PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the "ministry") reconsideration decision of October 13, 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, the ministry had an observer attend the appeal hearing.

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 May 5, 2015; a physician's report ("PR") completed by the appellant's general practitioner (the "physician") on June 10, 2015; and an assessor's report ("AR") completed by a social worker on May 26, 2015.

- Two pages from the PR, with modifications endorsed by the physician on September 25, 2015 (the "Amended PR Pages").

- An undated letter from a second social worker, stating that when the appellant has seen him on a number of occasions he has demonstrated "extreme difficulty walking, bending, and often suffers from intense jolts of pain throughout his body."

- A letter from the appellant's friend, dated September 29, 2015, describing the assistance she provides the appellant with DLA.

- A listing of medications taken by the appellant.

Admissibility of Additional Information

At the appeal hearing the appellant submitted a five-page typewritten letter from the physician, dated January 5, 2016 (the "Physician's Letter"). The appellant explained that he'd had a difficult time getting the additional information in a timely fashion since the physician is so busy. The appellant met with the physician after-hours on the evening before the appeal hearing, and the physician took the time to go over the appellant's application forms and the reconsideration decision, and then to personally create the five-page letter.

The purpose of the Physician's Letter, as stated by the physician, is to "discuss, rebut and restate as per [the reconsideration decision]."

The ministry had no objection to admissibility of the Physician's Letter.

The panel assessed the Physician's Letter as both reiterating, and providing more detailed explanation, of information that had been before the ministry at reconsideration. It also contains a number of statements that the panel has assessed as going to argument. The Physician's Letter tends to corroborate the previous information, and accordingly the panel has accepted it into evidence in accordance with section 22(4) of the *Employment and Assistance Act*.

Oral information provided by the appellant supplied additional detail which was substantially consistent with information that was before the ministry at the time of reconsideration. This oral information was admitted into evidence in accordance with section 22(4) of the *Employment and Assistance Act*.

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

* * *

The panel assessed the evidence as follows:

Diagnoses

In the PR the physician diagnosed the appellant with cardiac tachycardia (onset 2013), hypertension (2006), irritable bowel/diverticulitis/bowel resection (2004), GERD (date of onset not identified), sleep apnea/sleep disturbance (2013), gout (date of onset not identified), chronic lumbar pain/paresthesia (date of onset not identified), and acute right knee arthritis (date of onset 2014). In the Additional Comments section of the PR the physician referred to "depression". Under Degree and Course of Impairment the physician stated "He is seen by a team of specialists looking into all aspects of his health – improvement is likely – resolution (total) is unlikely. Final functional level unclear."

In the Physician's Letter he also referred to:

- The appellant's history of migraines (onset 1999), stating "These are less severe than when he was younger and NOT a major component of his Disability claim – but do exist."
- Depression-anxiety with onset about 1997.

Physical Impairment

In the PR the physician reported that:

- In terms of physical functional skills the appellant can walk 4+ blocks unaided, climb 5+ stairs unaided, lift 5 to 15 pounds, and remain seated for 1 to 2 hours. (In the Amended PR Pages the physician stated that the appellant can walk 2 to 4 blocks unaided, and commented "With pain during rehabilitation + recovery.")

In the AR the social worker stated that she had known the appellant for one month and had seen him three times. She indicated the appellant requires continuous assistance with lifting/carrying/holding, and that he takes significantly longer than typical with walking indoors and outdoors, climbing stairs, and standing. She commented "All activities/tasks eventually put him to bed." She also commented "His back can seize and lock. Unable to move. Very painful."

In the Physician's Letter, he stated that:

- He has been the appellant's physician for 16 years.
- The lumbar and knee pain is severe.
- The appellant had surgery on both knees in 2015 and "is rehabilitating and walking with a cane, some of the time, and has significant (severe) distress with mobilization Even with knee surgery, the mechanics of walking and mobilizing related to his lumbar disease persists."
- The appellant has fatigue secondary to sleep disturbance.
- The appellant's level of physical functioning indicates profound disability relative to the vast majority of men of his age and this disability is complicated by constant pain and fatigue.
- He has known the appellant for 16 years as a hardworking self-reliant man. The fact that he is not now is only because of his progressive musculoskeletal disabilities, complicated by his

chronic physical diagnoses and emotional stressors.
- The likelihood of full or significant recovery is either unlikely or unclear at this time.
- "I ask you to please reconsider your position or allow [the appellant] time to have a formal functional assessment by a community [occupational therapist]."

