

PART C – Decision under Appeal

The Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated 17 June 2015 determined 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 his impairment was likely to continue for at least 2 years. However, the ministry was not satisfied that

- the appellant had a severe mental or physical impairment and
- that the appellant's mental or physical impairment, in the opinion of a prescribed professional, directly and significantly restricted his daily living activities (DLA) either continuously or periodically for extended periods and
- that as a result of those restrictions, in the opinion of a prescribed professional, the appellant required help to perform DLA.

PART D – Relevant Legislation

Employment and Assistance for Persons with Disabilities Act (EAPWDA), section 2
Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), section 2

PART E – Summary of Facts

The following evidence was before the ministry at the time of reconsideration:

- A 3 page PWD Application – Applicant information (Self Report – SR) completed by the appellant and his advocate on 2 February 2015 indicated that:
 - The appellant suffers from chronic myofascial pain syndrome, degenerative disc disease, hepatitis C, carpal tunnel syndrome, fibromyalgia and depression since approximately 2004;
 - He developed permanent plantar fasciitis causing sharp pain in his feet and preventing him from standing more than 10 minutes;
 - Numerous other ailments are causing pain making it difficult to do any menial task and even sit;
 - He suffers from insomnia;
 - He is always in fear of re-hurting himself;
 - His insomnia contributes to making him always forgetful to the point that he may forget something in the oven and being reminded by the smoke detector;
 - He finds it very difficult to put on clothes and may use the same clothes for a month at a time;
 - He is unable to wash his teeth and cannot keep his arms up for any length of time making it difficult cleaning himself;
 - He finds it extremely painful to do housekeeping and will do it only when it is unhygienic to ignore it and laundry takes him 20 times as long as it used to and most of the cleaning is done by housemates;
 - He leaves the house for groceries shopping twice a month, wearing a backpack since he cannot carry anything with his hands and the load has to be minimal as he cannot carry anything heavier than 10 lbs;
 - It takes him 4 times as long to cook and it must be short since he must stop and put ice on his arm and if he spends 1 hour in the kitchen, he will have to spend the rest of the day in bed to recover;
 - He can hardly take a bus as he cannot run to catch the bus and is afraid of further injury caused by the jolt of departing and stopping;
 - He is taking a number of medications for chronic pain, depression and insomnia including sleeping pills, anti-depressants and acetaminophen;
 - He uses orthotics for his feet.
- An 8 page Physician Report (PR) dated 17 February 2015 completed and signed by the appellant's physician, a general practitioner (GP), indicated the following:
 - Specific diagnoses: chronic myofascial pain syndrome, hepatitis C and depression, onset before 2004. The GP also made a comment to the effect that the appellant's old records were not available except for a summary from previous physician in 2004.
 - Health history: The GP referred to the appellant's SR as to how it affects his life. He added:
 - the appellant suffers from pain in his neck, back, legs and arms, limiting his activities;
 - is unable to stand, lift, sit for too prolonged periods;
 - pain aggravated by ADL;
 - had bilateral surgery for carpal tunnel syndrome but continues to have pain;
 - not found any relief from previous medications;
 - depressed and has not found previous antidepressants helpful;

- old records not available to see previous consultations, investigations and treatment.
- The appellant was prescribed medication that interfered with his ability to perform DLA. The GP explained that he had not found any medication that have helped – side effects of previous medications tried and unable to afford medications “Lyrica helped but could not afford”, - currently on no medications.
- The appellant is currently not using any prostheses but was treated with an air cast and wrist splint in past.
- The impairment was likely to continue for 2 years or more from that date and the GP explained that pain is chronic, unlikely to improve.
- In terms of functional skills, the GP indicated that the appellant could walk 1 to 2 blocks unaided, he could climb 2 to 5 steps unaided, he was limited to lifting no more than 7 kg, with a note “able to lift but not repetitively”, he could remain seated less than 1 hour and the GP did not indicate if the appellant had difficulties with communication but checked “Other”, without further comment.
- In terms of significant deficits with cognitive and emotional functions, the GP identified 2 areas: emotional disturbance and motivation but provided no details.
- In terms of general additional comments, the GP reiterated that he had limited knowledge of the appellant’s past history because he did not have access to his old records and had only been his GP since July 2014. The GP added that the appellant had previous scope to left knee, had bilateral carpal tunnel surgery but no other surgeries.
 - The GP had seen the appellant 2 to 10 times during the previous 12 months.
- An 11 page Assessor Report (AR) also dated 17 February 2015, completed and signed by the same GP indicated the following:
 - The appellant lived alone, renting a room in a house occupied by another family (not relatives).
 - The GP indicated the following impairments impacting the appellant’s ability to perform DLA: Depression, chronic myofascial syndrome, chronic pain in hands from carpal tunnel syndrome – no better after surgery – lacks motivation likely as a result of depression.
 - The appellant’s speaking and hearing abilities are good but his reading and writing abilities are poor because he fatigues easily – unable to concentrate for prolonged periods – pain in hand holding pen.
 - In terms of mobility and physical ability, he is independent walking indoors and outdoors, climbing stairs and standing with the comment that he must take frequent breaks due to fatigue and pain; he needs periodic assistance from another person for lifting, carrying and holding. The GP also comments that the appellant is unable to do repetitive activities for prolonged periods due to fatigue and exhaustion.
 - In terms of cognitive and emotional functioning, the GP identified 6 areas with moderate impact: bodily functions, emotions, attention/ concentration, executive, memory and motivation; 3 areas with minimal impact: consciousness, motor activity and other emotional or mental problems; 5 areas with no impact: impulse control, insight & judgment, language, psychotic symptoms and other neuropsychological problems. The GP also commented that the appellant suffered from depression affecting his memory, causing difficulties concentrating; the appellant lacks motivation as a result of depression; often he does not prepare meals or only makes simple meals; he has problems sleeping.
 - In terms of DLA, the appellant is independent in the following areas:
 - Personal care (comments: generally able to care for himself but when depression is bad, lacks motivation and does not look after himself well – if he is in a lot of pain, is

