

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of February 1, 2016, 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 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 form dated November 12, 2015 ("SR"), a physician's report ("PR") and an assessor's report ("AR"), both completed by the appellant's general practitioner (the "physician") on November 6, 2015.
- The appellant's Request for Reconsideration ("RFR") form dated December 30, 2015 in which the appellant states that his doctors disagree with the ministry decision, that he has been very sick with his COPD and cannot get an appointment with his doctor until after April 2, 2016 so he requested an extension of time to complete reconsideration.

### Diagnoses

- In the PR the physician (who has known the appellant for 2 years and has seen him two to ten times in the past 12 months) diagnosed the appellant with prostate cancer with metastases (date of onset June 2014), COPD (date of onset 2002) and double lobectomy right lung for lung cancer (date of onset 2007).
- For Section B – Mental or Physical Impairment in the AR, the physician did not complete question one requesting a brief summary describing the appellant's physical or mental impairments that impact his ability to manage DLA.

### Physical Impairment

- In the Health History portion of the PR, the physician states that the severe COPD causes shortness of breath, poor exercise tolerance, gets breathless walking 100 meters and that the appellant needs to use an inhaler every day. The physician states that the lung cancer has made the appellant's respiratory reserve very poor. The physician states that the appellant has completed radiotherapy for his prostate cancer resulting in weight loss and weakness, that he has a suspicious pelvic node that may contain metastasis of cancer and has a high risk of relapse.
- In terms of physical functioning the physician reported in the PR that the appellant can walk 1 to 2 blocks unaided, can climb 2 to 5 steps unaided, can lift 5 to 15 pounds and has no limitations with respect to remaining seated.
- Under Additional Comments, the physician reports that the appellant's lung disease is irreversible and deteriorating and that he has severe COPD compounded by lobectomy right lung with poor response to inhalers. The physician states that the appellant is not definitively free of prostate cancer and needs continuing monitoring and hormone therapy.
- In the AR the physician reports that the appellant independently manages walking indoors and standing, requires periodic assistance with walking outdoors, climbing stairs and carrying and holding, and continuous assistance with lifting. The physician explains that the appellant needs help carrying anything over 7 kg and is short of breath walking 100 meters which takes him three times longer than normal.

### Mental Impairment

- In the Health History portion of the PR the physician commented that there are no significant

deficits with cognitive and emotional function.

- In the AR the physician indicates that the appellant's ability to communicate with speaking, reading, writing and hearing are good.

#### DLA

- In the AR the physician indicates that the appellant is independent with all aspects of personal care, paying rent and bills, medications, and transportation. For basic housekeeping the appellant requires periodic assistance with basic housekeeping (cannot carry anything more than 7 kg). With shopping, the appellant is independent with reading prices and labels, making appropriate choices and paying for purchases but requires periodic assistance going to and from stores and carrying purchases home, explaining that he gets short of breath walking 100 meters and needs assistance to walk further. For meals, the appellant is independent with meal planning and safe storage of food but requires periodic assistance with food preparation and cooking, as he is still weak from radiotherapy.

#### Help

- In the PR the physician reports that the appellant does not have any prosthesis or aids for his impairment.
- In the AR the physician indicates that the appellant receives help from family and friends. The appellant does not use assistive devices or have an assistance animal.

#### **Additional information provided**

In his Notice of Appeal the appellant states that he disagrees with the ministry's reconsideration decision because he has COPD, stage 4 prostate cancer, requires daily medications and does not have two lungs.

At the hearing the appellant provided oral evidence stating that he was not well that he has undergone 37 radiation treatments, and is weak and sick. He states that he lives alone, but that his mother and sister come and help him a few times each week, varying from 45 minutes to two hours at a time. The appellant states that he loves walking but can only walk half a block. He also stated that he was recently diagnosed with arthritis and it is now hard to get up in the morning. He states that long hot steam showers help his arthritis but aggravate his COPD.

