

PART C – Decision under Appeal

The Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated 7 January 2016 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;
- the appellant’s mental or physical impairment, in the opinion of a prescribed professional, directly and significantly restricted daily living activities (DLA) either continuously or periodically for extended periods and
- 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, divided in 3 sections: 1 Self Report (SR), 2 Physician Report (PR) and 3 Assessor Report (AR) as follows:

- Section 1 – Applicant Information (SR): the appellant chose not to complete this SR and signed the application before a witness on 23 June 2015.
- Section 2 – the PR completed and signed on 25 June 2015 by the appellant's physician (a general practitioner – the GP) who has known him since 2014 and seen him 2 to 10 times during the previous 12 months. The GP reported the following:
  - Specific diagnoses: lumbar degenerative disc disease (onset 2000), left hip osteoarthritis (OA) – 1990's, coronary artery disease (onset 1990), anemia iron deficiency, peptic ulcer disease (onset 2001) and chronic cough-smoker (onset 2001).
  - Health history: chronic lumbar pain disc disease, left hip pain arthritis, anemic – chronic, peptic ulcer of stomach, smoker – chronic cough and shortness of breath, ADLs + 1 ADLs impaired (?), difficulty with all activities and needs help daily.
  - The appellant was prescribed medication and/or treatment that interfered with his ability to perform DLA (indicated medication 20mg).
  - 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 with the comments: chronic condition present for years – suggest physician to reassess in 2 years to confirm [the appellant] still suffering from current conditions.
  - In terms of functional skills, the GP indicated that the appellant could walk 1 to 2 blocks unaided, he could climb 2 to 5 steps unaided, he can lift 7 to 16kg, has no limitation remaining seated and has no difficulties with communication.
  - The appellant has no significant deficits with cognitive and emotional functions.
  - The GP provided the following additional comments: chronic lumbar pain; daily pain; cannot lift, push, pull, carry; anemia chronic fatigue; ulcer pain; [illegible]; left hip arthritis – difficulty climbing stairs, lifting [illegible].
- Section 3 – the AR completed by the same GP also dated 25 June 2015 reported the following:
  - The appellant lives alone.
  - In terms of physical or mental impairments that impact DLA, the GP listed the diagnoses of the PR.
  - The appellant's speaking, reading, writing and hearing abilities are good.
  - In terms of mobility and physical ability, the GP indicated that the appellant needed periodic assistance from another person for walking indoors / outdoors and standing, and took significantly longer than typical for these activities plus climbing stairs, lifting, carrying/holding as well the appellant needs continuous assistance with climbing stairs, lifting and carrying/holding. Comments: lumbar pain and can't climb more than 1 to 2 flights, hip pain and can't stand more than 10 to 15 minutes, chronic pain and chronic fatigue.
  - In terms of cognitive and emotional functioning, the GP indicated a major impact for bodily functions but did not add any comment.

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- For DLA the GP provided the following assessments, his comments in brackets:
    - *Personal care*: needs periodic assistance and takes significantly longer for dressing (can't stand up), grooming (has to sit), bathing (poor appetite), toileting (ulcer), transfers in/out of bed & transfers on/off chair (due to pain, difficulty to move around fast) but while he needs periodic assistance, it does not take significantly longer for feeding self and regulating diet (due to pain – difficulty).
    - *Basic housekeeping*: continuous assistance for laundry and basic housekeeping (due to pain and anemia, unable to do).
    - *Shopping*: independent for reading prices and labels (difficulty going to stores), making appropriate choices (hip pain and back pain) and paying for purchases (cant' lift bags); needs periodic assistance and takes significantly longer for going to and from stores (anemia); continuous assistance and takes significantly longer for carrying purchases home. The GP provided additional comments: lumbar, leg and hip pain, needs help with personal care, toileting, bathing, grooming, needs help to cook and housekeeping – fatigue.
    - *Meals*: independent for safe storage of food (can't cook); periodic assistance for meal planning, continuous assistance for food preparation and cooking (can't stand long due to hip pain, back pain).
    - *Pay rent and bills*: independent in all aspects.
    - *Medications*: independent in all aspects.
    - *Transportation*: periodic assistance for getting in/out of a vehicle (can't walk to bus stop), using public transit (can't stand long) and using transit schedules and arranging transportation. General comments: needs help with cooking, shopping, transportation [illegible] needs help daily.
    - *Social functioning*: the GP indicated “N/A” for social functioning, help required and safety issues.
  - For assistance provided by others, the GP indicated “Friends” and in terms of necessary assistance, the GP indicated help for transportation, housekeeping, cooking and [illegible].
  - For assistance provided through assistive devices the GP mentioned lifting device, toileting and bathing aids (railing) but did not provide any details on equipment or devices used by the appellant.
  - The appellant does not use a service animal.
  - Additional information: [illegible] hip pain + lumbar pain, can't lift, push, pull, carry; can't stand long; can't climb stairs; can't [walk?] long.
  - The assessor's sources of information were:
    - Office interview with the appellant;
    - Other assessments – advocacy group.
  - With the AR, 3 health reports were provided:
    - 2012 x-ray, ultrasound, mammography, fluoroscopy, MRI, bone densitometry report: moderate osteoarthritis of the joint; advanced narrowing of degenerative disc disease with narrow... disc space, gas in the nucleus pulposus and marginal spurs.
    - Medical imaging report (23 March 2015): small nodules in the left apex are likely inflammatory; pulmonary nodules – these may be inflammatory or neoplastic – 6-month follow-scan recommended.
    - Chest x-ray (23 March 2015): normal.

