

## PART C – Decision under Appeal

The decision under appeal is the reconsideration decision of the Ministry of Social Development and Social Innovation (the ministry) dated April 28, 2016 which held that the appellant did not meet 2 of the 5 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 a medical practitioner confirmed that the appellant has a severe physical impairment that is likely to continue for at least 2 years. However, the ministry was not satisfied that:

- the evidence establishes that the appellant has a severe 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
- as a result of those restrictions, in the opinion of a prescribed professional, the appellant requires help, as it is defined in the legislation, 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

### Information before the ministry at reconsideration

- A PWD application comprised of the appellant's Self-report (SR) dated January 20, 2015, a Physician Report (PR), and an Assessor Report (AR). Both the PR and the AR are dated October 29, 2015 and were completed by a general practitioner (GP) who has been the appellant's GP since March 2015.
- CT and MR results, confirming right paracentral disc herniation at L5-S1.
- October 2015 correspondence respecting the denial of the appellant's workers' compensation claim that the L5-S1 disc herniation arose out of and in the course of his employment in 2013.
- October 28, 2015, 3-page Disability Application Letter ("the letter") from the appellant.

### Information provided on appeal

The appellant provided a Notice of Appeal dated May 5, 2016, which included additional information substantiating information in his previous submissions. The additional information was admitted in accordance with section 22(4) of the *Employment and Assistance Act* as being in support of the information and records before the ministry at reconsideration.

### Summary of relevant evidence

#### Diagnoses

The GP diagnoses lumbar discopathy and anxiety disorder.

#### Mental Impairment

The GP reports:

- There are no difficulties with communication. Ability to communicate via speaking, reading, writing, and hearing is good.
- A significant deficit with cognitive and emotional function is reported for emotion. No deficit is reported for the remaining 11 listed areas of functioning.
- The sections in the AR respecting the daily impact on cognitive and emotional functioning from mental impairment or brain injury and assessments regarding social functioning are marked "n/a."

In the SR, the appellant describes his physical impairment, noting that it is hard to focus on anything because he is always feeling pain. In the letter, the appellant describes his physical medical condition and his interactions with treating physicians and workers' compensation. He writes that the mental aspect of his injury has been traumatizing, and he has lost plenty of friends and strained relations with family due to the original misdiagnosis.

## DLA

The GP writes that the L5-S1 herniated disc impacts the appellant's ability to manage DLA.

In the PR, the GP indicates:

- Basic housework, daily shopping, and mobility outside the home are continuously restricted. The restriction is described as "significant."
- Mobility inside the home and use of transportation are periodically restricted, described as "back pain is challenging in movement and bending."

In the AR, where asked to provide information specific to individual tasks of each DLA, the GP did not provide information respecting personal care, basic housekeeping, and shopping. All listed tasks of meals, pay rent and bills, and medications are noted as independently managed by the appellant. Two tasks of transportation – getting in and out of vehicle and using public transit – are reported to take significantly longer than typical to perform, with the final task, using transit schedules and arranging transportation, managed independently. The GP does not provide commentary.

In the letter, the appellant writes that he tries his best to complete all his household chores but sometimes basic things like shaving become a huge ordeal. Every task he attempts must be properly planned and coordinated within time frames allowing him breaks, making life extremely difficult. In his Notice of Appeal, the appellant writes that his physical impairment restricts him from performing basic DLA such as cooking, washing dishes, laundry, vacuuming and other household chores. He has a difficult time completing tasks, having to do them in increments if at all.

## Need for Help

The GP reports that assistance is provided by family and that the appellant does not require assistive devices or an assistance animal.

## PART F – Reasons for Panel Decision

### **Issue on Appeal**

The issue on appeal is whether the ministry's decision to deny the appellant 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. In particular, was the ministry reasonable in determining that:

- a severe mental impairment was not established;
- the appellant's daily living activities (DLA) are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and
- as a result of those restrictions, in the opinion of a prescribed professional, the appellant does not require the significant help or supervision of another person, an assistive device, or the services of an assistance animal to perform DLA?

### **Relevant Legislation**

#### **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.

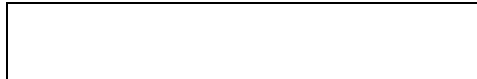
(3) For the purposes of subsection (2),

(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.

(4) The minister may rescind a designation under subsection (2).

**EAPWDR**

**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.

**(2)** For the purposes of the Act, "**prescribed professional**" means a person who is authorized under an enactment to practice the profession of

- (a) medical practitioner,
- (b) registered psychologist,
- (c) registered nurse or registered psychiatric nurse,
- (d) occupational therapist,
- (e) physical therapist,
- (f) social worker,
- (g) chiropractor, or
- (h) nurse practitioner.

