

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) Reconsideration Decision dated January 13, 2016 which found that the appellant did not meet all of the 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 an impairment that is likely to continue for at least two years. However, the ministry was not satisfied that the evidence established that:

- the appellant has a severe mental or physical 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
- 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 ministry did not attend the hearing. After confirming that the ministry received notice of the date, time and location of the hearing, the panel proceeded in its absence pursuant to section 86(b) of the *Employment and Assistance Regulation*.

The evidence before the ministry at the time of the Reconsideration Decision included:

1. The appellant's Persons With Disabilities ("PWD") Application comprised of:
  - The Applicant Information and Self-report ("SR") completed by the appellant and dated August 10, 2015;
  - The Physician Report ("PR") dated August 10, 2015 and the undated Assessor Report ("AR"), both prepared by the appellant's general practitioner ("GP") of 2.5 years and who treated the appellant 11 or more times in the 12 months prior to completing the PR;
2. A letter dated May 24, 2013 prepared by a neurosurgeon and addressed to the GP ("Consult Letter");
3. A medical imaging report dated July 4, 2012 setting out the results of a CT scan of the appellant's lumbar spine ("CT Report"); and
4. The appellant's Request for Reconsideration dated December 25, 2015 ("RFR").

### ***Admissibility of Additional Evidence***

#### ***Oral Evidence***

The appellant gave oral evidence at the hearing. He described his physical condition, the associated impairment and its impact on his ability to perform tasks of DLA. On review of the evidence, the panel notes that none of the appellant's oral evidence was "new evidence" but rather, it specifically related to and referred to the documents that were before the ministry at reconsideration. The panel therefore finds that the appellant's oral evidence is admissible as it is in support of the information and records that were before the minister when the decision being appealed was made, pursuant to section 22(4)(b) of the *Employment and Assistance Act*.

#### ***Diagnoses***

In the PR, the GP notes that the appellant has been diagnosed with spinal stenosis with a date of onset of 2012.

#### ***Physical Impairment***

In the Consult Report, the neurosurgeon provides a clinical impression of the appellant after setting out his history and the results of a physical and neurological examination. The neurosurgeon comments that the appellant presented with a history of low back and left leg pain which limited his walking to only 2 blocks. A CT scan showed moderate spinal stenosis at the L3-4 level. On review of the CT Report, the appellant is described as having "moderate multilevel degenerative changes with moderate spinal canal stenosis at the L3-4 level" as noted in the Consult Report.

In the SR, the appellant describes his disability as including his hip, knee, shoulder and brain. He adds that it is hard to walk, sit, lift and he cannot remember anything.

In the PR, the GP comments that the appellant has a "long standing history of OA of lumbar spine" which has

progressed over the past three years into spinal stenosis. He adds that the appellant cannot walk more than 50 feet without severe pain. The GP describes the appellant's impairment as a progressive disease and notes that he can walk less than 1 block unaided on a flat surface, climb 2 to 5 steps unaided, lift 5-15 lbs and remain seated for 2-3 hours. The GP adds that the appellant is being followed by a neurosurgeon and may need metal rod stabilizing surgery at some point in the future.

In the AR the GP describes the appellant's impairment as "lumbar spinal stenosis causing pain and instability." The GP notes that the appellant requires periodic assistance from another person with all listed areas of mobility and physical ability including walking indoors and outdoors, climbing stairs, standing, lifting, carrying and holding and adds the comment that the appellant's back pain and spinal stenosis is made worse by activity.

In the RFR, the appellant writes that he cannot stand on legs because of his hip. He adds that his arthritis is so bad and that he has it in his spine, hip, leg, knee, back and hands. He continues by writing that he is in bed a couple of days a week due to hepatitis C and that he is pretty sick all of the time.

### ***Mental Impairment***

The appellant has not commented on any conditions or symptoms related to mental impairment in the RFR or the SR other than to say that his disability includes his brain and that he cannot remember anything.

In the PR, the GP has not diagnosed the appellant with a mental disorder and has answered "No" to the question of whether the appellant has any significant deficits with cognitive and emotional function.

In the AR, the GP notes that the appellant's ability to speak, read and hear are good while his writing is satisfactory. The GP has noted that the appellant is not restricted or impacted in any of the areas relating to mental impairment.

