

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated September 10, 2015 which found that the appellant did not meet two 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 he has a severe physical impairment that, in the opinion of a medical practitioner, is likely to continue for at least two years. However, the ministry was not satisfied that the evidence establishes that:

- 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 Person With Disabilities (PWD) Application comprised of the applicant information and self-report dated May 25, 2015, a physician report (PR) and an assessor report (AR) both dated May 25, 2015 and completed by a general practitioner who has known the appellant for one year.

The evidence also included the Request for Reconsideration dated August 25, 2015.

### ***Diagnoses***

In the PR, the appellant was diagnosed by the general practitioner with chronic MSRA [methicillin-resistant staphylococcus aureus] in his feet and venous insufficiency, both with an onset in December 2011. The general practitioner noted that the appellant was still to see an infectious disease specialist. In the AR, when asked to describe the mental or physical impairments that impact the appellant's ability to manage daily living activities, the general practitioner wrote: "physical problem with his feet."

### ***Daily Living Activities (DLA)***

In the PR and AR, the general practitioner reported that:

- In terms of health history, the appellant has "...severe MSRA feet infection causing him to be unable to walk long distances."
- The appellant has not been prescribed medications and/or treatments that interfere with his ability to perform DLA.
- The appellant has no difficulties with communication.
- The appellant is not restricted with several listed DLA, specifically: personal self care, meal preparation, management of medications, use of transportation, management of finances, and social functioning.
- The appellant is continuously restricted with several listed DLA, specifically: basic housework, daily shopping, and mobility inside and outside the home. Regarding the degree of restriction, the general practitioner wrote: "...swollen painful feet make him (sic) to walk slow and short distance. Severe pains after walking."
- In the additional comments to the PR, the general practitioner wrote that the appellant sometimes needs to go to the hospital twice a day for IV antibiotics.
- The appellant has a good ability to communicate in all areas. An additional check is included to indicate that the appellant has satisfactory hearing.
- The appellant uses an assistive device and takes significantly longer than typical with moving about indoors and outdoors and the general practitioner wrote: "...due to severe feet pain he uses a walker and walks slowly."
- The appellant is independently able to perform every task of several DLA, specifically: basic housekeeping, meals, paying rent and bills, managing medications and social functioning.
- The appellant uses an assistive device and takes significantly longer than typical with tasks of the DLA personal care (transfers in/out of bed and on/off chairs), while remaining independent with the tasks of dressing, grooming, bathing, toileting, feeding self and regulating diet, and with a task of the DLA shopping (going to and from stores), while remaining independent with the tasks of reading prices and labels, making appropriate choices, paying for purchases and carrying purchases home. The general practitioner wrote: "...pain worse on sitting or lying down, he uses his walker to get up; he needs to do first steps before he could walk otherwise he falls. He walks slow."

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- The appellant takes significantly longer than typical with the task of getting in and out of a vehicle, while remaining independent with using transit schedules and arranging transportation as part of the transportation DLA.. The general practitioner wrote: "...after sitting for a while, he needs to put his feet on ground slowly and stand then take first steps, then he can start walking slow."
  - In the additional comments to the AR, the general practitioner wrote: "...chronic feet MRSA infection and venous insufficiency causing severe feet pain and swelling, making walking very difficult. He needs to walk slowly."

In his self-report, the appellant wrote that:

- The pain in his feet makes walking even short distances painful.
- He can only walk short distances around his apartment and he uses a walker to walk outside for short distances.

In his Request for Reconsideration, the appellant wrote that:

- His original application states that he can walk 2 blocks unassisted but he cannot walk unassisted outside without his walker.
- He cannot sit with his feet on the floor without causing extreme pain.
- Wearing socks or shoes for a short time causes pain in his feet.
- His feet hurt badly when he is in bed or sitting in his apartment.
- He sleeps poorly and wakes up in pain when he moves his feet.

### ***Need for Help***

The general practitioner reported in the PR that the appellant "uses a walker to walk around" and, in the AR, that the appellant lives alone and assistance is provided by his friends, namely "...his neighbors at the apartment building." For assistance provided through the use of an assistive device, the general practitioner indicated a walker and wrote: "walker with wheels and a chair in case he needs to sit."

### ***Additional Information***

In his Notice of Appeal dated September 23, 2015, the appellant expressed his disagreement with the ministry's reconsideration decision and wrote that he has a severe physical impairment that impacts him significantly on a daily basis, with everything that is needed to be done. It is a challenge in his daily life to get what needs to be done with assistance from people.

