

PART C – Decision under Appeal

The Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated 24 September 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 (EAPWDA) 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

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 PWD Application – 3 page Applicant Information (Self Report – SR) completed and signed by the appellant before a witness on 7 July 2015 indicated that the appellant had constant back pain and that one day he bent down to pick up a sock and then could not get up again and that a neighbour had to pick him up and carry him to his couch.
- A 5 page Physician Report (PR) dated 19 June 2015 completed and signed by the appellant's physician, a general practitioner (GP), indicated the following:
 - Specific diagnoses: mechanical back pain for 20 years and prostate cancer, onset 2015.
 - Health history: Chronic back pain with loss of lordosis preventing the appellant from doing household duties or sitting more than 30 minutes. "He is unable to sustain a job due to more persistent pain in recent years. Despite medication he finds it very hard to function at home" and does not do any recreation. Large social impact because he is more dependent and a friend cooks and cleans for him.
 - The appellant was prescribed medication that interfered with his ability to perform DLA and the anticipated duration is "life long".
 - The appellant does not require any prostheses or aids for his impairment.
 - The impairment was likely to continue for 2 years or more from that date and the GP explained that his condition would get worse.
 - In terms of functional skills, the GP indicated that the appellant could walk 4 + blocks unaided, he could climb 5 + steps unaided, he can do no lifting, he can remain seated for less than 1 hour and has no difficulties with communication.
 - In terms of significant deficits with cognitive and emotional functions, the GP indicated none.
 - The GP did not have any further comment.
- An 8 page Assessor Report (AR) dated 22 June 2015, completed and signed by the same GP indicated the following:
 - The appellant lives alone but gets help for his DLA every day from a friend.
 - In terms of physical or mental impairments that impact the appellant DLA, the GP indicated: "Back is not in use."
 - The appellant's speaking, reading, writing and hearing abilities are good.
 - In terms of mobility and physical ability, he is independent walking indoors, outdoors, climbing stairs and standing but needs continuous assistance from another person for lifting, carrying and holding and the GP indicated that the appellant cannot use his back at all – no bending, stooping, carrying.
 - The GP did not complete the section on "Cognitive and Emotional Functioning" that is to be completed for a person who has an identified mental impairment or brain injury but wrote a short comment that is illegible.
 - In terms of DLA, the GP indicated the appellant was *independent* for:
 - grooming,
 - showering,
 - toileting,
 - feeding self,
 - transfers (in / out of bed and on / off chair),
 - going to and from stores,

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- reading prices and labels,
 - making appropriate choices,
 - paying for purchases,
 - meal planning,
 - pay rent and bills,
 - medications,
 - using public transit,
 - using transit schedules and arranging transportation and
 - social functioning (good functioning with immediate and extended social networks).
- He needs *continuous assistance* for:
 - regulating diet,
 - laundry,
 - basic housekeeping (comment: friend does all household duties),
 - carrying purchases home (comment: no carrying),
 - food preparation,
 - cooking and safe storage of food.
 - He takes *significantly longer* for:
 - dressing (comment: his friend helps him dressing and takes 4 times longer – has to sit down to do some of the dressing) and
 - getting in and out of a vehicle (no comment).
 - The GP made some additional comments to the effect that the amount of disability caused by non-use of the lower back is incredible and that the essential areas where he needs [one word illegible] assistance are the same activities of his skill sets to work.
 - In terms of social functioning, the GP commented that the appellant cannot help others as he depends on them.
 - In terms of assistance provided by others, the GP indicated “Friends”.
 - The appellant did not need assistive devices or assistance animals.
 - In terms of additional information, the GP indicated that the appellant gradually lost his independence and rely on a friend for cleaning and cooking. He wrote: “What drives his disability is the fact that his skill sets rely on a healthy back to continue to work. He has no skills in a line of duty that preserves his back.” He found the appellant reliable in presenting and did not seem to have a hidden agenda – he was pleasant but could not sit for more than a few minutes.
 - The assessor’s sources of information were:
 - Office interview with the appellant;
 - File / chart information;
 - Friend.
 - The GP had known the appellant since July 2008 and had seen him 11 or more times during the previous year.
 - The GP described the services he could provide to the appellant as: medications, investigations, supportive care and indicated that the appellant was unable to engage in the suggested therapy due to his financial limitations.

When requested by the ministry to provide more information on the appellant’s diagnosis of prostate cancer, the GP replied by an addendum to part F of the PR with the mention that prostate cancer was determined by blood work and that the appellant was waiting to see an urologist and that there was

no treatment yet as the appellant's condition was considered a non-disabling condition at the time. The GP signed the statement and dated 4 August 2015.

In his Request for Reconsideration dated 11 September 2015, the appellant indicated it was at his GP's request because of constant back pain and not being able to work. He stated he was diagnosed with prostate cancer and was in constant pain in his hips, legs and feet. He added a Laboratory Requisition form by his GP dated 10 September 2015 for PSA – Known or suspected prostate cancer to be done every 3 months for one year.

