

## 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 April 14, 2015 which held that the appellant did not meet 3 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 and that a medical practitioner confirmed that the appellant has an impairment that is likely to continue for at least 2 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 those restrictions, in the opinion of a prescribed professional, the appellant requires help, as it is defined in the legislation, 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

### Evidence before the ministry at reconsideration

- A PWD application comprised of the appellant's Self-report (SR) dated November 21, 2014 and a Physician Report (PR) and Assessor Report (AR) completed by the appellant's general practitioner ("the GP") of 6 years and dated December 2, 2014.
- A March 26, 2014 consultation report by a Rheumatology Consultant ("the rheumatologist").
- Results of a January 22, 2014 bone scan.
- August 18, 2011 letter from a neurosurgeon ("the neurosurgeon").
- Results of a February 24, 2011 lumbosacral spine CT scan.

### Additional information submitted on appeal and admissibility

Section 22(4) limits the evidence that a panel may admit to information and records before the minister at the time of reconsideration and oral and written testimony in support of the information available at reconsideration.

The appellant submitted a copy of his 8-page Request for Reconsideration submission "the reconsideration letter" dated April 13, 2015 [which was not included in the Record of the Ministry Decision]. The document does not contain additional evidence and was accepted by the panel as argument.

The appellant's testimony at the hearing for the most part reiterated previous information with the addition of some corroborative information which was admitted by the panel pursuant to section 22(4) of the *Employment and Assistance Act (EAA)* as being in support of the information and records before the ministry at reconsideration.

### Summary of relevant evidence

#### Diagnoses

The GP diagnoses advanced spinal degeneration, scoliosis, and arthritis in the spine and pelvis. Sacroiliac joint dysfunction is also reported by the GP. Some degenerative changes in the thoracic spine (with mild scoliosis) and lumbar spine as well as some osteoarthritis in AC joints, knees, and PIP joints are diagnosed by the rheumatologist. The 2014 bone scan confirms degenerative disc disease.

#### Physical Impairment

- The GP reports that the appellant has near constant pain in the thoracic spine and pelvis with

frequent severe back spasms. Severity is described as being at a disabling level.

- The GP reports that the appellant is able to:
  - walk less than 1 block and climb 5+ steps unaided, taking 2-3 times longer than typical with frequent rests and time for recovery;
  - lift and carry/hold a maximum of 10 kg;
  - remain seated for less than 1 hour; and
  - stand for a maximum of 15-20 minutes with poor balance while standing due to spasms and his right leg giving out, and is at constant risk of falling.
- The appellant describes constant intense knife-like pain in both his spine between his shoulder blades (which may be attributable to a past hairline fracture) and SI (sacroiliac) joint dysfunction at the base of his spine which is aggravated by bending and leaning forward. The appellant also stated that he has pain in his lumbar region which is not as significant as the thoracic and sacroiliac pain. Painful spasms are triggered by excessive weight over his right leg when standing or walking, resulting in loss of balance and 15 falls over the past five years, and by excessive or prolonged pressure against his right buttock while sitting or lying down.
- The appellant reports the need to frequently change position when standing, seated or lying down and frequently uses ice and heat for slight relief of pain and spasms.
- The rheumatologist reports perfectly normal range of movement of the appellant's neck, shoulders, elbows, wrists and small joints of his hands with no evidence of pain or tenderness in any of the joints and no evidence of enthesitis and no numbness. Full range of motion of the hips, knees, ankles and toes was also reported. Pain over the left and right facet joints at L5, S1 and L4-5 and pain on bending over and especially on straightening up. The appellant has difficulty sitting for more than 15 minutes, standing for more than 20 minutes and lifting or twisting; he can walk however for a while. "He has difficulty working at the moment because of the pain and the limited function of his back and appears to be disabled." The appellant added that he may have told the rheumatologist these limitations respecting remaining seated and walking etc. and that although the rheumatologist noted deformity of two thoracic vertebrae, this finding was not included by the rheumatologist, perhaps because it is outside his field of practice.

