

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of July 18, 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:

- Radiologist Report invoice for MRI – MR Arthrogram dated May 6, 2015
- Invoice from an orthopedic surgeon to the appellant dated June 25, 2015 for a consult
- The appellant's PWD application form consisting of the appellant's self-report form dated February 25, 2016 ("SR"), a physician's report ("PR") dated February 2, 2016 and an assessor's report ("AR") dated February 25, 2016, both completed by the appellant's general practitioner (the "physician") who has known the appellant for more than one year and has seen the appellant 2 to 10 times in the last year
- The appellant's Request for Reconsideration ("RFR") form with attached letter from the appellant (the "RFR Letter") in which the appellant states that he would rather not go on disability and would prefer to be working but he is not able to right now. The appellant states that he has worked hard all his life and hopes to be able to continue as he loves working and keeping busy. The appellant states that income assistance is not enough to survive on.
- Invoice from an imaging office to the appellant dated June 23, 2016 for an MRI Lumbar Spine

### Diagnoses

- In the PR the physician diagnosed the appellant with lumbar degenerative disease and multiple drug use, date of onset not indicated.

### Physical Impairment

- In the Health History portion of the PR, the physician states that the appellant complains of severe and constant pain in his low back, that he has been unable to work for some time, and has sometimes abused drugs. The physician indicates that the appellant is 5 feet 6 inches and weighs 140 pounds.
- In terms of physical functioning the physician reported in the PR that the appellant can walk 4+ blocks unaided on a flat surface, can climb 5+ steps unaided, can lift 5 to 15 pounds, and can remain seated for 2 to 3 hours.
- In the AR the physician reports that the appellant has severe back and hip pain, L4/5 disc herniation and difficulty coping with the pain. The physician indicates that the appellant is independent with walking indoors, walking outdoors (50% longer), climbing stairs (50% longer) and standing, but requires continuous assistance from another person with lifting, noting his lifting restriction is 20 pounds.
- In the SR the appellant states that he cannot walk because of pain all the time and that he has a hard time sleeping due to nerve discomfort.
- In the RFR Letter the appellant states that he has not been able to work for almost two years due to his hip and back pain and cannot even do small jobs. He states that he goes for walks, does a bit of weed eating or just does nothing and he is suffering constantly all the time with pain, aching, and burning in the foot. The appellant states that he has been to chiropractors and has had laser treatments on his back, x-rays and cat scans, cortisone shots twice in the hips and once in the spine, and nothing has helped. He states that he has had three MRI's (one on the hip and two on the spine) and the latest one was done on June 23, 2016 and he does not yet have those results. The appellant states that because he is so desperate his

mother paid for the last two MRI's so he could get quicker appointments.

### Mental Impairment

- In the Health History portion of the PR, the physician indicates that there are no difficulties with communication other than a lack of fluency in English. He indicates that the appellant has significant deficits with cognitive and emotional function in the area of psychotic symptoms due to cocaine use.
- In the AR the physician indicates that the appellant's ability to communicate with speaking, reading, writing and hearing is satisfactory.
- In the AR the physician indicates that the appellant has moderate impacts to the areas of bodily functions, emotion, impulse control, attention/concentration, executive, motivation and psychotic symptoms; minimal impact in the areas of consciousness and insight and judgment and no impact in the areas of memory, motor activity, language, other neuropsychological problems and other emotional or mental problems. The physician comments that the appellant has struggled with pain and addiction, and was depressed and psychotic in 2006 and 2013. He notes that the appellant saw a psychiatrist in 2006 and is not much improved.
- In the RFR Letter the appellant states that his life "...*just sucks right now and gets down right depressing*".

### DLA

- In the PR, the physician indicates that the appellant has not been prescribed any medication and/or treatments that interfere with his ability perform DLA. In the PR the physician indicates that the appellant's impairments do not restrict his ability to perform DLA except periodically with social functioning.
- In the AR the physician indicates that the appellant is independent with all aspects of DLA except that he has periodic restrictions with carrying purchases home, budgeting, paying rent and bills (often runs out of money).
- With respect to social functioning, the AR indicates that the appellant requires periodic supervision with making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others, dealing appropriately with unexpected demands, and securing assistance from others. The physician indicates that the appellant has marginal functioning with his immediate and extended social networks, commenting that he has few friends and relies on family/mother.