### ***Daily Living Activities***

In the AR, the RPN comments on the assistance required by the appellant in relation to the impairment that directly restricts his ability to manage his DLA as follows:

- Personal Care: The appellant is independent in all tasks other than dressing for which he requires periodic assistance.
- Basic Housekeeping: The appellant is independent with all tasks.
- Shopping: The appellant is independent with all tasks other than going to and from stores which the GP notes requires continuous assistance from another person and which takes 3 times longer.
- Meals: The appellant is independent with all tasks.
- Paying Rent and Bills: The appellant is independent with all tasks.
- Medications: The appellant is independent with all tasks.
- Transportation: The appellant is independent with all tasks.
- Social Functioning: The appellant is independent in all of the listed areas of social functioning and has good functioning with his immediate and extended social networks.

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

In the PR, the GP notes that the appellant does not require any prostheses or aids for his impairment. In the AR, the GP indicates that the appellant receives help required for DLA from family members and friends but that he does not receive assistance through the use of an assistive device.



## **Evidence On Appeal**

### **Appellant's Evidence At Hearing**

The appellant stated at the hearing that he suffered a leg, knee, hip and back injury as a result of a fall 20 years ago. He added that he was involved in a pedestrian/motor vehicle injury two years ago and suffered hip and back injuries. He currently has difficulty walking, sitting and standing and in the morning when he wakes up it takes him 15-20 minutes to "straighten out." He currently takes 8-10 pain medication pills each day. He was diagnosed with hepatitis C approximately 12 years ago which causes him to be sick and unable to get out of bed or get outside.

In response to questions, the appellant confirmed that he is able to dress himself, that if he goes out shopping he is in pain and that he is unable to get comfortable walking or standing. The appellant indicated that he has arthritis in his spine, back, hips and shoulders and he attributes this to his previous occupation which he is unable to do anymore. The appellant clarified that he is able to perform tasks of DLA but that they are painful and take longer and that he receives assistance from friends and his girlfriend for some tasks. He stated that he was not present when the GP completed the AR, specifically with respect to the tasks of DLA and that he last met with the GP approximately 1 ½ months ago. The appellant gave evidence that he has not had an MRI on his back and that the neurosurgeon has advised against surgery at this time.

## 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 designation as a PWD under section 2 of the *EAPWDA*, 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 met the age requirement and that he has an impairment that 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 mental or physical impairment;
- the appellant's 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.

The criteria for being designated as a 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.

### **Positions of the Parties**

At the hearing, the appellant argued that he is in pain all the time and that he is unable to work. In his Notice of Appeal dated January 20, 2016, the appellant writes that because of arthritis, his mobility is short and limited.

The ministry's position as set out in the Reconsideration Decision is that the appellant is ineligible for designation as a Person With Disabilities.

### **Severity of impairment**

Section 2(2)(a) of the *EAPWDA* provides that when addressing the issue of a severe physical or mental impairment in the context of a person applying for a PWD designation, that person must be found to have a severe physical or mental impairment that, in the opinion of a medical practitioner, is likely to continue for at least 2 years.

A diagnosis of a serious medical condition or conditions 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. In making its determination, the ministry must consider all the relevant evidence, including that of the appellant. However, the legislation is clear that the fundamental basis for the analysis is the evidence from prescribed professionals – in this case, the GP.

### **Severity of mental impairment**

At the hearing the appellant did not argue that he suffers from a specific mental condition or impairment.

The ministry's position as set out in the Reconsideration Decision is that the evidence does not support a finding that the appellant suffers from a severe mental impairment.

*Panel Decision*

On review of the evidence, the GP has not diagnosed the appellant with a mental impairment or condition. In the PR, the GP answers “No” to the question of whether the appellant has any significant deficits with cognitive and emotional function and similarly in the AR, the GP indicates that the appellant does not experience any impact on daily functioning as a result of a mental impairment or brain injury.

While the appellant has identified in the RFR that his disability includes his brain and that he cannot remember anything, after reviewing the evidence as a whole as set out above, the panel finds that the ministry was reasonable in its determination that the evidence did not support a finding that the appellant suffers from a severe mental impairment as provided by section 2(2) of the *EAPWDA*.

### **Severity of physical impairment**

The appellant takes the position that he is in daily pain and that his various conditions constitute a severe physical impairment.

The ministry’s position as set out in the Reconsideration Decision is that the evidence as a whole, including the appellant’s functional skill limitations, does not support a finding that the appellant has a severe physical impairment.