- limited in what he can do and takes longer to perform DLA).
- Reading prices and labels;
- Making appropriate choices;
- Paying for purchases;
- Pay rent and bills;
- Medications;
- Using transit schedules and arranging transportation.
- The appellant needs periodic assistance from another person for:
 - Laundry;
 - Basic housekeeping;
 - Going to and from stores (comment: can drive short distances unless he is having pain);
 - Meals (comment: meal assistance at times – only prepares simple meals – lacks motivation due to depression and chronic pain makes meal preparation difficult);
 - Getting in and out of a vehicle;
 - Using public transit (comment: difficulty getting to bus stop and if bus is full and has to stand).
- The appellant needs continuous assistance from another person or unable:
 - Carrying purchases home (comment: cannot carry anything heavier than 5 to 10 lbs & can only carry on short distances).
- In terms of general comments on DLA, the GP wrote that the appellant's requirements change depending on his level of pain and motivation – would require assistance with any repetitive manual activity and with lifting/carrying anything heavy.
- In terms of social functioning, a section the assessor was asked to complete only if the appellant had an identified mental impairment, including brain injury, the GP left that section blank, with no comment.
- The appellant's functioning is marginal in terms of immediate and extended social networks, with no comment.
- The GP indicated that counselling may help with the depression but that the appellant stated antidepressants had not helped.
- In terms of assistance provided by other people, the GP indicated "Other" and commented that his room was cleaned by others in the house where he lives, that he had no regular assistance with shopping and that others in the appellant's home occasionally assist with laundry. In terms of help required where none is available, the GP mentioned "occasional transportation with assistance to purchase groceries".
- The GP indicated that the appellant routinely uses toileting and bathing aids to help compensate with his impairment. The GP added that the appellant occasionally used crutches in the past when he was having severe pain in his legs, that he has orthotics for his feet and that he currently lives in a house with toilet and bathtub supports that he finds useful.
- The appellant did not have an assistance animal.
- In "Additional Information" the GP wrote: "Limited in his activities due to pain, weakness, fatigue and lack of motivation due to depression".
- The GP's sources of information were:
 - Office interview with appellant and
 - Other assessment: old form from 2004 by previous family doctor.
- This was not the first contact with the appellant and he has known him since July 2014 and has seen him 11 or more times during the previous 12 months.