### Help

- In the PR the physician indicates that the appellant does not require any prostheses or aids for his impairment.
- In the AR the physician explains that the appellant relies on his mother for some cleaning and financial help and relies on welfare for income. The physician indicates that the appellant does not require any assistive devices and does not have an Assistance Animal.

### **Additional information provided**

With his Notice of Appeal dated August 3, 2016 the appellant provided a letter from his mother who

states that it seems that to qualify for disability you have to be unable to function on your own and be in need of assistance on a “daily basis” but unfortunately that is not the case for her son. She states that the appellant is unable to work due to back problems and that to her and a lot of other people who see him and hear about his pain and suffering every day we all know he should qualify for disability with no problem. The appellant’s mother states that she personally knows quite a few people that managed to get on disability and none of them need help with “daily living”. She states that those other people either had some good help with the application or lied about their condition.

The appellant’s mother states that there is no option left for her son but to appeal a third time. She states that her son has back issues, pains and is unable to sleep and that those are all disabilities to the person that is living this nightmare and that anyone who does not have medical issues cannot possibly understand what another person is going through. The appellant’s mother states that she just wanted to voice her concerns and opinion about the application and how it seems to focus on “daily living”.

The ministry provided an email dated August 29, 2016 indicating that its submission will be the reconsideration decision provided in the Record of Ministry Decision.

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

The ministry did not object to information in the letter from the appellant’s mother. The panel has accepted the appellant’s mother’s letter 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 provides further explanation about the appellant’s physical condition.

With the consent of both parties, the hearing was conducted as a written hearing pursuant to section 22(3)(b) of the *Employment and Assistance Act*.

## 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 information provided by the physician indicates that the appellant is able to independently manage most areas of mobility and physical ability. The ministry's position is that although the physician indicates that the appellant takes 50% longer with walking outdoors and climbing stairs, the assessments provided by the physician are more in keeping with a moderate degree of physical impairment.

The appellant's position is that he has severe multilevel lumbar disc disease that causes him constant pain and that despite numerous treatment and investigations, he has not experienced any improvement. The appellant's position is that the information provided is sufficient to establish that he qualifies for PWD designation. In particular, the appellant states that he has not been able to work for almost two years due to his hip and back pain and cannot even do small jobs. He states that he goes for walks, does a bit of weed eating or just does nothing and he is suffering constantly all the time with pain, aching, and burning in the foot.

*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 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 PR indicates that the appellant has been diagnosed with lumbar degenerative disease but the physician indicates that the appellant is able to walk 4+ blocks unaided on a flat surface, can climb 5+ steps unaided, can lift 5 to 15 pounds and can remain seated for 2 to 3 hours. Although the AR indicates that it takes the appellant 50% longer with walking outdoors and climbing stairs the appellant is still independent with walking indoors, walking outdoors, climbing stairs, and standing; but requires continuous assistance with lifting and has a lifting restriction of 20 pounds.

The panel finds that the appellant has a medical condition that causes him some pain and limitations but given the significant level of independence, the panel finds that the ministry reasonably determined that the information provided does not establish that the appellant has a severe physical impairment.

While the appellant and his mother both indicate that he is unable to work, employability is not a criterion for designation as PWD.

### **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 indicates that the appellant has seven moderate impacts with cognitive and emotional functioning and two minimal impacts but no major impact in any areas. The ministry's position is that the information provided by the appellant's physician speaks to a moderate rather than a severe mental impairment.

The appellant's position is that he struggles with depression due to the limitations caused by his physical impairments and that the information provided by the physician establishes that he has a severe mental impairment.