### Mental Impairment

- A mental disorder is not diagnosed.
- The GP reports that the appellant's ability to communicate is good.
- The GP identifies significant deficits with cognitive and emotional function for emotional disturbance (depressed), motivation and attention or sustained concentration due to pain and slowness.
- In the AR, the GP indicates that the sections addressing impact on cognitive and emotional functioning due to mental impairment or brain injury and social functioning are not applicable.
- In the SR, the appellant writes that his physical disability has adverse psychological effects including irritability, difficulty concentrating, lack of motivation, and frustration and that he has grief and despair over the loss of his abilities and lack of pain relief. At the hearing, the appellant confirmed that these impacts are secondary to his physical impairment.

DLA

- In the PR, the GP writes that the appellant has significant restrictions of daily life and his ability to care for himself and is unable to perform many tasks essential for normal daily living (achieves about 1/3 of what a typical person completes) and that those he can perform take at least 2-3 times longer to complete.
- The appellant has not been prescribed medication or treatments that interfere with his ability to perform DLA.
- The GP reports that all aspects of the DLA moving about indoors and outdoors, personal care, and basic housekeeping (usually unable to complete) as well as the physical tasks of the DLA shopping, meals, and transportation take 2-3 times longer to perform due to pain, back spasms, balance problems, and numbness.
- The appellant is not restricted in his ability to perform the DLA pay rent/bills and medications or any of the listed cognitive aspects of other DLA.
- The appellant writes that because personal hygiene and household tasks take at least twice as long as typical, he does not have enough time in a day to do all of the tasks he would like and must prioritize the most essential.
- The rheumatologist's report indicates that the appellant "can dress himself and do light housework, etc."
- The appellant describes difficulties with shaving, showering and other tasks of personal grooming due to pain from bending, leaning, and numbness in his hands and feet. He attempts to avoid positions that exacerbate pain and trigger spasms and therefore no longer changes his bedding, cleans sinks or the toilet, mops, or picks things up off the floor.
- At the hearing, the appellant stated that the comorbidity of all of his conditions makes it difficult to do most things.

Need for Help

- The GP does not identify the need for either periodic or continuous assistance from another person for any of the specific tasks of DLA listed in the PWD application form but indicates that assistance is provided by family ("mother provides minimal help") and that the appellant requires assistance described as "house keeper, homemaker."
- The GP reports that no assistive devices are currently used but that balance issues may later necessitate devices. The appellant does not have an assistance animal.
- The appellant writes that his mother sometimes performs some tasks the appellant finds too difficult including cleaning his bathroom sink or toilet, vacuuming, and changing the bedding.
- At the hearing, the appellant stated that his mother is only able to provide minimal assistance and he has no one else to help him.

## PART F – Reasons for Panel Decision

### **Issue on Appeal**

The issue on appeal is whether the ministry's decision to deny the appellant designation as a PWD was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. In particular, was the ministry reasonable in determining that:

- a severe physical or mental impairment was not established;
- the appellant's daily living activities (DLA) are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and
- as a result of those restrictions, in the opinion of a prescribed professional, the appellant does not require help, as it is defined in the legislation, to perform DLA?

### **Relevant Legislation**

#### **EAPWDA**

**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).

#### **EAPWDR**

**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 authorized under an enactment to practice the profession of

- (a) medical practitioner,
- (b) registered psychologist,
- (c) registered nurse or registered psychiatric nurse,
- (d) occupational therapist,
- (e) physical therapist,
- (f) social worker,
- (g) chiropractor, or
- (h) nurse practitioner.

#### **Severe Physical Impairment**

The appellant argues that the majority of his and his physician's evidence has been ignored including his SR, the medical reports, and the physician's assertion that the impairment is disabling. More weight should have been given to the appellant's own information in accordance with *Hudson v.*

*EAAT* and the information from his GP, a prescribed professional with 6 years' knowledge of the appellant, should be the final word. Further, the information provided has been taken out of context. For example, while the ticked boxes indicate that the appellant can climb 5 or more stairs or lift 35 pounds it does not reflect the fact that he can manage those tasks if they are unavoidable but cannot sustain or repeat them and requires considerable recuperation time. The appellant also questions how the ministry can find that a severe impairment is not established when the GP indicates that the appellant has the minimal level of functioning for both walking (less than 1 block unaided) and remaining seated (less than 1 hour). The appellant argues that the ministry's reasoning is inadequate in light of *Hudson v. EAAT* because it is unclear by what reasoning conclusions are reached.