#### **Admissibility of New Information**

The ministry did not object to information in the Notice of Appeal or the appellant's oral evidence. The panel has admitted the appellant's testimony as it is evidence in support of information and records that were before the ministry at the time of reconsideration, in accordance with section 22(4) of the *Employment and Assistance Act*. In particular, the new information corroborates the information at reconsideration respecting the appellant's impairment, his ability to perform DLA, and help needed. However, the appellant's evidence that he has recently been diagnosed with arthritis represents new information and a new medical condition that were not before the ministry at the time of reconsideration so the panel has not admitted that aspect of the appellant's evidence.

## 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 ministry's position, as set out in its reconsideration decision, is that the information provided is not evidence of a severe physical impairment. The ministry's position is that the functional limitations reported by the physician demonstrate that the appellant experiences limitations to his physical functioning due to his COPD and weakness but that the assessments provided by the physician speak to a moderate rather than a severe physical impairment.

The appellant's evidence is that he has severe COPD, one lung, has had lung cancer where an operation removed two third of his right lung, he had skin cancer on his face (removed), he has completed 37 radiation treatments and that he is weak, cannot walk more than half a block before becoming very tired, that he requires hormone therapy for the rest of his life and assistance from his sister and mother. The appellant's position is that due to his health conditions and limitations he meets the criteria for designation as PWD as supported by his physician.

#### *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. Likewise the use of the word "severe" in and of itself does not establish a severe impairment.

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. The legislation makes it clear that the determination of severity is

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at the discretion of the minister, taking into account all of the evidence. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a prescribed professional.

The panel finds that although the physician describes the appellant's COPD as severe in two places the use of the word severe is not sufficient on its own to meet the criteria of a severe physical impairment as required by EAPWDR section 2(2). While the appellant has a serious medical condition and that the physician reports some functional limitations resulting from his medical conditions, particularly his COPD with resulting weakness and fatigue, the appellant remains independent with walking indoors and standing, and is able to climb 2 to 5 steps unaided, can lift 5 to 15 pounds and has no limitations with respect to being seated. The panel also notes that while the appellant reports he is weak and fatigued after walking half a block, the physician indicates that the appellant can walk 1 to 2 blocks unaided so the information regarding how far the appellant can walk is somewhat inconsistent. The panel finds that the ministry was reasonable in determining that the physical limitations reported speak to a moderate rather than severe physical impairment.

### **Severe Mental Impairment**

The ministry's position is that the information provided does not establish that the appellant has a severe mental impairment. The ministry notes that the physician does not indicate that the appellant has any significant deficits with his cognitive and emotional functioning, that his level of ability with speaking, reading, writing and hearing is good, that he does not have any difficulties with communication and does not require any support/supervision with his social functioning.

The appellant did not take the position that he has a severe mental impairment although in the SR he states that he has trouble accepting his situation.

### *Panel Decision*

As the physician has not diagnosed the appellant with a mental impairment and has not indicated that the appellant has any significant deficits with his cognitive and emotional functioning, the panel finds that the ministry's decision that the appellant does not have a severe mental impairment was reasonable.

### **Significant Restrictions to DLA**

The ministry's position is that it relies on the medical opinion and expertise of the appellant's physician and finds that there is not enough evidence to establish that the appellant's impairments directly and significantly restrict his DLA either continuously or periodically for extended periods. The reconsideration decision notes that the physician indicates that the appellant requires periodic assistance with laundry, basic housekeeping, food preparation and cooking but that all other aspects of the appellant's DLA are managed independently. The ministry acknowledges that the appellant has certain limitations resulting from shortness of breath and weakness but the frequency and duration of these periods are not described in order to determine if they represent a significant restriction to the appellant's overall level of functioning. The ministry's position is that the assessments provided by the physician indicate a moderate level of restriction.

