

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) Reconsideration Decision dated January 8, 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 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 29, 2015;
- The Physician Report ("PR") dated August 29, 2015 and the Assessor Report ("AR") dated August 29, 2015, both prepared by the appellant's general practitioner ("GP") of 2 years and who treated the appellant 2-10 times in the 12 months prior to completing the PR and AR, and that the source of the information used to complete the PWD application was "office interview with applicant";

2. The appellant's Request for Reconsideration (RFR) dated December 22, 2015 in which he states that:

- He is in a lot of pain;
- Sometimes it takes him hours to get out of bed;
- If he's not lying down he tries to sit on the edge of a bed or sofa so that he can get back up easily and that this is uncomfortable;
- He has pain in his wrists, arms and fingers and eats tea and bread because he cannot cook; and
- He needs help with DLA some days worse than other.

### ***Diagnoses***

In the PR, the GP notes that the appellant has been diagnosed with degenerative disc disease (DDD), right hip arthritis and lumbar radiculopathy with a date of onset for all conditions of 1980.

### ***Physical Impairment***

In the SR, the appellant describes his disability as including "back pain, both shoulders, left knee, both hands and sometimes difficulty preparing meals and other personal daily activities".

In the PR, the GP states that the appellant has "chronic back pain and hip pains now getting worse and leading to difficulty with standing, sitting, sleeping, lying on left side due to pain. The GP provided further comments regarding the appellant's left shoulder which are unintelligible. The GP indicates that the conditions are likely to continue for 2 years or more, the appellant can walk 1-2 blocks unaided on flat surfaces, climb 2-5 stairs, lift under 2 kg, can remain seated for less than 1 hour and has no difficulties with communication. The GP adds that the appellant has not been prescribed any medication or treatment that interfere with his ability to perform DLA's and does not require any prostheses or aids for his impairment.

In the AR, the GP reports that the appellant takes significantly longer with walking indoors, walking outdoors, climbing stairs, standing, lifting, and carrying and holding. The panel notes however that the GP has not indicated whether the appellant is independent with these tasks or if he requires assistance, either periodic or continuous.

### ***Mental Impairment***

The appellant has not commented on any conditions or symptoms related to mental impairment in the RFR or the SR.

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, write and hear are good. In response to the question whether the appellant is impacted by way of a mental impairment or brain injury the GP has responded “N/A.” The GP also notes that the appellant is independent with good functioning in all aspects of social functioning listed on the PWD application.

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

In the PR, the GP has indicated that the appellant is continuously restricted with personal self care, meal preparation, basic housekeeping, daily shopping, mobility inside the home, mobility outside the home and use of transportation. The GP describes the appellant’s degree of restriction as including difficulty with bathing, lying on the couch and sitting in a chair.

In the comment section the GP describes the appellant’s degree of restriction as including difficulty with bathing, lying on the couch and sitting in a chair.

In the AR, the GP notes that the appellant :

- Is independent in feeding himself, regulating his diet, doing his laundry, reading prices and labels, making appropriate choices, paying for purchases, meal planning, safe storage of food, banking, budgeting, pay rent and bills, filling/refilling prescriptions, taking medication as directed, safe handling and storage of medication;
- Usually takes public transit because the appellant has difficulty getting in and out of a car, but is independent in using transit schedules and arranging transportation.
- Takes significantly longer with dressing, grooming, bathing, toileting, transfers (in/out of bed and in/out of chair), basic housekeeping, going to and from the store, carrying purchases home, food preparation, cooking, and using public transit.

### ***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 does not receive help required for DLA from family members and friends or through the use of an assistive device but that he receives assistance through the use of assistive devices; namely a cane, toileting aids and bathing aids.

### **Evidence On Appeal**

#### **Appellant’s Evidence At Hearing**

The appellant stated that:

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- his career of 45+ years and old age have caught up with him and arthritis is very bad;
  - his right leg suddenly falls numb and he can fall;
  - he cannot walk, cut meat, be in direct sun, shower, cook on a regular basis, lean back while sitting;
  - his sister brings him meals once per week and he gets additional help from her and his sons;
  - his breathing is a problem but he is not certain why yet;
  - when sitting he must sit on high surfaces or lean on the edge of the seat or he will have trouble getting up;
  - he has a high bed so he can get out of it with less difficulty;
  - he lives on the ground floor so he does not have to encounter stairs at home;
  - he uses a cane or holding on to walls to get around;
  - he emails his sons and sister for help because he does not have a phone;
  - his body is covered with pain from the arthritis but has no other health issues;

The ministry relied on the reconsideration decision.

### ***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 the appellant's reference to his problematic breathing and large bulge on his left arm are not in support of or corroborate the evidence that was before the ministry at the time of reconsideration. The panel therefore finds that the appellant's reference to his breathing problems and bulge on his left arm are not admissible as they are not 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*.

On review of the evidence, the panel notes that the remainder of the appellant's oral evidence was not "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*.

## 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 his body is covered with pain due to arthritis and this result in it taking hours for him to get up and go in the mornings and prevents him from completing his daily activities.

The ministry's position as set out in the Reconsideration Decision is that the appellant is ineligible for designation as a Person With Disabilities on the basis that the appellant had not satisfied the legislative requirements in the *EAPWDA*.

### **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**

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.

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 pain on a daily basis and that his arthritis constitutes 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*

As mentioned above, diagnoses of serious medical conditions do not by themselves determine that the physical impairment is severe. The appellant faces challenges but panel is of the view that the impacts of his physical impairments are not clear or consistent. The appellant states that he cannot walk, shower, cook or sit comfortably. In the PR the GP, who conducted an office interview, mentioned that the appellant could walk 1-2 blocks *unaided*, climb 2-5 stairs, lift under 2 kg and sit less than 1 hour. In the AR the same GP states that walking indoors and outdoors, climbing stairs, standing, lifting, and carrying and holding do not require either periodic or continuous assistance from another person or that the appellant is independent in these functions. The GP has only indicated that these functions take significantly longer but there is no indication as to how much longer.

Section 2(2) of the *EAPWDA* requires that the minister must be satisfied that a person has a severe mental or physical impairment that results in restrictions to a person's ability to function independently or effectively. The evidence given by the GP indicates that the appellant's functional ability is good and there is no indication that he requires help. Therefore 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.

**Restrictions in the ability to perform DLA**

The appellant argues that he is restricted in his ability to perform tasks of DLA due to the pain he suffers from his arthritis.

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.

The GP addresses DLA's in both the PR and AR. In the PR the GP has indicated that the appellant is restricted in personal self care, meal preparation, basic housekeeping, daily shopping, mobility inside the home, mobility outside the home and use of transportation continuously but not in management of medications and finances and social functioning. However in the AR, the GP has not indicated whether the appellant is independent or if he requires periodic or continuous assistance in his personal care functions, but rather that they take significantly longer and no indication of how much longer. Similarly, with basic housekeeping the GP noted that the appellant is independent with laundry but takes significantly longer with basic housekeeping and no indication as how much longer. With shopping, the GP notes that the appellant is independent with the majority of the functions (as described previously) but takes significantly longer with going to and from the store and carrying purchases home, with no indication as how much longer. With meals the GP notes that food preparation and cooking takes significantly longer but does not indicate how much longer. The appellant faces challenges but the impacts of his physical impairments are not clear or consistent.

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 PR and 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 sister and sons.



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.