**Severe Impairment**

The legislation 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. While the legislation does not define “impairment”, the PR and AR 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.

When considering the evidence provided respecting the severity of impairment, the ministry must exercise its decision-making discretion reasonably by weighing and assessing all of the relevant evidence and cannot simply defer to the opinion of a prescribed professional, as that would be an improper fettering of its decision-making authority.

The legislation does not require that both a severe physical and a severe mental impairment be established; either is sufficient to meet this legislative criterion. The ministry determined that the appellant has met this criterion as it was satisfied that he has a severe physical impairment. However, the panel will still consider the reasonableness of the ministry’s determination that a severe mental impairment was not established.

#### *Mental Impairment*

The appellant does not expressly argue that he has a severe mental impairment but does note that the mental aspect of his physical injury has been traumatizing and causes difficulty focusing.

The ministry’s position is that although a deficit is reported in the area of emotional disturbance, the GP does not report any impacts on daily functioning respecting cognitive and emotional function, instead indicating that that section of the AR is not applicable. Additionally, no difficulties with communication are reported. The ministry is not satisfied that the information provided is evidence of a severe mental impairment.

#### *Panel Decision*

The appellant is diagnosed with anxiety disorder and the GP indicates that there is a significant deficit in the area of emotion. However, the sections of the AR addressing impacts on daily functioning in 14 areas of cognitive and emotional function is marked as not applying to the appellant, as are the sections respecting social functioning. The appellant is also reported as having no problems with communication or decision-making. Based on the lack of impact that the appellant’s anxiety is reported as having on his functioning, the panel finds that the ministry reasonably determined that a severe mental impairment has not been established.

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

The appellant’s position is that due to his herniated disc, even performing basic tasks can be an ordeal and he must plan tasks to allow for breaks.

The ministry acknowledges that as a result of his severe physical impairment the appellant experiences some limitations to his physical functioning but, as the GP has not indicated that the appellant requires continuous assistance to manage his DLA or the use of an assistive device, the ministry is not satisfied that his ability to manage DLA is significantly impacted. The ministry concludes that as the majority of DLA are performed independently or require little help from others, the information from the prescribed professional does not establish that impairment *significantly restricts* DLA either continuously or periodically for extended periods.

*Panel Decision*

The legislative requirement respecting DLA set out in section 2(2)(b) of the EAPWDA is that the minister be satisfied that as a result of a severe physical or mental impairment a person is, in the opinion of a prescribed professional, directly and significantly restricted in the ability to perform DLA either continuously or periodically for extended periods. Consequently, while other evidence may be considered for clarification or support, the ministry's determination as to whether or not it is satisfied, is dependent upon the evidence from prescribed professionals. DLA are defined in section 2(1) of the EAPWDR and are listed in both the PR and the AR sections of the PWD application with the opportunity for the prescribed professional to check marked boxes and provide additional narrative to present a clear and complete description of the extent of the restrictions and their impact on an applicant's functioning.

In this case, the prescribed professional is the appellant's GP. In the PR, the GP indicates that the appellant is continuously restricted with basic housework, shopping, and mobility outside the home (a component of the DLA "move about outdoors and indoors"). Additionally, there are periodic restrictions with mobility inside the home and use of transportation. The GP describes restrictions with DLA as "significant." However, in the AR, the GP either provides no information as to how the appellant's ability to perform 3 DLA is restricted or indicates that the appellant independently manages the other DLA, with some tasks taking significantly longer to perform. Specifically, no information is provided in the AR respecting the ability to manage personal care, basic housekeeping, or shopping. Moving about outdoors and indoors and the physical aspects of transportation are reported to take significantly longer to perform. The GP does not indicate how much longer these activities take to perform. All tasks of meals, pay rent and bills, and medications are managed independently.

Noting that some of the information requested in the AR was not provided by the GP, the panel finds that based on the available information from a prescribed professional, the ministry reasonably concluded that the appellant independently manages the majority of his DLA, without the use of assistive devices, and with minimal assistance from others. Therefore, the panel finds that the ministry reasonably determined that the information from the prescribed professional does not establish that impairment significantly restricts DLA either continuously or periodically for extended periods as required by section 2(2)(b)(i) of the EAPWDA.

**Help to perform DLA**

The appellant does not expressly address the need for assistance.

The ministry's position is that because it has not been established that DLA are significantly restricted, it cannot be determined that 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. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform a DLA.

The establishment of direct and significant restrictions with DLA is a precondition of the need for help criterion. As the panel found that the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established, the panel also finds that the ministry reasonably concluded that it cannot be determined that the appellant requires help to perform DLA as required by section 2(2)((b)(ii) of the EAPWDA.

**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, was reasonably supported by the evidence, and therefore confirms the decision. The appellant is not successful on appeal.