

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of December 11, 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

The appellant did not attend the hearing. Having confirmed that the appellant was notified, the panel proceeded with the hearing in accordance with section 86(b) of the Employment and Assistance Regulation.

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 April 29, 2015; a physician’s report (“PR”) completed by the appellant’s general practitioner (the “physician”) on July 16, 2015; and an assessor’s report (“AR”) completed by a registered nurse (the “RN”) on July 8, 2015. Attached to the AR is a two-page letter from the RN providing additional detail with respect to information in the AR.
- A Request for Reconsideration form dated December 8, 2015, including the appellant’s written statement.
- Reports (collectively referred to herein as the “Reports”) on:
  - Results of an x-ray examination of both knees conducted in June 2013 (“Very early osteoarthritic change. No other significant findings.”)
  - Results of a diagnostic radiography of bone spurs conducted in September 2014 (“There is a moderate sized plantar calcaneal spur.”)
  - Results of an ultrasound examination of the appellant’s shoulder region conducted in November, 2013 (“...probably a focal full thickness tear of the supraspinatus tendon close to its insertion.”)
  - Results of an x-ray examination of the appellant’s right knee conducted in September 2013 (“No fracture is seen.”)
- An undated handwritten list of medications taken by the appellant.

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The panel assessed the evidence as follows:

### Diagnoses

In the PR the physician diagnosed the appellant with osteoarthritis, back pain, type 2 diabetes, and hypertension.

### Physical Impairment

In the PR the physician reported that:

- The appellant has been his patient for five years and that he has seen the appellant 11 or more times in the past year.
- The appellant can walk 2-4 blocks unaided on a flat surface, can climb 5+ steps unaided, can lift 15 to 35 pounds, and can remain seated for less than one hour.
- “Lower back pain preventing [appellant] to do his work effectively.”

In the AR and her attached letter, the RN reported that:

- She had met the appellant one time, for the purpose of completing the AR.
- The appellant’s impairments include chronic back pain, arthritis in knees/elbows/wrists/fingers, bone spurs in his feet, and chronic fatigue.

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- The appellant independently manages walking indoors and outdoors, climbing stairs, and standing but takes longer than typical with these functions. He needs periodic assistance from others with lifting, particularly to lift higher than his chest level.
  - The appellant can climb 10-15 steps slowly, and then has to rest at the top before coming down very slowly using the hand rail.

In his self-report the appellant stated that:

- He has suffered with arthritis for several years but it is getting worse and restricting his physical activity.
- He is in continuous pain. It interferes with his sleep and he gets no relief from medications.
- His heel spurs and lower back pain restrict his mobility.

In his reconsideration submission the appellant reported that his daily routine has become extremely difficult due to his health. He indicated that at his age it is hard for him to find employment, and that he does not have much work experience because of his health issues. The appellant stated that retraining won't help because he is in constant pain.

### Mental Impairment

In the PR the physician reported no difficulties with communication and no significant deficits with cognitive and emotional function.

In the AR the RN indicated that:

- The appellant's speaking ability is good, and that reading/writing/hearing are satisfactory.
- The appellant experiences depression, PTSD due to abuse, anxiety in crowds/noise, difficulty trusting people, loss of self-esteem, feelings of worthlessness, and isolation.
- He experiences major impacts in 4 of 14 categories of cognitive and emotional functioning (bodily functions, emotion, executive, motivation) along with moderate impacts in 3 additional categories (consciousness, attention/concentration, memory.)

### 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.
- The appellant experiences no direct restrictions in any of the prescribed DLA except for meal preparation, where the physician indicated the appellant experiences continuous restrictions due to back pain from standing at the stove.

In the AR the RN reported that:

- The appellant independently manages all tasks related to the DLA of personal self-care (though taking longer than typical with transfers and dressing), management of finances (pay rent and bills), and management of medications.
- The appellant independently manages most tasks related to the DLA of daily shopping (except for periodic assistance going to/from stores and carrying purchases), meal preparation (except for periodic assistance with meal planning and safe storage of food – the appellant does most

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of his own cooking but relies on his mother's encouragement to do so), and use of transportation (except for having to use the frame of the vehicle or occasionally rely on assistance from another person to get in/out of a vehicle.)

- The appellant independently manages all tasks related to the DLA of social functioning except for requiring period support/supervision to interact appropriately with others. The appellant has good functioning with his immediate social network, and marginal functioning with his extended social network.

In his self-report the appellant stated that he has had to restrict his physical activities and DLA to no more than thirty minutes per day or spend the next morning in bed recovering.

Help

In the PR the physician reported that the appellant does not require any prostheses or aids for his impairment. In the section of the AR dealing with assistive devices, the RN did not indicate that the appellant routinely uses any equipment or devices to help compensate for his impairment.

The RN reported that the appellant receives help with DLA from friends and family, and that he does not have an assistance animal.

## PART F – Reasons for Panel Decision

The issue on this appeal is whether the ministry's decision to deny the appellant designation as a PWD was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. In particular, was the ministry reasonable in determining that the appellant does not have a severe physical or mental impairment, and that in the opinion of a prescribed professional the appellant's impairments do not directly and significantly restrict him from performing DLA either continuously or periodically for extended periods, and that as a result of those restrictions the appellant does not require help to perform DLA?

