

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of April 21, 2015, which found that the appellant did not meet three of five statutory requirements of section 2 of the *Employment and Assistance for Persons With Disabilities Act* (“EAPWDA”) for designation as a person with disabilities (“PWD”). The ministry found that the appellant met the age requirement and that in the opinion of a medical practitioner the appellant’s 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 that
- as a result of those restrictions, the appellant requires the significant help or supervision of another person, an assistive device, or the services of an assistance animal

## PART D – Relevant Legislation

EAPWDA, section 2

Employment and Assistance for Persons with Disabilities Regulation (“EAPWDR”), section 2

## PART E – Summary of Facts

With the consent of the appellant (as indicated in his Release of Information dated May 25, 2015) his advocate attended the appeal hearing on his behalf. Having confirmed that the appellant was notified, the panel proceeded with the hearing in accordance with section 86(b) of the Employment and Assistance Regulation. On request by the appellant's advocate the panel granted a 15 minute recess for the advocate to review the appeal record and prepare submissions.

The information before the ministry at the time of reconsideration included the following:

- The appellant's PWD application form consisting of the appellant's self-report dated July 20, 2014; a physician's report ("PR") completed by the appellant's general practitioner (the "physician") on October 14, 2014; and an assessor's report ("AR") completed by the physician on December 12, 2014.

### Admissibility of Additional Information

Prior to the hearing the appellant submitted the following 2 documents to the office of the Employment and Assistance Appeal Tribunal with his Notice of Appeal:

- The appellant's two-page typewritten statement dated May 5, 2015; and
- An undated one-page handwritten statement from the appellant's spouse.

The ministry stated it had no objection to admissibility of these documents.

The panel considered Document 1 as consisting substantially of argument. Document 2 provides additional detail tending to corroborate information that was before the ministry in the appellant's self-report regarding restrictions to his ability to manage DLA. Accordingly, the panel has accepted Document 2 as evidence in support in accordance with section 22(4) of the *Employment and Assistance Act*.

Oral information provided by the appellant's advocate provided additional detail which was consistent with information that was before the ministry at the time of reconsideration, and was accepted by the panel as evidence in support in accordance with section 22(4) of the *Employment and Assistance Act*.

The ministry relied on its reconsideration decision and provided no additional information.

### Diagnoses

In the PR the physician diagnosed the appellant with chronic low back pain (onset 2006) and left knee pain (onset 2000). The physician commented "Chronic low back pain. No focal neurological deficits. Patient subjectively reports severe low back pain that is recurrent + affects daily functioning. No objective restrictions on office physical exam. Has daily low back pain that is aggravated by ADL but not clearly restrictive of them."

Physical Impairment

In the PR the physician reported that:

- He had seen the appellant two to ten times over the previous 12 months.
- In terms of physical functional skills the appellant can walk 4+ blocks unaided on a flat surface, climb 5+ steps unaided, can lift 15 to 35 pounds, and can remain seated for less than one hour.
- In the Additional Comments section of the PR the physician commented that the appellant has chronic discogenic low back pain and that he may benefit from a function capacity evaluation conducted by an occupational therapist to better objectively quantify the level of impairment, as the current limitations are only presently subjective reports. The physician noted that the appellant is awaiting a neurology consultation and that he was awaiting an MRI of his lumbar spine and knee which was scheduled for January 2015.

In the AR the physician reported that:

- The appellant independently manages walking indoors and outdoors, climbing stairs, standing, and carrying holding, but requires a dolly for lifting. The physician commented "Difficulty standing + sitting for prolonged periods, pain [with] ambulation."

In his self-report the appellant stated that:

- His knee hurts to the point he can barely stand and his back and legs hurt from the time he wakes up until he goes to sleep.
- Sometimes he cannot walk and he cannot stand for more than a minute without nerve pain in hips and toes.
- He had an umbilical hernia repaired and he has another one which causes him not to be able to pick things up.
- His back hurts all the time.
- He has psoriasis which causes his fingers to crack, bleed, and hurt.

In his written statement of May 5, 2015 the appellant stated that he has been referred to a social worker to conduct an assessment and he is awaiting a neurological assessment.

Mental Impairment

- In the PR the physician reported that the appellant has no difficulties with communication and has no significant deficits with cognitive and emotional function.
- In the AR the physician reported that the appellant's ability to communicate is good in all respects.
- In section B.4 of the AR the physician indicated that the appellant's impairment has a moderate impact on his attention/concentration, and minimal or no impact on 11 of the remaining 14 categories of cognitive and emotional functioning, and with no assessment provided in 2 categories. The physician commented "Worsening mood symptoms/irritability due to progressive pain symptoms. Poor concentration/loss of interest in activities when experiencing pain."

- The appellant's advocate indicated that the appellant's physical impairments affect his mood and are causing strains in his family relationships.