For part of his oral testimony the appellant was tearful. He stood up periodically during the hearing to ease his back. In his oral testimony the appellant stated that:

- He has worked hard all his life, even as a child, so his body is now worn out. He had to work hard on the farm as a child and was not able to get an education.
- He has been in pain for many years but has a high pain tolerance and just kept going until he couldn't go on anymore.
- He has become immune to pain medication and doesn't want to become addicted.
- He is a fast learner on the job, but not with book work.
- He wore wrist braces for carpal tunnel syndrome for 20 years but no longer wears them as they make it too difficult to do things.
- He wears a back brace (an off-the-shelf brace bought from a pharmacy) every time he leaves the house.

In response to a question from the panel, the appellant replied that the freezing/locking of his back referred to by the social worker happens "a couple of times a year" and can immobilize him for a couple of weeks.

Mental Impairment

In the PR the physician reported:

- No difficulties with communication.
- No significant deficits with cognitive and emotional functioning, but indicated deficits with 3 of 12 categories of functioning: emotional disturbance, motivation, and motor activity.
- Under Additional Comments, the physician stated "While dealing with a multitude of physical symptoms, we are yet to understand how his psychology is affected past the depression."

In the Amended PR Pages the physician reported:

- Possible Obstructive Sleep Apnea – cannot afford CPAP machine.
- Never finished grade 12 – not book smart. Learning disability in school.
- Poor sleep – poor concentration and focus.

In the AR the social worker indicated that:

- The appellant's ability to communicate is satisfactory in terms of speaking, reading, and writing (with additional comments). With respect to hearing she indicated "Some difficulty focusing on the words of others."
- The appellant suffers major impacts in 9 of 14 categories of cognitive and emotional functioning, and moderate impacts in 4 of the remaining categories.

In the Physician's Letter he reported that:

- The appellant's intelligence and executive functioning have never been officially assessed.

- His depression and anxiety issues are chronic, variable and certainly aggravated by his present situation.
- His speech, hearing and basic comprehensions are adequate, but he likely has reduced cognitive strength which is probably significant in his ability to cope and problem solve.

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.
- He is directly and continuously restricted in the DLA of meal preparation, management of medications, basic housework, daily shopping, mobility outside the home, and use of transportation.
- He is directly and periodically restricted with personal self-care and mobility inside the home.
- He is not restricted with management of finances or social functioning.

In the AR the social worker reported that:

- The appellant requires continuous assistance and takes significantly longer than typical with all aspects of the DLA of basic housekeeping, daily shopping, meal preparation, and managing personal finances. (The social worker commented "shared tasks" with respect to banking/budgeting/pay rent and bills.)
- The appellant independently manages all tasks related to personal medications, but that his partner provides continuous assistance as well.

In the Physician's Letter, he stated that:

- "…the legislation does NOT require frequency and duration…"
- The appellant's symptoms and disabilities are significant and continuous if not periodic for extended periods of time. "He needs support at home, his mobility is restricted and he is unable to work at any of his prior vocations."
- "All [DLA] are either severely restricted for a man his age (this MUST be the standard we are comparing to) or need regular assistance to perform, AND when he does function or attempt to function he is in continuous and significant pain."

In response to questions from the panel the appellant responded that:

- His roommate does the cleaning and laundry. He is not able to do much. He wipes the windows if he is able. He is not able to do vacuuming.
- He loves cooking and does the food preparation in stages, resting in between.
- He bathes himself but has trouble reaching his lower legs and feet. He can bend down but can't get up. Everything he does is slow.
- His roommate sets out his medications.
- His roommate pays the bills as he forgets a lot of things.
- He likes to do the shopping himself. His roommate goes with him, but the appellant "does prices better." If he's hurting, he leans on the store buggy for support.

Help

In the PR the physician reported that the appellant does not require any prostheses or aids for his impairment.

In the AR the social worker indicated that:

- The appellant receives help with DLA from his family, friends, his children, his roommate, and her children.
- He routinely uses braces to help compensate for his impairment.
- The appellant does not have an assistance animal.

In her letter of September 29, 2015, the appellant's friend stated that she helps the appellant on a daily basis with cooking, cleaning, laundry, making up his pills in a weekly pill case. This help is necessitated by the condition of his health.