In his Notice of Appeal dated 15 January 2016, the appellant indicated that he disagreed with the reconsideration decision and that he cannot stand or sit for longer than 15-20 minutes without severe pain developing.

At the hearing the son of the appellant's landlord (the friend) assisted the appellant and testified that the appellant lived in the same house as him and that he had known him for 7 years and was aware the appellant was disabled. He noticed the appellant's health deteriorating over the years and was driving him on occasion to his doctors' appointments. He said that the appellant was unable to climb stairs without having to hold on the railing and that his father helps the appellant going shopping and carrying his purchases since the appellant cannot carry anything. He suggested that the appellant was unable to sit but later indicated that his father had tried to provide employment to the appellant and provided a very comfortable chair but that the appellant could sit at the most for 2 hours on that chair and that he was not employable, even for part-time employment. The witness also explained that the appellant was not fluent in English and that the physician who completed the Application for PWD designation was not entirely aware of his situation and that it would have been preferable that the witness be there with the appellant to explain to the physician exactly what the situation is with the appellant.

The appellant testified that he had lots of problems with his lower back and thighs and was often in much pain. He had many tests at the hospital but the doctors were not able to find exactly what was causing some of the health impairments he was suffering from – anemia was a possible cause. They found blood in his stools and one possibility was that it might be caused by stress. He also indicated that he had pain in his upper left arm as well as stomach and chest. He stated that he could walk around but that after 10 to 15 minutes he had to stop, change position and rest. He said that with income assistance he only had \$100 left monthly for his expenses, after paying rent and utilities. He confirmed that when he went to see the doctor to complete the Application for PWD he was alone and even though the doctor did not speak the appellant's language, no one was able to help him communicate with the doctor and to answer questions, which he did the best he could. Further, he had difficulties finding a doctor that would agree to complete the ministry's questionnaire and 2 doctors refused to complete it. He stated he does most of the housework himself but about once weekly the appellant's daughter comes to help doing housekeeping, in particular heavy cleaning, and she brings the appellant's laundry at her place to wash it and return it to him after.

The appellant testified that he can walk indoors and outdoors on his own, he does not need help from anyone but must stop regularly. He cannot carry anything and his landlord, friends or family will help him when he had to lift or carry anything. He does not cook and gets his food at the grocery store with help from his landlord and also gets food from his daughter and he does not have to cook that type of food. He can stand for about ½ hour and does his own toileting; his landlord installed a bar in the shower so that he can hold on to it. He can get in and out of bed by himself and tried a couple of times to take the bus but he needed help once he got off the bus and had too much to walk and does not use public transit anymore as he can get a ride with his friends. He indicated that he had been approved the persons with persistent multiple barriers to employment (PPMB) designation about two years ago and that it is up for renewal soon.

The ministry relied on the reconsideration decision.



The panel determined the 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, providing more information on the impact of his medical condition on the appellant and corroborating the evidence that was before the reconsideration officer.