### DLA

- In the PR the physician indicated that the appellant has not been prescribed any medication or treatments that interfere with his ability to perform DLA. In response to a question as to whether the appellant's impairments directly restrict his ability to perform DLA, the physician responded "No", and further indicated no restrictions to any of the listed DLA.
- In the AR the physician indicated that the appellant independently manages all tasks related to all DLA, though he commented "pain symptoms aggravated by driving". With respect to the DLA of "relate to, communicate or interact with others effectively" (social functioning), the physician reported that the appellant has good functioning with his immediate social network and marginal functioning with extended social networks.

In his self-report the appellant stated that:

- He can't keep up with the chores so his wife does most of the housework and outside work.
- He tries to help with chores but can only try for a short while then has to lie down.
- His impairments have caused him to take a less demanding job and he can only work three days a week and earn "below poverty wages." Previously he had been making a good living and worked full time all his life.

In his written statement of May 5, 2015 the appellant stated that his wife helps him with mobility issues and is forced to manage all tasks related to basic daily living and parenting.

In her written statement the appellant's wife stated that:

- She has watched the appellant struggle with pain on a daily basis.
- She has to assist the appellant with his DLA such as driving, running errands, preparing meals, and household chores. She now does most DLA.

At the hearing, the appellant provided the following oral information through his advocate:

- The appellant and his spouse feel the information provided by the physician doesn't adequately reflect the severity of his impairments or the restrictions to DLA resulting from his impairments. The physician has said that the appellant is too young to be experiencing the issues he has reported.
- The appellant requires help with DLA, everything from standing to sitting, and he sometimes needs help with getting his shirt on over his arm. He cannot assist with maintenance of the family home as he cannot bend to load the dishwasher, for example.
- Other DLA take longer than typical or require the assistance of another person, primarily the appellant's wife.
- The appellant uses the handrails when climbing stairs and his wife sometimes has to walk behind him on the stairs to be available to provide support because his balance is poor.
- The appellant uses support bars in the bathroom for tub, shower, and toilet.

- Further investigations are in process. The appellant has been referred and is waiting for an appointment with the pain clinic. He has been referred to a social worker for an independent assessment. He is also awaiting a neurological assessment.

In response to a question from the panel, the appellant's advocate responded that she has no information as to whether the appellant attended an MRI session in January 2015.

Help

- In the PR the physician reported that the appellant does not require any prostheses or aids for his impairment. The physician commented "Requires family assistance [with] ADL".
- In the AR the physician indicated that the appellant does not have an assistance animal.

## PART F – Reasons for Panel Decision

The issue on this 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 the appellant does not have a severe physical or mental impairment, and that in the opinion of a prescribed professional the appellant's impairments do not directly and significantly restrict him from performing DLA either continuously or periodically for extended periods, and that as a result of those restrictions the appellant does not require help to perform DLA?

The relevant legislation is as follows:

### 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.

**EAPWDR section 2(1):**

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.

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**Severe Physical Impairment**

The appellant's position is that the pain and instability caused by his back and knee problems constitute a severe physical impairment. He argued through his advocate that his mobility is impaired and noted that the physician confirmed that he requires a dolly for lifting. The appellant also argued that the physician did not accurately reflect the severity of the appellant's impairment in the application forms.

The ministry's position, as set out in its reconsideration decision, is that the information provided by the physician does not establish that the appellant has a severe physical impairment. The ministry argued that the physician reported the appellant as independently managing all activities requiring mobility and physical ability except lifting, for which the appellant requires the use of a "dolly." The ministry argued that a dolly is not an assistive device as defined in section 2(1) of the EAPWDA.

**Panel Decision:**

A diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment. An "impairment" is a medical condition that results in restrictions to a person's ability to function independently or effectively.

To assess the severity of an impairment 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 performing DLA is restricted. A medical barrier to the appellant's ability to engage in paid employment is not a legislated criterion for severity. The legislation makes it clear that the determination of severity is at the discretion of the minister, and that the fundamental basis for the

analysis is the evidence from prescribed professionals – in this case, the appellant’s physician.

The physician’s assessment of the appellant’s physical functioning in the PR is at the higher end of the scale except for remaining seated. In the AR the physician indicated that the appellant independently manages virtually all aspects of mobility and physical activity, except for the appellant’s use of a dolly for “lifting.” Read in context with the physician’s evidence in the PR that the appellant can lift 15 to 35 pounds, the evidence indicates that the appellant requires a dolly for lifting weights greater than 15 to 35 pounds. Based on the plain meaning of the definition of “assistive device” in section 2(1) of the EAPWDA, the panel finds that a dolly is not an assistive device because it is not primarily designed for the purpose of enabling a person with a severe physical or mental impairment to perform DLA.