At the hearing the appellant testified that a family member provided some financial help when needed and that his friend was doing his housework and cooking voluntarily since he found those chores hard to do but he could do them if need be. He also testified he was a mechanic all his life.

The panel determined the appellant's 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 minister at reconsideration and provided more specific information on the arrangement he had with his friend and corroborated his evidence at reconsideration.

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 of section 2 of the EAPWDA 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 his 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

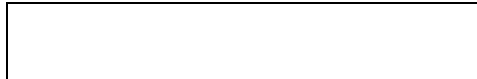
(iii) the services of an assistance animal.

(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.

Severity of impairment:

A diagnosis of a serious medical condition – for instance prostate cancer - 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 forms 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*.

The panel notes that the evidence refers to the appellant's inability to work because of his physical condition and that causes increased financial hardship. However, for a PWD designation employability or the ability to work are not included criteria that determine eligibility under the legislation.

Severe physical impairment:

The appellant argued that his condition has worsened and that he is in constant pain in his hips, legs

and feet. He stated his financial situation was very limited and a PWD designation would assist him in going to his appointments in a major centre away from his home town and be treated for his ailments.

The ministry argued that the evidence provided by the GP did not confirm a severe physical impairment since there was not enough information about the appellant's physical functioning that would substantiate a severe condition.

Panel decision:

The panel notes that the appellant's physical impairment strictly relates to his back condition and the fact that he cannot bend, stoop and lift any weight. All his other functions are not affected by his medical condition and the GP noted in his 4 August 2015 addendum to the PR with respect to the diagnosis of prostate cancer that the appellant did not need any treatment "yet" and that his condition was considered as "non-disabling" at this time. The panel also notes that the appellant is not limited in walking, climbing stairs and he is independent for standing. The panel acknowledges that the appellant's physical condition is difficult because of his back but overall it is consistent with a moderate impairment and finds that the ministry reasonably determined the appellant did not establish a *severe* physical impairment.

Severe mental impairment:

The appellant did not argue that he had a severe mental impairment and the ministry argued that there was no medical evidence of any mental impairment.

Panel decision:

The panel notes that no mental illness or brain injury is identified in the PR. Further, the PR indicated there were no significant deficits with cognitive and emotional function and the AR's parts on mental impairment or brain injury were not completed by the GP. As well, the panel notes that the appellant is independent for DLA that are specific to mental impairment under s. 2 (1)(b) of the EAPWDR: making decisions about personal activities, care or finances (decision-making) and also notes the GP indicated "independent" and "good" for the other area that is: relating to, communicating or interacting with others effectively (social functioning).

Given the evidence presented, the panel finds that the ministry reasonably determined that the information provided did not establish that the appellant had a severe mental impairment.

Daily living activities:

The appellant argued that his condition is such that a friend helps him doing the housekeeping and cooking meals for him.

The ministry argued that the medical evidence was that although the appellant was restricted with DLA requiring lifting and carrying, he is independent with a large number of DLA and that the restrictions as described by the GP are not consistent with physical functioning that he reported in both the PR and the AR.

Panel decision:

The panel notes that the medical limitations indicated by the GP are that he is unable to bend, stoop and, consequently, carry and lift any weight – he has no limitation walking and standing. The medical evidence is not consistent with any nexus between the appellant's physical limitations and his inability to perform DLA like meals and housekeeping. When asked if he could do them by himself, the appellant gave evidence that he could. In his AR, the GP wrote: "The essential areas where he needs [illegible] assistance are the same activities as his skill sets to work" and, again, the panel finds there is no nexus between the appellant's skill sets (mechanics) and housekeeping and meals.

The only real nexus between his physical limitations (that he cannot bend and stoop) and DLA appears to be only in terms of dressing that takes him 4 times longer than typical and where he gets some help from his friend and sits down to do some of the dressing. In terms of getting in and out of a vehicle, the GP did not provide any further information as to how much longer it takes and how often or what assistance, if any, would be required.

To meet the legislative requirement, at least two DLA must be significantly restricted continuously or periodically for extended periods, which the panel finds the ministry reasonably determined was not met. Given those circumstances and the evidence available, taking into consideration that s. 2 (2) of the EAPWDR specifically requires that the **impairment** "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"

the panel concludes that the ministry reasonably determined there was not enough information from a prescribed professional to establish that the appellant's *impairments directly and significantly restricted* DLA continuously or periodically for extended periods.

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

The appellant argued that he had help from a friend to perform most of his housework and meals, as well as dressing as a result of his condition.

The ministry argued that since DLA are not significantly restricted, it cannot be determined that significant help is required from other persons. In terms of assistive devices, the ministry argued there was no evidence that the appellant required an assistive device.

Panel decision:

The panel acknowledges that the AR mentions the appellant needs continuous assistance with or is unable to perform a number of DLA. As mentioned above, the panel found no nexus between the DLA where a friend helps the appellant (meals and housekeeping) and his medical condition that prevents him from bending, stooping and carrying and the help the appellant gets to perform those DLA appears to be consistent with an arrangement of convenience and not the direct result of his impairment. There is no evidence the appellant required an assistive device. Consequently, since the panel found 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:

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. Therefore, 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.