- The GP provides medical services to the appellant.
- In his request for reconsideration dated 17 June 2015, the appellant reiterated what was in his SR and further indicated the following:
 - He cannot stand more than 5 minutes before he experiences severe pain in his feet due to the heel pain syndrome and as a result he requires continuous assistance for any activities where he must stand for more than 5 minutes;
 - He sleeps in his clothes 2 to 3 times per week to avoid having to get dressed the next day;
 - He has to limit showering every 3 to 4 days and needs assistive devices to access the shower and to sit as he cannot stand;
 - He brushes his teeth once a week because he cannot hold a toothbrush without pain;
 - When he goes to the toilet, he has difficulties wiping and often have to shower after to clean himself properly;
 - He struggles to hold a knife or fork and cannot cut his food and as a result, he only eats food that does not need to be cut;
 - It takes much longer to get out of bed as it is a lengthy process and it takes 5 to 6 times longer to get in and out of a vehicle.
- With his request for reconsideration, the appellant provided the following documents:
 - A Medical Report for employment dated 22 November 2004 by his then family doctor that indicated the appellant had a permanent or chronic mental or physical impairment that was likely to continue for at least 2 years and was the primary barrier to finding and maintaining employment and the physician indicated the appellant suffered from chronic myofascial pain syndrome, degenerative disc disease, carpal tunnel syndrome, heel pain syndrome / achilles tendinitis and right metatarsa osteoarthritis.
 - A letter dated 2 June 2015 by the appellant's landlady indicated that she has lived with the appellant since January 2015 and has witnessed that he required frequent ongoing assistance on a near daily basis and more specifically:
 - Shower seat;
 - Grab bar to get in and out of the shower;
 - Grab bar near the toilet;
 - Assistance to prepare meals (appellant completely unable to cook for himself);
 - Assistance to complete household tasks including washing dishes, vacuuming and doing laundry;
 - Assistance to shop for personal needs;
 - She also indicated that the appellant regularly slept on the floor because of his back pain.

At the hearing, the appellant provided the following additional oral evidence:

- Since 2004, when a previous medical report was completed, he estimated that his health conditions had worsened.
- He went abroad to his home country on a number of occasions between 2010 and 2013 to find employment but that did not materialize and he then returned to Canada.
- The appellant gave his SR to his family physician approximately 2 weeks before the PR and the AR were completed so that the GP could familiarize himself with its content and take that into account when completing parts 2 and 3 of the ministry's form.
- After the reconsideration decision and before the appeal, the appellant went back to his GP,

asking him to provide more information about his medical condition than what appeared in the PR and the AR but the GP declined.

The panel determined the additional oral evidence was admissible under s. 22(4) of the Employment and Assistance Act (EAA) as it was in support of the records before the ministry at reconsideration and corroborated some of the facts then presented.

PART F – Reasons for Panel Decision

The issue under appeal is whether the ministry's determination that the appellant has not met all of the eligibility criteria for designation as a PWD because it was not satisfied that

- the appellant had a severe mental or physical impairment and
- that the appellant's mental or physical impairment, in the opinion of a prescribed professional, directly and significantly restricted his DLA either continuously or periodically for extended periods and
- that as a result of those restrictions, in the opinion of a prescribed professional, the appellant required help to perform DLA

was either a reasonable application of the legislation or reasonably supported by the evidence. The ministry determined that the age requirement and that her impairment was likely to continue for at least 2 years had been met.

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

2 (1) In this section:

"**assistive device**" means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform;

"**daily living activity**" has the prescribed meaning;

"**health professional**" repealed

"**prescribed professional**" has the prescribed meaning;

(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person has a severe mental or physical impairment that

(a) in the opinion of a medical practitioner is likely to continue for at least 2 years, and

(b) in the opinion of a prescribed professional

(i) directly and significantly restricts the person's ability to perform daily living activities either

(A) continuously, or

(B) periodically for extended periods, and

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

(3) For the purposes of subsection (2),

(a) a person who has a severe mental impairment includes a person with a mental disorder, and

(b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires

(i) an assistive device,

(ii) the significant help or supervision of another person, or

(iii) the services of an assistance animal.

(4) The minister may rescind a designation under subsection (2).

Section 2 of the EAPWDR provides further clarification:

2 (1) For the purposes of the Act and this regulation, "**daily living activities**",

(a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:

(i) prepare own meals;

(ii) manage personal finances;

- (iii) shop for personal needs;
 - (iv) use public or personal transportation facilities;
 - (v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
 - (vi) move about indoors and outdoors;
 - (vii) perform personal hygiene and self care;
 - (viii) manage personal medication, and
- (b) in relation to a person who has a severe mental impairment, includes the following activities:
- (i) make decisions about personal activities, care or finances;
 - (ii) relate to, communicate or interact with others effectively.
- (2) For the purposes of the Act, "**prescribed professional**" means a person who is
- (a) authorized under an enactment to practise the profession of
 - (i) medical practitioner,
 - (ii) registered psychologist,
 - (iii) registered nurse or registered psychiatric nurse,
 - (iv) occupational therapist,
 - (v) physical therapist,
 - (vi) social worker,
 - (vii) chiropractor, or
 - (viii) nurse practitioner, or
 - (b) acting in the course of the person's employment as a school psychologist by
 - (i) an authority, as that term is defined in section 1 (1) of the *Independent School Act*, or
 - (ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the *School Act*, if qualifications in psychology are a condition of such employment.