The appellant's position is that his medical conditions have left him weak and fatigued and that without assistance from his family he does not know what he would do. He states that he cannot vacuum or walk as much as he used to. He states that walking half a block is difficult and that getting to the bus is hard. He reports that he spends a lot of time lying in bed and at home. He paces himself to complete his household tasks throughout the day. He is able to make his breakfasts and lunches and that his mother typically prepares his dinners and he just warms them up. He states that his ability to perform his DLA is worse after his hormone injections, which were every month but are now every three months.

### *Panel Decision*

The legislation – s. 2(2)(b)(i) of the EAPWDA – requires that the minister be satisfied that in the opinion of a prescribed professional, a severe mental or physical 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. Finally, there is a component related to time or duration. The direct and significant restriction may be either continuous or periodic. If it is periodic it must be for extended periods. Inherently, any analysis of periodicity must also include consideration of the frequency. All other things being equal, a restriction that only arises once a year is less likely to be significant than one, which occurs several times a week. Accordingly, in circumstances where the evidence indicates that a restriction arises periodically, it is appropriate for the ministry to require evidence of the duration and frequency of the restriction in order to be "satisfied" that this legislative criterion is met.

In the appellant's circumstances, the physician, in the AR, indicates that the appellant is independent with all aspects of personal care, paying rent and bills, medications, and transportation. For basic housekeeping the appellant requires periodic assistance with basic housekeeping (cannot carry anything more than 7 kg). With shopping, the appellant is independent with reading prices and labels, making appropriate choices and paying for purchases but requires periodic assistance going to and from stores and carrying purchases home, explaining that he gets short of breath walking 100 meters and needs assistance to walk further. For meals, the appellant is independent with meal planning and safe storage of food but requires periodic assistance with food preparation and cooking, as he is still weak from radiotherapy. However, the physician did not indicate what he meant by "periodic" – he did not indicate the frequency, length and type of assistance required and from whom. The physician did not indicate that the appellant requires any support or supervision with respect to his social functioning.

Given the significant degree of independence exhibited by the appellant, including the fact that he lives alone and is independent with all aspects of personal care, management of medications, transportation, paying rent and bills and most aspects of shopping and meals, the panel finds that the ministry reasonably determined that the evidence is insufficient to show that the appellant's ability to perform his DLA is significantly restricted either continuously or periodically for extended periods as required by EAPWDR section 2(2)(b).

### **Help with DLA**

The ministry's position is that, as it has not been established that DLA are significantly restricted;

therefore, it cannot be determined that significant help is required from other persons.

The appellant's position is that he requires help from his family each week and that without them he does not know what he would do. The appellant states that his mother comes over once a week, typically for two hours assisting with vacuuming and grocery shopping. His sister comes over once or twice each week for 45 minutes. The appellant states that while he is able to make basic meals his mother prepares most of his dinners for him.

#### *Panel Decision*

The physician reports that the appellant does not require any prosthesis or aids for his impairment but that the appellant's family provides help. The AR indicates that the appellant does not require the use of any assistive devices or an assistive animal.

While the appellant's evidence is that he requires help from his family, particularly with vacuuming, shopping and preparing dinners, and that his mother comes once a week and his sister comes once or twice each week, there is little other narrative about the frequency or duration of the assistance provided and the information provided establishes that the appellant is independent with many DLA.

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.

As the panel finds that the ministry reasonably determined that the appellant does not have a severe impairment that directly and significantly restricts the appellant's ability to manage his DLA either continuously or periodically for an extended period of time, the necessary precondition has not been satisfied in this case. The panel finds that the ministry's decision that the appellant did not satisfy the legislative criteria of EAPWDA section 2(3)(b) was reasonable.

#### **Conclusion**

The panel acknowledges that the appellant has a serious medical condition that does impact his functional limitations and makes it more difficult to complete his DLA. However, having reviewed and considered all of the evidence and the relevant legislation, the panel finds that the ministry's decision finding the appellant ineligible for PWD designation is reasonable based on the evidence and is a reasonable application of the legislation in the circumstances of the appellant. The panel therefore confirms the ministry's decision.