A the hearing, the appellant provided the following additional documents:

- 1) Letter dated October 13, 2015 in which a registered nurse wrote that:
  - The appellant has been receiving services from home health nursing regularly since September of 2014; he is seen once weekly, with more appointments booked depending on his health care needs.
  - The appellant has been diagnosed with bilateral MRSA cellulitis to his lower limbs and feet and has been a recurrent issue in the past number of years; the treatment is intravenous anti-biotics which may need to be administered twice daily (every twelve hours).
  - The appellant has received the following types of services: intravenous medication administration, peripherally inserted central catheter (PICC) care and chronic wound care; and,

2) Undated statement signed by the general practitioner in which the appellant wrote that:

- He cannot independently manage all of his DLA.
- For personal care, he has a bar in his shower to grab/hold onto. Showering must be quick as his feet hurt extremely badly even for short periods of time. He has a neighbor who stands outside his bathroom for safety reasons to make sure he does not fall. Having a bath is impossible since he would not be able to bend down or get back up safely. Toileting is an issue as the toilet is quite low and getting back up safely has been difficult;
- For basic housekeeping, shopping, meals, paying rent and bills, picking up medications and transportation, he has to rely on people around him to help with all aspects of daily living because of his bad feet and the constant pain. There have been periods where he has not had the help so he has gone without food, medication, and paying bills. He relies on the food bank and others to get him there as he cannot walk or drive.
- He cannot do stairs as he has tried and fallen or ripped off the rails which he must use every time. He cannot do anything without his walker to hold onto.
- He has felt overwhelmed and depressed. This “puts quite a damper” on his social life as he can no longer enjoy the things he used to.

At the hearing, the appellant and his advocate stated that:

- The statement by the appellant was reviewed with the general practitioner this week and the general practitioner signed the statement. There was information missing from the PWD application that is covered in the new statement.
- The appellant receives \$610 from the ministry and his rent is \$553 so there is little left over at the end of the month.
- The appellant cannot walk or drive and there is no public transit so he relies on others for transportation.
- The appellant relies on a walker to get around since he is unstable due to his condition and he has a hard time with stairs and needs to use the railings.
- The doctor made an error in filling out the PR since he indicated that the appellant can walk 2 blocks unaided but the appellant always uses a walker. The doctor did not seem to understand the severity of the appellant’s condition.
- The appellant’s previous doctor moved to another community.
- The appellant has been referred to an infectious disease specialist in another community but the appellant “does not have a dime to spend on anything” and is having difficulty finding a way to get to the appointment, and they are trying to make arrangements.
- The appellant tried to do the PWD application on his own and experienced a language barrier with his current doctor. Although the doctor asked the appellant some questions, the appellant did not really understand what he was saying.
- The appellant made marks on the PR and the AR where he did not agree with the doctor’s assessments. He does not agree that he can walk 1 to 2 blocks unaided since he uses a walker and he cannot remain seated even 1 to 2 hours because his legs would really start to hurt. He had his hearing tested and his hearing on his left side is somewhat diminished.
- The appellant’s mobility inside is “limited” and his mobility outside is “horrible”. He has scars on his legs where he has fallen.
- The appellant can “shower and shave” and get himself ready but he is restricted and in pain. It is hard for him to sleep and it is “hard to do the around-the-house stuff.” He can manage to make himself a meal.

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- The doctor “sugar coated” his answers and just “hammered them out on his computer.”
  - The appellant is physically in pain all the time and needs help. He does not want in-home care but he gets services every week at the hospital.
  - The appellant cannot get or hold down a job.

The ministry relied on its reconsideration decision, as summarized at the hearing.

***Admissibility of Additional Information***

Section 22(4)(b) of the *Employment and Assistance Act* is designed to strike a balance between a pure appeal on the record of the ministry decision and a hearing *de novo* (a completely new hearing). It contemplates that while a party may wish to submit additional evidence to the panel on the appeal, the panel is only empowered to admit “oral or written testimony in support of” the record of the ministry decision; it provides a limited opportunity to augment evidence on appeal but it does not provide a hearing *de novo* or new hearing. If the additional evidence substantiates or corroborates the information and records before the minister at the reconsideration stage, the evidence is to be admitted; if it does not, then it does not meet the test of admissibility under section 22(4)(b) of the *EAA* and cannot be admitted.

The ministry did not object to the admissibility of the additional documents but pointed out that the information in the undated Statement contradicts the information provided by the general practitioner in the PWD application. The panel considered the appellant’s oral testimony and the letter from the RN dated October 13, 2015 as information that corroborates the extent of the appellant’s impairment as diagnosed in the PWD application, which 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 the reconsideration, in accordance with Section 22(4)(b) of the *Employment and Assistance Act*.

The panel did not admit the information in the Undated statement by the appellant regarding his ability to perform DLA and signed by the general practitioner as this was not information before the ministry at reconsideration and does not tend to corroborate information before the ministry at that time but, as pointed out by the ministry, contradicts that information. For example, while the general practitioner indicated in the PR that the DLA meals is not restricted and, in the AR, that the appellant is independent with the tasks of meal planning, food preparation, cooking and safe storage of food, the appellant wrote in the Statement signed by the general practitioner that he has to rely on people around him to help with meals, and “all aspects of daily living” because of constant pain in his feet. The panel notes that the general practitioner has not provided an explanation for the change in his assessment since the time of the PWD application in May 2015.