## 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 was either a reasonable application of the legislation or reasonably supported by the evidence. The ministry was not satisfied that:

- the appellant had a severe mental or physical impairment;
- the appellant's mental or physical impairment, in the opinion of a prescribed professional, directly and significantly restricted DLA either continuously or periodically for extended periods and
- as a result of those restrictions, in the opinion of a prescribed professional, the appellant required help to perform DLA.

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;

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- (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 the impairment:***

A diagnosis of a serious medical condition 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 legislation clearly provides that the determination of severity of impairment is at the discretion of the minister, taking into account all of the evidence including that of the appellant. However, the legislation is also clear that the fundamental basis for the analysis is the *evidence from a prescribed professional* respecting the nature of the impairment and its impact on daily functioning. The appellant indicated that there was a communication problem and the GP did not appreciate the extent of his impairment. However, the panel notes that the medical reports required for a PWD designation must be based on the opinion of the medical practitioner and not of the appellant. Section 3 of the Application states clearly that the AR should be completed by a prescribed professional "having a history of contact and recent experience with the applicant" and continues: "Please

complete this section based on your knowledge of the Applicant, observations, clinical data and experience.” It is the responsibility of the appellant to make sure that the prescribed professional completing the AR meets these requirements.

As well, the panel notes that, in this case, the ministry did not have the benefit of the appellant’s evidence since he declined to complete the self-report. However, at the hearing the panel had the benefit of the appellant’s evidence similar to a self-report and of a friend. The panel also notes that the appellant presented evidence to the effect that he could not secure employment but also notes that employment is not one of the criteria determining eligibility for a PWD designation.

***Severe physical impairment:***

The appellant argued that his medical condition is such that he has difficulties walking, climbing stairs, carrying and lifting and needs help to do all those activities and many DLA and that it results in a severe physical impairment.

The ministry argued that while the appellant was facing difficulties in terms of physical activities, there was not enough information to determine that it was severe and argued that it was rather a moderate physical impairment.

***Panel decision:***

As mentioned above, diagnoses of serious medical conditions do not by themselves determine that the physical impairment is severe. The appellant faces challenges but the impacts of his physical impairments are not clear or consistent. There are limitations for walking and in the PR the physician mentioned that the appellant could walk 1 to 2 blocks *unaided* but in the AR, he indicated that the appellant required *periodic assistance from another person*. In his testimony, the appellant stated he could walk by himself, that he did not need the assistance of another person but needed to take a break regularly. In the AR the GP did not mention the type of assistance required to walk, by whom and how much longer it takes the appellant to perform that activity.

For climbing stairs, the PR mentions that the appellant can climb 2 to 5 steps unaided while in the AR the GP indicated the appellant needed *continuous* assistance from another person; the evidence from the appellant and his friend is more to the effect that the appellant can climb stairs but need to rely on the railing if the flight of stairs is longer. The appellant needs continuous assistance for lifting, carrying and holding while, at the same time the GP states that it takes him longer to perform that activity – without specifying how much longer - and it is not clear whether it takes longer for the person who would assist the appellant or whether the appellant takes longer if he does not get the assistance from another person – this is important as it may or may not indicate the severity of the impairment. In the PR, the GP indicated no limitation for sitting while the appellant indicated in his Notice of Appeal that he could not sit for more than 15 – 20 minutes and his witness indicated that he could sit for up to a couple of hours in a comfortable chair but no more.

Based on the evidence provided, the panel acknowledges that the appellant experiences limitations to his physical functioning but finds that the ministry reasonably determined that the assessments provided by the medical practitioner speak to a moderate rather than a severe physical impairment.



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***Severe mental impairment:***

The appellant did not argue he had a severe mental impairment.

The ministry argued that the information provided by the appellant did not establish that he had a severe mental impairment.

***Panel decision:***

At the outset, the panel notes that there is no diagnosis of a mental impairment. In the PR, when asked if there are any significant deficits with cognitive and emotional function, the GP responded by the negative. In the AR, the GP indicated that all the appellant's abilities to communicate were good and the whole section about social functioning is marked as "N/A". The panel also notes that for DLA that are specific to a mental impairment under s. 2 (1)(b) of the EAPWDR, making decision about personal activities, care or finances and relating to, communicating or interacting with others the reports do not mention any restriction in terms of decision making and social functioning. The only area where the GP notes a major impact is "bodily functions", without giving any explanation while all the other areas of mental impairments have no impact. Consequently, the panel finds the evidence is insufficient to support a severe mental impairment.