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 cumulatively his medical conditions, and the resulting pain, constitute a severe physical impairment. He argued that both the physician and the social worker used terms such as "severe" and "significant" in describing his impairment. Finally he argued that all of his functioning takes significantly longer than typical and is accompanied by continuous and significant pain.

The ministry's position, as set out in the reconsideration decision, is that the evidence does not establish a severe impairment of physical functioning. The ministry argued that the level of physical functioning described by the physician isn't consistent with a severe impairment, and that the social worker did not describe how much longer than typical the appellant takes with physical functions, or the frequency or duration of the periods when his back seizes and locks.

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, its expected duration, the extent of its impact on daily functioning as evidenced by functional skill limitations and the degree to which performing DLA is restricted. The legislation makes it clear that the determination of severity is at the discretion of the minister. The minister must consider all relevant evidence (including that of the appellant) though the fundamental basis for the analysis is the evidence from prescribed professionals – in this case, the physician and the social worker. In exercising its

decision-making power the ministry cannot merely defer to the opinion of the professionals with respect to whether the statutory requirements are met as that approach would amount to an improper fettering of discretion. The ministry depends to a great extent on objective evidence from the professionals such as the degree of impairment, the length of time physical functions take, frequency and duration of restrictions to assess whether the statutory criteria are satisfied. Accordingly, the use of the term "severe" by the physician or social worker does not determine that the criterion of severity has been satisfied.

Regarding the severity of the impairment, the test is not whether the appellant is severely impaired as compared to the majority of men his age; it is whether his level of impairment directly and significantly restricts his ability to manage DLA independently. In the PR, the Amended PR Pages, and the AR the prescribed professionals have indicated that the appellant walks independently for up to four blocks, and that he takes significantly longer than typical to do so. He is currently using assistive devices in the form of a knee brace and cane "some of the time", and experiences "pain during rehabilitation + recovery." There is no evidence as to how long the period of recovery is expected to be or the expected prognosis, though the physician indicated that despite the knee surgery the appellant will continue to have lumbar pain while walking. The physician stated in the PR that some improvement is likely, but the appellant's final functional level remains unclear. Information from the physician and social worker indicate other physical functional skills in the mid-range of the scale. There is no information from the social worker to give an indication of how much longer than typical the appellant takes with walking and climbing stairs.

There are frequent references in the evidence to the impact the appellant's medical conditions have on his ability to work at paid employment. Unlike the CPP disability pension or private occupational disability insurance, the ability to work at paid employment is not a statutory criterion for PWD designation. The legislation instead focuses on the ability to manage DLA independently. Paid employment generally requires a higher level of functioning than DLA. As discussed in more detail in the subsequent section of this decision under the heading Significant Restrictions to DLA , the evidence provided does not establish that the appellant's physical condition has translated into significant restrictions in his ability to manage his DLA independently.

Accordingly, while acknowledging that the appellant's conditions do impact his functioning, the panel has concluded that the ministry reasonably determined that the evidence falls short of establishing that the appellant has a severe physical impairment.

Severe Mental Impairment

The appellant's position is that his depression and anxiety constitute a severe mental impairment that significantly restricts his functioning. He argued that the physician has confirmed that his depression and anxiety are long standing, and the social worker has confirmed that he experiences major impacts to the majority of his cognitive and emotional functioning.

The ministry's position is that the information provided by the physician and the social worker does not establish a severe mental impairment. The ministry argued that the physician did not diagnose a mental disorder or brain injury in the PR, and that the social worker did not complete the section of the AR (which is to be completed for an applicant with an identified mental impairment, including brain injury) dealing with social functioning.

Panel Decision:

In the PR the physician did refer to the appellant as having depression, and in the Physician's Letter he provided more detail with respect to the long-standing nature of the appellant's depression and anxiety. However, the panel notes that depression was not listed in the Diagnosis section of the PR or Amended PR Pages as an impairment. There is no clear evidence as to how these conditions affect the appellant's ability to function other than the appellant's statements that he forgets things which necessitates his roommate to help with managing his pills and finances. In the Physician's Letter, he indicated that intelligence and executive function have never been officially assessed.