## 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 PWD designation, 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 has a severe mental impairment but his DLA are not, 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, 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**

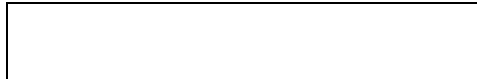
2 (1) For the purposes of the Act and this regulation, **"daily living activities"** ,

(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.

At reconsideration, the ministry was satisfied that the information provided is sufficient evidence of a severe physical impairment.

**Restrictions in the ability to perform DLA**

The appellant's position is that his severe physical impairment directly and significantly restricts his ability to perform DLA on an ongoing basis to the extent that he requires the significant assistance of another person, namely his friends and neighbors, and the use of a walker as an assistive device. The appellant confirmed that he does not take the position that he has a severe mental impairment.

The ministry's position is that the information from the prescribed professional does not establish that the appellant's severe physical impairment significantly restricts his DLA either continuously or periodically for extended periods. The ministry argued that the general practitioner reported that the appellant is independent in all aspects of his DLA with the exception of the use of an assistive device for transfers in/out of bed and on/off chair as part of the personal care DLA and going to and from stores as part of the shopping DLA.

*Panel Decision*

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, a 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.

In the appellant's circumstances, the general practitioner reported in the PR that the appellant has not been prescribed medications and/or treatments that interfere with his ability to perform DLA. The general practitioner reported that the appellant is not restricted with several listed DLA, specifically: personal self care, meal preparation, management of medications, use of transportation, management of finances, and social functioning. In the AR, the general practitioner indicated that the appellant is independent with most of the tasks of the DLA personal care, specifically: dressing, grooming, bathing, toileting, feeding self and regulating diet. The general practitioner indicated that the appellant uses an assistive device and takes significantly longer than typical with the tasks of transferring in/out of bed and on/off chairs. In the AR, the general practitioner confirmed that the appellant is independent and does not require assistance with any of the tasks of the DLA meals, medications, finances, and social functioning. Regarding the DLA transportation, the general practitioner indicated that the appellant takes significantly longer than typical with getting in and out of

vehicle but does not require the assistance of another person or the use of an assistive device and remains independent with using transit schedules and arranging transportation. The general practitioner wrote: "...after sitting for a while, he needs to put his feet on ground slowly and stand then take first steps, then he can start walking slow."

In the PR, the general practitioner reported that the appellant is continuously restricted with several listed DLA, specifically: basic housework, daily shopping, and mobility inside and outside the home. Regarding the degree of restriction, the general practitioner wrote: "...swollen painful feet make him (sic) to walk slow and short distance. Severe pains after walking." Regarding the DLA basic housework, the general practitioner reported in the AR that the appellant is independent with basic housekeeping and laundry. For the DLA daily shopping, the general practitioner indicated that the appellant is independent with the tasks of reading prices and labels, making appropriate choices, paying for purchases and carrying purchases home and uses an assistive device and takes significantly longer than typical with one task, namely going to and from stores. The general practitioner wrote: "...pain worse on sitting or lying down, he uses his walker to get up; he needs to do first steps before he could walk otherwise he falls. He walks slow." The general practitioner reported that the appellant uses an assistive device and takes significantly longer than typical with moving about indoors and outdoors and wrote: "...due to severe feet pain he uses a walker and walks slowly." In the additional comments to the AR, the general practitioner wrote: "...chronic feet MRSA infection and venous insufficiency causing severe feet pain and swelling, making walking very difficult. He needs to walk slowly."

In his self-report, the appellant wrote that the pain in his feet makes walking even short distances painful, that he can only walk short distances around his apartment and he uses a walker to walk outside for short distances. At the hearing, the appellant added that his mobility inside is "limited" and his mobility outside is "horrible" and he has scars on his legs where he has fallen. The appellant stated that he can "shower and shave" and get himself ready and can manage to make himself a meal but he is restricted and in pain and it is "hard to do the around-the-house stuff." The appellant stated that he is physically in pain all the time and needs help. He does not want in-home care but he gets services every week at the hospital. He cannot get or hold down a job. 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, the panel finds that the ministry was reasonable to conclude that most of the tasks of DLA are performed by the appellant independently, although a few tasks take him an unspecified amount of time longer with the use of a walker as an assistive device, and 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, pursuant to Section 2(2)(b)(i) of the EAPWDA.

#### **Help to perform DLA**

The appellant's position is that he requires the significant assistance of another person to perform DLA, namely his friends and the nursing services at the hospital and the use of a walker 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 from other persons.



***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 panel finds that the evidence of the appellant's general practitioner, as the prescribed professional, establishes that the appellant "uses a walker to walk around" and assistance is provided by his friends, namely "...his neighbors at the apartment building." In the letter dated October 13, 2015, the registered nurse wrote that the appellant receives weekly services that include: intravenous medication administration, PICC care and chronic wound care. 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.

**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 pursuant to Section 2(2) of the EAPWDA was reasonably supported by the evidence, and therefore confirms the decision.