as an assistive device. 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.

**Panel Decision**

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.