#### *Panel Decision*

The PR was prepared by the appellant’s GP of 2.5 years. In it, he describes the appellant as suffering from long standing osteoarthritis of the lumbar spine which has during the past 3 years developed into spinal stenosis. He has not made reference to the appellant suffering from hepatitis C as raised at the hearing. He describes the appellant’s functional capacity as including an ability to walk less than 1 block (specifically 50 feet), and climb 2-5 steps unaided while being able to lift between 5 and 15 lbs. The GP has not indicated that the appellant requires any prostheses or aids for his impairment. The appellant’s evidence is that surgery has not been recommended by the neurosurgeon who prepared the Consult Report.

In the AR, the GP indicates that the appellant requires periodic assistance while walking indoors and outdoors, climbing stairs, standing, lifting, carrying and holding. The panel notes the appellant’s evidence that he is unable to get comfortable while walking and standing but otherwise there is no evidence either in the AR or from the appellant at hearing to explain the need, frequency or duration of periodic assistance. Further, on review of the tasks of DLA that are of a physical nature including basic housekeeping, personal care, meals and shopping, the panel notes that the GP is of the opinion that the appellant is largely independent in all of these tasks.

After having reviewed the evidence as described above, the panel finds that the ministry was reasonable in its determination that the evidence does not support a finding that the appellant suffers from a severe physical impairment. Section 2(2) of the *EAPWDA* requires that the minister must be satisfied that a person has a severe mental or physical impairment. Here, the GP has described the appellant as affected by his condition and while the panel finds that the evidence indicates that the appellant has a physical condition which causes him pain and has an impact on him, the evidence of his functional capacity and physical abilities is not suggestive of a severe physical impairment.

### **Restrictions in the ability to perform DLA**

The appellant argues that he is restricted in his ability to perform tasks of DLA.

The ministry’s position as set out in the Reconsideration Decision is that it has not been established by the evidence of a prescribed professional that the appellant’s ability to perform DLA has been directly and significantly restricted by his physical or mental impairments either continuously or periodically for extended

periods as required by section 2(2) of the *EAPWDA*.

*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 or her DLA, continuously or periodically for extended periods. In the present case, while the appellant has provided evidence at the hearing of the challenges that he faces with DLA, the legislation is clear that to satisfy the criteria the evidence must come from a prescribed professional. In the present case, this evidence has been provided by one prescribed professional - the GP.

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 DLA, if any, are significantly restricted by the appellant's impairments, either continuously or periodically for extended periods. Employability is not a listed criterion in the legislation and as such is not a consideration in the determination of whether an applicant's DLA are restricted by a severe impairment.

As the GP completed both the PR and the AR, he only addressed the appellant's DLA in the AR. There he has indicated that the appellant is independent with all tasks of DLA other than dressing for which he requires periodic assistance, and going to and from stores for which he requires continuous assistance and which takes 3 times longer than usual. Further, the GP has indicated that the appellant is independent in all aspects of social functioning and that he has good functioning with his immediate and extended social networks.

While the appellant gave evidence that he was not present when the GP completed the section in the AR that addresses DLA, the panel notes that the AR was completed in August 2015 which would have provided the appellant sufficient time and opportunity to review this document and return to the GP had he disagreed with his opinion. The panel notes further the appellant's evidence that he last saw the GP 1 ½ months ago. Regardless of this, in making its decision in this matter the panel must consider the evidence that was before the ministry at reconsideration and therefore, considering the evidence of the GP as set out in the AR, the panel concludes that the ministry reasonably concluded that the evidence was insufficient to establish that the appellant's impairment significantly restricts his ability to perform tasks of DLA either continuously or periodically for extended periods.

**Help with DLA**

The appellant argues that he requires help with various tasks of DLA with that help coming from his friends and girlfriend.

The ministry's position as set out in the Reconsideration Decision is that because it has not been established that the appellant's DLA are significantly restricted, it cannot be determined that significant help is required.

*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. Section 2(3) of the *EAPWDA* provides that a person requires help in relation to a DLA if, in order to perform it, the person requires an assistive device, the significant help or supervision of another person, or the services of an assistance animal. In other words, it is a pre-condition to a person requiring help that there be a finding that a severe impairment directly and significantly restricts a person's ability to manage his or her DLA either continuously or periodically for an extended period.

Given the panel's finding that the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established, the panel further finds that the ministry's



conclusion that it cannot be determined that the appellant requires help to perform DLA as a result of those restrictions, as defined by section 2(3)(b) of the *EAPWDA*, was reasonable.

**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 under section 2 of the *EAPWDA* was a reasonable application of the applicable enactment in the circumstances of the appellant, and therefore confirms the decision.