Both professionals reported that the appellant's communication skills are generally satisfactory. The physician indicated in the PR and the Amended PR Pages that the appellant has cognitive and emotional deficits in three areas, but responded "no" to the question as to whether these deficits are significant. In contrast, the social worker in the AR reported that the appellant experiences major impacts in 9 of 14 categories of cognitive and emotional function and moderate impacts in 4 additional categories. Given that the physician has known the appellant for 16 years and can be expected to know the appellant's mental functioning better than the social worker who had only known the appellant for 3 months, the panel has put more weight on the physician's evidence where the two differ.

Section 2(1)(b) of the EAPWDR prescribes two DLA that are specific to mental impairment – make decisions about personal activities, care or finances (decision making), and relate to, communicate or interact with others effectively (social functioning).

The evidence indicates that the appellant is not significantly restricted with respect to decision making in that the social worker's evidence states that he independently manages the decision making aspects of personal self-care (regulating diet) and she reported no restrictions on the appellant's ability to independently manage the task of making appropriate social decisions. The appellant's evidence is that he is good at, and enjoys the task, of reading prices and labels and making appropriate shopping decisions. In the panel's view, the evidence that banking/budgeting/bill paying are shared tasks, and that the appellant's roommate helps manage his medications by putting them into a weekly organizer, are not (when considered in context) indicative of a severe mental impairment.

Regarding social functioning, the evidence of both the physician and social worker indicates that the appellant is not significantly restricted with this DLA.

Based on the foregoing evidence and analysis, the panel concludes that the ministry reasonably determined that it does not demonstrate a severe mental impairment.

Significant Restrictions to DLA

The appellant's position is that his impairments significantly restrict his ability to manage his DLA. He argued that his mobility is continuously and significantly restricted by pain, as are almost all other DLA. He stated that he relies heavily on others to perform many tasks related to most DLA.

The ministry's position, as set out in its reconsideration decision, is that there is not enough evidence

to establish 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's evidence demonstrates the appellant independently manages the majority of DLA.

Panel Decision

The legislation – s. 2(2)(b)(i) of the EAPWDA – requires that a severe impairment directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods. The term "directly" means that there must be a causal link between the severe impairment and the restriction. In other words, it is not enough simply to list a number of medical conditions - the evidence must draw a clear link between the medical condition and a restriction to DLA. The direct restriction must also be significant.

Finally, there is a component related to time or duration. The direct and significant restriction may be either continuous or periodic. If it is periodic it must be for an extended time. Inherently, any analysis of periodicity must also include consideration of the frequency. All other things being equal, a restriction that only arises once a year is less likely to be significant than one which occurs several times a week. Accordingly, in circumstances where the evidence indicates that a restriction arises periodically, it is entirely appropriate for the ministry to require evidence of the duration and frequency of the restriction in order to be "satisfied" that this legislative criterion is met. It is also appropriate (where the evidence indicates that an applicant takes significantly longer than typical to perform a function or DLA) for the ministry to require some quantitative evidence as to how much longer it takes.

For the reasons provided above in the discussion under the heading Severe Mental Impairment, the panel has concluded that the DLA of management of medications, management of finances, decision-making, and social functioning are not significantly restricted.

Although the evidence indicates that the appellant experiences continuous restrictions with the majority of his DLA, the evidence is not sufficient to demonstrate that those restrictions are significant as contemplated by the legislation. The evidence does indicate that the appellant has difficulty with many aspects of basic housework. However, with respect to the DLA of mobility inside and outside the home, the evidence is that the appellant is currently recovering from recent surgery to both knees, that some degree of improvement is expected, but that the final resolution is unclear. The physician noted that the appellant will continue to experience lumbar pain when walking but the continuing extent of the impact on mobility is not clear on the evidence. The appellant's evidence is that he independently manages his personal self-care (while being careful not to fall down in the shower), he does much of the meal preparation and cooking (though resting between stages), most of the daily shopping (though accompanied by his roommate), and is able to drive a vehicle (albeit a borrowed vehicle) for his transportation needs.

Based on the foregoing evidence and analysis, the panel finds that the ministry reasonably concluded that the evidence falls short of establishing that the appellant's impairment significantly restricts his ability to manage DLA either continuously or periodically for extended periods.

Help with DLA

The appellant's position is that he requires the use of assistive device (cane and braces) along with friends and family to manage DLA.

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

The panel is sympathetic to the appellant's circumstances and acknowledges that his medical conditions affect his ability to perform DLA. However, 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.