The physician noted that the evidence for the appellant’s impairments is the appellant’s own subjective statements. He stated that there were “No objective restrictions on office physical exam.” The physician has recommended that objective information should be obtained through an occupational therapist’s assessment, a neurology examination, and an MRI examination. No such objective evidence is before us. Because of the emphasis on professional opinion and evidence in the legislation, where there is a conflict between the physician’s evidence and that of the appellant or his wife, the panel has given more weight to the physician’s evidence. The physician has not identified a hernia or psoriasis (referenced by the appellant in his self-report) as impairments and has not provided any information on how those conditions may affect the appellant’s functional abilities.

There are frequent references in the evidence to the impact the appellant’s medical conditions have on his ability to work at paid employment. The panel notes that employability is not a statutory criterion regarding PWD designation – the focus of the legislation is on the ability to perform DLA. Paid employment generally requires a higher level of functioning than DLA. As discussed below under the heading Significant Restrictions to DLA, the appellant’s impairment does not appear to have translated into significant restrictions in his ability to manage DLA.

Based primarily on the physician’s evidence of the lack of objective restrictions, and the high levels of physical functioning he reported, the panel concludes that the ministry reasonably found that the evidence does not establish a severe physical impairment.

### **Severe Mental Impairment**

The appellant did not expressly advance an argument regarding a severe mental impairment. He did, however, argue that pain causes him to be irritable and it is affecting his relationships.

The ministry’s position is that the evidence does not demonstrate a severe mental impairment. The ministry referred to the physician’s evidence about there being minimal or no impacts to cognitive and emotional functioning, the appellant’s good communication skills, and that the appellant does not require support or supervision with any aspects of social functioning.

### **Panel Decision:**

The legislation (EAPWDA section 2(2)) requires that a severe impairment must be identified by a medical practitioner and be confirmed as being likely to continue for at least 2 years. The physician



has provided no diagnosis of a mental health condition, though he commented on the appellant demonstrating irritability, loss of interest in activities, and poor concentration “when experiencing pain.” There is no medical evidence to show that the appellant has any significant difficulties with communication, decision-making or social functioning. The physician has reported that the appellant’s impairments cause a moderate impact in one of fourteen categories of cognitive and emotional functioning (attention/concentration), but otherwise have minimal or no impact.

Based on the foregoing evidence, the panel concludes the ministry reasonably determined that the appellant does not have a severe mental impairment.

### **Significant Restrictions to DLA**

The appellant’s position is that his impairments, primarily due to back and knee pain, significantly restrict his ability to manage his DLA. He argued that he relies substantially on his wife to manage DLA.

The ministry’s position, as set out in its reconsideration decision, is that there is not enough evidence to confirm that the appellant’s impairments directly and significantly restrict his ability to perform DLA either continuously or periodically for extended periods. The ministry argued that the physician indicated that the appellant independently manages all DLA.

### **Panel Decision**

The legislation – s. 2(2)(b)(i) of the EAPWDA – requires the ministry to substantially assess direct and significant restrictions of DLA in consideration of the opinion of a prescribed professional, in this case the appellant’s physician. 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 professional’s opinion is fundamental to the ministry’s determination as to whether it is “satisfied”.

The evidence of the physician is that the appellant independently manages virtually all tasks related to all DLA. His evidence on this point is consistent in the PR and the AR which he completed almost two months later. It is also consistent with the opinion expressed by the physician in narrative in the PR that the appellant’s low back pain is aggravated by DLA but is “not clearly restrictive of them”. The appellant’s evidence and that of his wife – that the appellant requires his wife’s assistance with almost all DLA – is not consistent with that of the physician. For the reasons given above under the discussion of Severe Physical Impairment, the panel has given more weight to the physician’s evidence where it differs from that of the appellant and his wife.

Based on the lack of any medical evidence of direct and significant restrictions to the appellant’s ability to manage DLA independently, the panel finds that the ministry’s was reasonable in concluding that there is not enough evidence to confirm that the appellant’s impairments directly and significantly restrict his ability to perform DLA either continuously or periodically for extended periods.

### **Help with DLA**

The appellant’s position is that he requires significant assistance with DLA, relying substantially on

his wife. He argued that the physician confirmed that he requires the assistance of his family to help with DLA and he uses a dolly as an assistive device for lifting. The appellant's advocate stated that he also uses support bars in the bathroom for tub, shower, and toilet.

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

Panel Decision

A finding that a severe impairment directly and significantly restricts a person's ability to manage his DLA either continuously or periodically for an extended period is a precondition to a person requiring "help" as defined by section 2(3)(b) of the EAPWDA. For the reasons provided above, the panel finds the evidence falls short of satisfying that precondition.

Accordingly, the panel finds that the ministry reasonably concluded it could not be determined that the appellant requires help with DLA as defined by section 2(3)(b) of the EAPWDA.

Conclusion

Having reviewed and considered all of the evidence and the relevant legislation, and for the reasons provided above, the panel finds that the ministry's decision finding the appellant ineligible for PWD designation is a reasonable application of the legislation in the circumstances of the appellant. The panel therefore confirms the ministry's decision.