The appellant's self report and the physician / assessor's reports:

At the hearing the appellant argued that the ministry did not give enough weight to the appellant's SR in its decision and that the SR should be part of the physician's PR as confirming its content and adopting it as part of his medical opinion because of the mention in it, stating "See summary from patient as to how it affects his life".

The ministry argued that it could give more weight for the GP's reports because it is mandated by the legislation and because of conflicting evidence between the SR and the PR/AR, mandating that more weight be given to the professional who is asked by law to provide such reports.

Panel decision:

The panel notes that there is no evidence that the GP did adopt the appellant's SR as his own and that when the appellant asked him to provide more information as a result of the ministry's first denial of PWD status, the GP declined to provide such information. Further, s. 2(2)(b) of the EAPWDA specifically refers to the opinion of a prescribed professional. In this matter, the PR and the AR were completed by the appellant's GP with the knowledge of the difficulties the appellant had in his daily activities that he had provided during his many appointments with his family physician since July 2014 (11 or more times according to the AR) and with his SR. The panel also takes into account that the physician has an ethical duty to provide accurate and true information as being part of the

medical profession. Thus, the panel finds that the ministry reasonably determined that more weight should be given to the prescribed professional's reports than to the SR since the GP was the professional chosen by the appellant to provide that information to the ministry, given the GP's medical training and objectivity and the legislative requirements.

Severity of impairment:

The panel notes that the legislation clearly 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.

A diagnosis of a serious medical condition or conditions does not in itself determine PWD eligibility or establish a severe impairment. While the legislation does not define "impairment", the ministry's PR and AR form 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.

Severe physical impairment:

The appellant argued that the ministry disregarded the evidence provided by the appellant in his SR and in his submission in support of his request for reconsideration and that, based on this evidence, the severity of the physical impairment should have been confirmed. As well, the fact that the appellant needed assistive devices (toileting aids, bathing aids, orthotics and, in the past, crutches, wrist splints and air cast) demonstrated a severe impairment to that area of functioning.

The ministry argued that the medical evidence fell short from demonstrating a severe physical impairment but was rather consistent with a moderate impairment. The ministry further argued that the use of assistive devices was no evidence of the severity of the impairment.

Panel decision:

There are significant contradictions between the GP and the appellant's description of his physical condition; for instance, the appellant stated that on occasion he must wear a brace on his wrists or legs for 2 weeks while the GP indicated in the PR that the appellant was "currently not using any prostheses (was treated with air cast and wrist splints in past)" and in the AR: "has occasional used crutches in past when he was having severe pain legs. Has orthotics for feet." In the same paragraph of the AR, he was asked what equipment or devices did the appellant routinely use to compensate with his impairment and the boxes before crutches, splints and braces were **not** checked. According to the GP in his reports, the appellant is independent in most of his mobility and physical abilities other than having to take frequent breaks and needed periodic assistance for carrying, lifting and holding. He is independent for the majority of DLA.

Given those inconsistencies between the SR and the GP's reports and the legislation (s. 2(2) of the EAPWDA), the panel finds the ministry reasonably relied mainly on the PR and the AR in determining whether the appellant's physical impairment was *severe*. The panel also finds that the definition of "Assistive device" at s. 2(1) of the EAPWDA does not suggest that as a result of someone having to use an assistive device, this would be evidence of a severe impairment, as argued by the appellant. The evidence shows that the only assistive devices mentioned by the GP are toileting aids, bathing aids and orthotics for his feet (AR) but he does not require any prosthesis or aids for his impairment (PR). The panel finds that those assistive devices, even including the occasional use of braces as stated by the appellant, could not by themselves make it unreasonable for the ministry to determine that the appellant had not demonstrated a severe physical impairment.

Given the evidence presented, the panel comes to the conclusion that the ministry could reasonably determine the appellant did not establish a severe physical impairment.

Severe mental impairment:

The appellant used the same arguments as for physical impairment to support his position that the ministry was unreasonable in determining he had not established a severe mental impairment.

The ministry argued that while there were limitations in terms of cognitive and emotional functioning due to depression, there was not enough information to establish a severe mental impairment.

Panel decision:

The panel notes that there is a diagnosis of depression in the PR and that there are several mentions that the appellant suffers from depression, including in his own SR and in the doctor's report from 2004. However, the GP in the AR indicated no major impact on the appellant's cognitive and emotional functioning and moderate impacts on bodily functions (the panel notes however that the appellant describes a much more significant impact on hygiene, toileting and sleep disturbance), emotion, attention/ concentration, executive, memory and motivation. The panel does not give much weight to the 2004 report since it is dated and was done for the purpose of employment and not for a PWD application but noted that the physician indicated no sensory, cognitive, mental health, learning disability and communication impairments.