The ministry argues that the information respecting the level of physical impairment is unclear as it would be reasonable to assume, given the reported limitations with walking and remaining seated, that the appellant would require some assistance to perform DLA. However, although the GP indicates that DLA take significantly longer, the GP has not indicated the need for assistance from another person or assistive devices.

#### *Panel Decision*

The legislation provides that the determination of severity of impairment is at the discretion of the minister, taking into account all of the evidence including that of the appellant. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a prescribed professional respecting the nature of the impairment and its impact on daily functioning. While the legislation does not define "impairment", the PR and AR define "impairment" as a "loss or abnormality of psychological, anatomical or physiological structure or functioning causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration." While this is not a legislative definition, and is therefore not binding on the panel, in the panel's opinion, it reflects the legislative intent and provides an appropriate analytical framework for assessing the degree of impairment resulting from a medical condition.

When considering the evidence provided respecting the severity of impairment, the ministry must exercise its decision-making discretion reasonably by weighing and assessing all of the relevant evidence and cannot simply defer to the opinion of a prescribed professional as that would be an improper fettering of its decision-making authority.

The panel finds that the evidence in the PR is that as a result of the pain caused by his medical conditions, most notably advanced spinal degeneration and pelvic spasms, the appellant has significant limitations in terms of his ability to walk (less than 1 block) and remain seated (less than one hour) with more moderate limitations reported for climbing steps and lifting. While, as the appellant argues, these limitations in and of themselves may not reflect either the associated difficulty or length of recovery time, as the ministry notes, and as discussed further by the panel in the following section dealing with DLA, the GP indicates that although physical tasks of DLA take 2-3 times longer to perform, the appellant manages almost all listed physical tasks of DLA without either periodic or continuous assistance from another person. The panel also notes that although the rheumatologist's 2014 consultation report stated that the appellant has pain on bending over, especially on straightening up, and has "difficulty working at the moment because of the pain and

limited function of his back and appears to be disabled”, normal range of movement is reported. Additionally, the rheumatologist’s report indicates that the appellant is able to stand for up to 20 minutes and walk “for a while” – which may reflect the appellant’s self-reported limitations or the rheumatologist’s assessment. The diagnostic imaging reports identify areas of both normal and degenerative physiology but do not address impact on physical functioning. Both the neurosurgeon and the rheumatologist recommend exercise or physical therapy.

While some of the physical functional skills reported by the GP and the appellant are clearly significant, the panel finds that the ministry was reasonable to consider this information together with the other available information including the GP’s evidence that the appellant independently manages most physical DLA tasks without any assistance and the evidence indicating that the appellant can stand for up to 20 minutes and “walk for a while.” Therefore, while the panel acknowledges that the appellant’s medical conditions and resulting pain limit his physical functioning, the panel finds that the ministry reasonably concluded that the information has not confirmed a severe physical impairment.

### **Severe Mental Impairment**

The appellant does not argue that he has a severe mental impairment but takes the position that the limitations and pain resulting from his physical impairment adversely impact his psychological functioning by causing irritability, difficulty concentrating, lack of motivation, and frustration, grief and despair over the loss of his abilities and lack of pain relief.

The ministry’s position is that a severe mental impairment has not been established by the GP’s evidence in the AR that the appellant’s impairments do not impact his cognitive or emotional functioning and that no support/supervision is required for any aspect of social functioning.