The relevant legislation is as follows:

### EAPWDA:

2 (1) In this section:

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

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

**"prescribed professional"** has the prescribed meaning.

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

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

(b) in the opinion of a prescribed professional

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

(A) continuously, or

(B) periodically for extended periods, and

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

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

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

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

(i) an assistive device,

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

(iii) the services of an assistance animal.

## **EAPWDR section 2(1):**

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

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

- (i) prepare own meals;
- (ii) manage personal finances;
- (iii) shop for personal needs;
- (iv) use public or personal transportation facilities;
- (v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
- (vi) move about indoors and outdoors;
- (vii) perform personal hygiene and self care;
- (viii) manage personal medication, and

(b) in relation to a person who has a severe mental impairment, includes the following activities:

- (i) make decisions about personal activities, care or finances;
- (ii) relate to, communicate or interact with others effectively.

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### **Severe Physical Impairment**

The appellant's position is that his osteoarthritis, back pain, diabetes, and hypertension – and the resultant constant pain - constitute a severe physical impairment. He argued that his physician has confirmed that his physical functioning is significantly restricted.

The ministry's position, as set out in its reconsideration decision, is that the evidence does not establish a severe impairment of physical functioning. The ministry argued that the ability to walk four blocks before resting is not indicative of severe impairment, and that the RN's repetitive use of the word "states" in the AR indicates that less weight should be given to her evidence than to the physician's evidence.

### **Panel Decision:**

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

To assess the severity of an impairment one must consider the nature of the impairment and the extent of its impact on daily functioning as evidenced by functional skill limitations and the degree to which performing DLA is restricted. A medical barrier to the appellant's ability to engage in paid employment is not a legislated criterion for severity. The legislation makes it clear that the determination of severity is at the discretion of the minister, and that the fundamental basis for the analysis is the evidence from prescribed professionals – in this case, the physician and the RN. The appellant's evidence must also, however, be considered.

The panel noted that frequently throughout the AR and her attached letter, the RN used the word “states”, indicating that she was primarily recording the appellant’s commentary rather than reporting the results of her own objective assessment of the appellant’s functioning. The RN met the appellant for the first time to complete the AR, and did not indicate that she referred to any prior medical files or reports other than the Reports. Based on these factors, along with the long history the physician has had with the appellant and the number of times the physician has seen the appellant in the past year, the panel finds that it was reasonable for the ministry to give more weight to the physician’s evidence than to the RN’s evidence where they differ.

The appellant’s physical functional skills as reported by the physician are generally near the higher end of the scale and are not indicative of a severe physical impairment. This is consistent with the RN’s evidence who reported that the appellant is mostly independent with physical functioning. Though she indicated that the appellant takes longer than typical with most physical functioning, she provided no evidence as to how much longer these functions take, making it difficult to conclude that it takes the appellant an unreasonably long time to function independently.

There are a number of references in the evidence to the impact the appellant’s medical conditions have on his ability to work at paid employment. The panel notes that employability is not a statutory criterion regarding PWD designation – unlike the CPP disability pension, the focus of the legislation is on the ability to perform DLA. Paid employment generally requires a higher level of functioning than DLA. As discussed in more detail in the subsequent section of this decision under the heading Significant Restrictions to DLA , the appellant’s physical condition does not appear to have translated into significant restrictions in his ability to manage his DLA independently.

For the foregoing reasons, the panel has concluded that the ministry was reasonable in determining that the evidence has not established a severe physical impairment.

### **Severe Mental Impairment**

The appellant did not expressly advance an argument with respect to a severe mental impairment.

The ministry’s position is that the information provided by the physician does not establish a severe mental impairment. The ministry argued that the mental impairments referenced by the RN were not confirmed by the physician, and that the physician noted no significant deficits with cognitive and emotional functioning.

### **Panel Decision:**

Section 2 of the EAPWDA requires that a severe impairment –including a severe mental impairment - must be identified by a medical practitioner and be confirmed as being likely to continue for at least 2 years. In this case the physician has provided no diagnosis of a mental impairment, has indicated no significant deficits in cognitive and emotional functioning, and has indicated no difficulties with communication. The panel notes as well that the appellant did not mention mental impairment in his self-report or in his written reconsideration statement.

Based on the foregoing evidence, the panel concludes that while the appellant may experience some deficits to cognitive and emotional function, the ministry reasonably determined that the evidence

does not establish 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 significantly impacted by pain and that if he does not limit his activities to 30 minutes per day he ends up bedridden the next day.

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 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. The direct restriction must also be significant. In circumstances where the evidence indicates that DLA are directly restricted, it is appropriate for the ministry to require evidence as to whether the restriction is continuous or periodic and – if periodic – of how frequently the restriction arises and how long it lasts.

The physician's evidence is that the appellant is not directly restricted in any DLA except that he requires continuous assistance with meal preparation because standing at the stove causes back pain. This does not indicate that the appellant experiences direct and significant restrictions to DLA. In the AR, DLA are broken down into discrete tasks. The RN has indicated that there are some tasks with many DLA for which the appellant requires periodic assistance, but she has provided no information as to the frequency or duration of these periods. Considering the evidence as a whole, it simply is not sufficient to establish that the appellant experiences significant restrictions to DLA.

Based on the foregoing evidence and analysis, the panel finds that the ministry reasonably concluded this statutory criterion was not satisfied.

### **Help with DLA**

The appellant's position is that he requires assistance from 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**

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.