S. 2(1)(b) of the EAPWDR prescribes two DLA that are specific to mental impairment: making decisions about personal activities, care or finances (decision-making) and relating to, communicating or interacting with others effectively (social functioning). In terms of decision-making, the appellant is independent (personal care, reading prices and labels, making appropriate choices, paying for purchases, pay rent and bills, medications and using transit schedules and arranging transportation). The panel also notes the GP did not complete a large part of the form dealing with support/supervision required in terms of social functioning and the panel notes that at the top of that section, it is stated "Social Functioning – Only complete this if the Applicant has an identified mental impairment, including brain injury." There is no explanation as to why the GP did not complete that part of the form but he did characterize the impact of the mental impairment on the appellant's immediate and extended social network as "marginal functioning" and mentioned at the bottom of the page "Counselling may help with his depression (he states antidepressants have not helped)".

The panel finds that given the evidence provided and the inconsistencies between the appellant's SR and the prescribed professional's reports, the ministry reasonably based its analysis on the evidence provided by the prescribed professional and reasonably determined there was not enough information to determine that the appellant had a severe mental impairment.

Daily living activities:

The appellant argued that there is ample evidence to show that the appellant needs periodic assistance from another person for many DLA and that continuous assistance is required with carrying purchases home. Further, the appellant argued that periodic was defined as "periodically for extended periods" and that was the definition the GP used to complete the forms. Additionally, the GP should not have to provide any further definition of "periodic" when completing the form.

The ministry argued that there were many contradictions between the SR and the GP's reports in terms of DLA, that the nature, frequency and duration of the periodic assistance required was not described and that the frequency and duration of the periods when the appellant needs such assistance could not be determined based on the information provided.

Panel decision:

At the outset, the panel notes that the form does define "periodic assistance" at page 17 of 28: "Periodic assistance – refers to the need for significant help for an activity some of the time as would be the case where a person required help due to the episodic nature of the impairment." The forms consistently mention "Periodic assistance from another person" in its questions and for each item, the prescribed professional is asked to "Explain / describe". In fact, the GP did understand that since he completed some of those questions; for instance in terms of personal care he wrote under "Explain / Describe": "Generally able to care for himself but when depression is bad, lacks motivation and does not look after himself well – if he is in a lot of pain, is limited in what he can do and takes longer to perform [DLA]." In terms of meals he wrote "Meal assistance at times – only prepares simple meals – lacks motivation due to depression and chronic pain makes meal preparation difficult".

The panel notes that the GP provided no information about the nature, frequency and the level of assistance required for those DLA where the appellant required periodic assistance. The SR on the other hand stated that the appellant required continuous assistance in most of his DLA, which is an obvious contradiction with his GP's report. There are also inconsistencies within the appellant's own evidence. For instance in his request for reconsideration, he wrote that he was limited to showering to every 3 – 4 days but in the next paragraph, he stated that he often had to shower after using the toilet to clean himself properly. In the AR, the GP mentions that the appellant needs periodic assistance with lifting, carrying and holding and continuous assistance "Carrying purchases home" while the appellant in his own evidence stated that he could buy what he could carry in a small backpack and bring it home and he showed the backpack to the panel at the hearing. That begs the question as to how periodic such assistance would be required? No evidence was provided in that respect.

As mentioned above, the appellant's evidence is that for most of his DLA he needs continuous assistance while the GP in the PR and the AR mentions that the appellant is independent for the

majority of DLA but needs periodic assistance for a number of them without explaining how often, how long and what assistance was required. Given those contradictions the panel concludes that the ministry reasonably determined there was not enough information to establish that the appellant's impairments directly and significantly restricted DLA continuously or periodically for extended periods.

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

The appellant argued that the GP indicated a need for significant help with a large number of DLA and that he required several assistive devices to help compensate for his impairment.

The ministry argued that since DLA are not significantly restricted, it cannot be determined that significant help is required from other persons is required. In terms of assistive devices, the ministry argued that the use of simple assistive devices does not establish the existence of a severe impairment that significantly restricts the ability to manage DLA.

Panel decision:

The panel notes that nowhere in the GP's reports is there any mention of *significant help* required, as argued by the appellant. The GP mentions that help is required at times, or with any repetitive manual activity, that counselling could help, others in home provide occasional assistance but there is no evidence as to the extent of the help required. In terms of assistive devices, those that he has are helpful but given the panel's finding that the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established, the panel further finds that the ministry's conclusion that it cannot be determined that the appellant requires help to perform DLA as a result of those restrictions was reasonable.

Conclusion:

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