### *Panel Decision*

The panel notes that the appellant does not argue that he has a mental impairment and finds that although the appellant reports an impact on his psychological functioning and the GP identifies three significant deficits with cognitive and emotional functioning in the PR, no mental disorder has been diagnosed. Further, the appellant is otherwise reported as having a good ability in terms of social functioning, communication, and cognitive/emotional functioning and as able to manage all cognitive aspects of all DLA. Therefore, the panel finds that the ministry reasonably determined that a severe mental impairment has not been established.

### **Restrictions in the ability to perform DLA**

The appellant argues that the GP has provided evidence to establish the requisite degree of restriction and that taking 2-3 times longer to perform a DLA means 200-300% longer which is significant. Further, tables and check boxes are not necessarily accurate, especially when taken out of context. For example, the notation that the appellant takes 2-3 times longer must be considered in light of the elaborative information respecting constant interruptions due to pain and the need to



change position every 15-20 minutes, as well as the recovery period. Also, there is no obligation for the appellant to prove himself "not independent" in all categories, some of which have no bearing on a physical impairment.

The ministry's position is that from the GP's written narrative, including that the appellant is only able to achieve about 1/3 of what a typical person completes, it appears that the appellant has a significant impairment that impacts his ability to manage DLA; however, the need for assistance is not indicated and there is insufficient information to confirm the appellant's ability to manage DLA is restricted continuously or periodically for extended periods.

#### *Panel Decision*

The legislative requirement respecting DLA set out in section 2(2)(b) of the EAPWDA is that the minister be satisfied that as a result of a severe physical or mental impairment a person is, in the opinion of a prescribed professional, directly and significantly restricted in the ability to perform DLA either continuously or periodically for extended periods. Consequently, while other evidence may be considered for clarification or support, the ministry's determination as to whether or not it is satisfied, is dependent upon the evidence from prescribed professionals. DLA are defined in section 2(1) of the EAPWDR and are listed in both the PR and the AR sections of the PWD application with the opportunity for the prescribed professional to check marked boxes and provide additional narrative.

The appellant's GP, a prescribed professional, has identified restrictions in the ability to perform all physical aspects of all DLA. Additional narrative is that the appellant takes 2-3 times longer and needs to rest which the panel finds establishes these restrictions as ongoing or continuous as there is nothing to suggest other than that the appellant routinely takes 2-3 times longer to perform DLA. In considering whether the continuous restrictions are significant, the panel has considered the appellant's argument that 2-3 times longer is significant and concludes that while taking 2-3 times longer to perform some DLA such as vacuuming may amount to a significant restriction, that a person experiences pain and takes 2-3 times longer for other tasks, such as getting in or out of a vehicle, is less likely to be viewed as a significant restriction. In the appellant's case, the most compelling evidence is respecting his ability to manage the DLA basic housekeeping. As is the case for other physical DLA tasks, basic housekeeping takes 2-3 times longer but, unlike other DLA, the GP reports that basic housekeeping tasks are usually not completed, though the rheumatologist reports the ability to manage light housekeeping. While there is other compelling information, including the GP's narrative that the appellant is only able to achieve about 1/3 of what a typical person completes, the GP also reports that, except for requiring assistance from a housekeeper/homemaker, the appellant independently manages all physical tasks of DLA without either periodic or continuous assistance from another person or the use of an assistive device. As the appellant argues, there is no legislative requirement that he be proven unable to manage all DLA; however, the panel cannot find the ministry unreasonable in concluding that, given the level of independence reported for all DLA except basic housekeeping, there is not enough evidence to establish that the appellant's impairment directly and significantly restricts his ability to perform DLA either continuously or periodically for extended periods.

**Help to perform DLA**

The appellant argues that a prescribed professional, his GP, has provided sufficient information to establish the need for the significant assistance of another person with DLA and that the fact that he currently receives minimal assistance with DLA does not mean that he does not require more assistance.

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

***Panel Decision***

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

The evidence of the prescribed professional is that the appellant does not currently require the use of an assistive device, though he may in the future, and that he receives some assistance from his elderly mother and requires the assistance of a housekeeper/homemaker. In light of this evidence, and as the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established, the panel finds that the ministry reasonably concluded that it cannot be determined that the appellant requires help to perform DLA.

**Conclusion**

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