### *Panel Decision*

In the PR, the physician indicates that the appellant has a substance-related disorder being multiple drug use. The physician indicates that the appellant has significant deficits with cognitive and emotional function in the area of psychotic symptoms due to cocaine and pot. In the AR, the physician indicates that the appellant does not have any major impact to his cognitive and emotional function. He indicates that the appellant has moderate impact seven areas being bodily functions, emotion, impulse control, attention/concentration, executive, motivation and psychotic symptoms, minimal impact to consciousness and insight and judgment and no impact to the areas of memory, motor activity, language, other neuropsychological problems or other emotional or mental problems.

The panel notes that the information provided in the PR and the AR are not consistent as the PR does not indicate that the appellant has significant deficits in the areas of emotional disturbance, impulse control, attention or sustained concentration, executive or motivation yet in the AR the physician has indicated that the appellant has moderate impact to those areas of cognitive function.

The physician has not provided any further information to explain the inconsistencies between the PR and the AR.

The information provided indicates that the appellant has some functional limitations due to his mental impairment as he struggles with pain and addiction, but as the physician has not indicated that the appellant has any major impacts to his cognitive and emotional functioning, the panel finds that the ministry was reasonable in determining that the information provided does not establish that the appellant has a severe mental impairment.

### **Significant Restrictions to DLA**

The ministry's position is that a severe impairment has not been established. The ministry's position is that considering the appellant's medical history, it is reasonable to expect that he would encounter some restrictions to his ability to perform DLA and require assistance as a result. The ministry's position is that as the majority of the appellant's DLA are performed independently or require little help from others, the information provided does not establish that an impairment significantly restricts DLA either continuously or periodically for extended periods.

The appellant's position is that he is suffering constantly with pain whether it is going for walks, doing a bit of weed eating, or doing nothing. In the RFR Letter, the appellant states that his pain goes on all day and night and that he ought to qualify for PWD designation.

#### *Panel Decision*

While the appellant's mother states that there appears to be too much focus on DLA and that other people who are less disabled than her son have qualified for disability, the panel notes that 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 PR, the physician indicates that the appellant's impairment does not restrict his ability to perform DLA except that he has a periodic restriction with respect to his social functioning. In the AR, the physician indicates that the appellant requires periodic assistance with carrying purchases home, budgeting, and paying rent and bills. The panel notes that the appellant is independent with the majority of DLA and with respect to the periodic assistance required the only information provided by the physician is that with respect to paying rent and bills the appellant often runs out of money. The



physician indicates that the appellant requires periodic support/supervision with all listed aspects of social functioning noting that the appellant makes poor choices at times and that pain and stress cause poor choices but the physician does not provide any further information on the frequency or duration of the support/supervision required.

Given the significant degree of independence reported and the lack of information regarding the frequency and duration of assistance needed with the appellant's DLA, 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 needs help with DLA and that the AR confirms that he receives help from his mother with respect to some cleaning and financial assistance.

### ***Panel Decision***

In the AR the physician indicates that the appellant's mother provides assistance with cleaning and financial assistance. However, there is no information from the appellant, the physician, or the appellant's mother regarding the frequency or duration of assistance provided.

In addition, 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 serious medical conditions that cause him pain and some functional limitations. While the appellant's mother's letter indicates that the PWD application seems to be focused on establishing that the appellant struggles with "daily living", the panel notes that the legislative requirement that the appellant's DLA be directly and significantly restricted either continuously or periodically for extended periods is only one of the five criterion that must be met.

The panel also notes that the appellant's mother states that she personally knows other people who managed to get on disability and none of them need help with DLA so they either had some good help with the application or lied about their condition. However, the panel also notes that each application must be considered on its own, based on all of the information provided. Having reviewed

and considered all of the evidence and the relevant legislation, the panel finds that the ministry's reconsideration decision finding that the appellant does not have a severe physical or mental impairment, and that the appellant's impairment does not directly and significantly restrict his ability to perform DLA either continuously or periodically for extended periods and that as a result of a severe impairment he needs help to perform DLA, 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 and the appellant is not successful in his appeal.