Thus, the panel finds 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 medical impairments affect most of his DLA. He argued that he cannot sit or stand and that he has difficulties with most DLA, needing help from another person. He stated that his doctor did not appreciate the extent of his impairments and their impact on his DLA for a lack of communication because of language.

The ministry argued that for those DLA where assistance is required, there is no information as to how much longer it takes the appellant to perform those activities and how often he requires assistance. The frequency and duration of the periods when the appellant needs periodic assistance are not described to determine if they represent a significant restriction to the appellant's overall level of functioning. Thus, the ministry argued that there is not enough evidence to confirm that the appellant's impairment significantly restricts his ability to perform DLA.

***Panel decision:***

The panel notes that *periodic assistance* is defined on the form as the "need for significant help for an activity some of the time as would be the case where a person required help due to the episodic nature of the impairment". The AR indicated that the appellant needed periodic assistance from another person for personal care but despite being asked to explain/describe, the GP did not indicate what she meant by "periodic" and the evidence from the appellant was to the effect that he could take care of himself but needed to rest at times because of pain. There is no evidence of how much longer

it takes the appellant for personal care.

For basic housekeeping, the GP indicated that the appellant needed continuous assistance from another person and the appellant's evidence was to the effect that his daughter takes his laundry for washing and that she does housekeeping, in particular heavy cleaning but otherwise, the appellant testified he could do basic housework.

In terms of shopping, the GP indicated he was mostly independent but needed periodic assistance for going to and from stores and continuous assistance for carrying purchases home; the evidence from the appellant and his friend is to the effect that his landlord drives him to the grocery store when needed and carry his purchases for him because he cannot lift or carry. Yet, it is not clear what exactly are the appellant's limitations for carrying and lifting since the GP in the PR indicated he could lift 7 to 16 kg but in the AR she wrote that the appellant could not lift bags.

Periodic assistance is required for meal planning with the comment "can't stand long" and continuous assistance for food preparation and cooking. The GP does not explain the type of assistance required and for meal planning how often but the panel notes that the comment to the effect that he can't stand long does not likely relate to meal planning – there is no need to stand to plan meals - and the overall evidence is not clear as to what assistance, if any, is required for planning his meals. The panel accepts the evidence that the appellant can stand for 15 – 20 minutes according to his Notice of Appeal. At the hearing the appellant indicated he does not cook since his daughter brings him food regularly or he goes to the grocery store and chooses his own meals.

The appellant is independent for paying rent / bills and managing his medications. According to the GP, the appellant needs "periodic" assistance from another person for transportation with the comment that he can't walk to the bus stop or stand long. The appellant indicated he had not used public transit for some time because he had to walk too much once at his destination. Again, it is not clear what assistance would be required from another person in terms of public transit and in terms of arranging transportation since the appellant indicated that he makes arrangements with his landlord or his friend to take him to where he needs to go.

Considering that a severe impairment has not been established, given the evidence presented and taking into account that the appellant is independent for many DLA, the panel finds that the ministry reasonably determined that there was not enough information from a prescribed professional to confirm that the appellant's *impairments directly and significantly restrict* DLA continuously or periodically for extended periods.

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

The appellant argued that because of his condition, he requires help with some of his DLA.

The ministry argued that since DLA are not significantly restricted, it cannot be determined that significant help is required from other persons.

*Panel decision:*

The panel notes that when asked in the AR if the appellant needed help to describe the support/supervision required that would help to maintain him in the community, the GP indicated “N/A”. In terms of assistance provided through the use of assistive devices, the GP indicated “lifting device” with no explanation as to what he meant, what type of equipment or device he was referring to and it makes it impossible for the ministry to even determine if that device would meet the definition of “assistive device” under s. 2 (1) of the EAPWDA.

It is clear that the appellant does have assistance from another person with some of his DLA but the assistance is fairly limited to a few DLA. Further, a finding that a severe impairment directly and significantly restricts a person’s ability to manage her 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, that precondition has not been satisfied in this case.

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 that the appellant was not eligible for PWD designation was reasonably supported by the evidence. The panel therefore confirms the ministry’s decision.