

## 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 15 August 2016 that denied the appellant designation as a person with disabilities (PWD). The ministry determined that the appellant did not meet all of the required criteria for PWD designation set out in the *Employment and Assistance for Persons with Disabilities Act*, section 2. Specifically, the ministry determined that the information provided did not establish that the appellant has a severe mental or physical impairment that in the opinion of a prescribed professional

(i) directly and significantly restricts his ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and,

(ii) as a result of those restrictions, he requires help to perform those activities.

The ministry determined that the appellant satisfied the other 2 criteria: he has reached 18 years of age and his impairment in the opinion of a medical practitioner is likely to continue for at least 2 years.

## 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 reconsideration consisted of the following:

1. The appellant's PWD Designation Application dated 12 January 2016. The Application contained:
  - A Self Report (SR) completed by the appellant.
  - A Physician Report (PR) dated 16 January 2016, completed by the appellant's general practitioner (GP), who has known the appellant on and off since 2001 and seen him 2-10 times over the past year
  - An Assessor Report (AR) dated 16 January 2016, completed by the same GP.
  - The following medical reports attached to the application:
    - a) CT scan of the chest dated 02 December 2013.
    - b) Bone survey skeletal x-ray dated 10 April 2014.
    - c) Consult report by an endocrinologist dated 02 October 2014.
    - d) CT scan of the thoracic spine dated 11 February 2016.
2. The appellant's signed Request for Reconsideration dated 13 July 2016.

In the PR, the GP lists the following diagnosis related to the appellant's impairment (onset October 2013): osteoporosis/multiple vertebral compression fractures.

The panel will first summarize the evidence from the PR, the AR and the medical reports relating to the appellant's impairments as it relates to the PWD criteria at issue in this appeal.

### Severity/health history

#### *Physical impairment*

PR:

Under Health History, the GP writes: "Had a fall October 2013. Severe daily back pain since. Ongoing tests showed osteoporosis/multiple vertebral compression fractures. Severe back pain persists despite daily pain medication. Worse with any movement/mobility and affects daily functioning involving same."

Under Degree and Course of Impairment the GP indicates that the impairment is likely to continue for two or more years, commenting, "[illegible] pain for over 2 years with no improvement. Will require ongoing specialist follow-up/pain control, but because of lack of change so far, I would consider this condition chronic/permanent."

As to functional skills, the GP reports that the appellant can walk 4+ blocks unaided, can climb 5+ steps unaided, is limited to lifting under 5 lbs., and can remain seated for 1 to 2 hours.

The GP indicates that the appellant has been prescribed medication and/or treatments that interfere with his ability to perform DLA. The GP explains: "Chronic pain meds/narcotics may affect cognitive processing." The GP states that the duration of the medications is indefinite.

Under Additional Comments the GP writes:

"Patient will require further testing and ongoing treatment for severe osteoporosis and

compression fractures.

Will require [illegible] treatments for long term pain and will require ongoing specialist referrals.”

AR:

The GP describes the appellant’s impairment as follows: “Severe chronic back pain – daily and limits mobility and any physical activity as outlined.”

Regarding mobility and physical ability, the GP assesses the appellant as independent for walking indoors, walking outdoors, climbing stairs and standing. He assesses the appellant as requiring continuous assistance from another person or unable for lifting and requiring periodic assistance from another person for carrying and holding, commenting: “Unable to lift/carry anything over 5 – 10 lbs. due to back pain. Requires daily assistance.”

Medical reports:

CT scan of the chest dated 02 December 2013:

Impression: Compression fractures involving the upper mid thoracic vertebral bodies...this is most marked at T5.

Bone survey skeletal x-ray dated 10 April 2014:

Impression: No focal bony lesions are detected in the skeleton apart from the vertebral collapse of T4 and T5 vertebral bodies.

Consult report by an endocrinologist dated 02 October 2014:

Impression: Multiple vertebral compression fractures associated with low bone mineral density. No evidence of secondary cause of bone loss. Most likely this represents genetic low peak bone mass. Other genetic abnormalities such as variant osteogenesis imperfecta are possibilities.

CT scan of the thoracic spine dated 11 February 2016:

Impression: Multilevel mid thoracic spinal compression fractures. The T4 and T5 fractures are not thought changed from 2014. The T2 and T6 compression fractures are new.

### *Mental impairment*

PR:

The GP assesses the appellant as having no difficulties with communications.

The GP indicates that the appellant has no significant deficits with cognitive and emotional function.

AR:

The GP assesses the appellant's ability to communicate as good for speaking, reading, writing and hearing.

Regarding cognitive and emotional functioning, the GP indicates that the appellant's mental impairment has a major impact on motor activity (lack of movement), commenting: “Mobility, daily activities slowed/limited due to back pain. Worse with any walking, sitting, lifting, bending or

carrying.” The GP indicates no impact for all other listed areas.

Ability to perform DLA

AR:

The GP reports that the appellant lives alone.

The GP assesses the assistance required for managing DLA as follows (the GP’s comments in parentheses):

- Personal care – independent but taking significantly longer than typical for dressing, transfers in/out of bed, and transfers on/off of chair (all mobility affected by chronic back pain); independent for grooming, bathing, toileting, and feeding self.
- Basic housekeeping – continuous assistance from another person or unable for laundry (family assistance due to back pain); periodic assistance from another person for basic housekeeping
- Shopping – continuous assistance from another person or unable for going to and from stores and carrying purchases home (as above – limited mobility due to chronic back pain); independent for reading prices and labels, making appropriate choices, and paying for purchases.
- Meals – independent in all aspects.
- Pay rent and bills – independent in all aspects.
- Medications – independent in all aspects.
- Transportation – independent in all aspects.

With respect to social functioning, the GP assesses the appellant as independent for all listed aspects: making appropriate social decisions, developing and maintaining relationships, interacting appropriately with others, dealing appropriately with unexpected demands and securing assistance from others.

The GP did not provide an assessment of the impact of the appellant's impairment on his immediate or expanded social networks.

Help provided/required

PR:

The GP indicates that the appellant does not require any prostheses or aids to compensate for his impairment.

AR:

The GP indicates that the appellant requires help for DLA from his family.

The GP does not indicate that the appellant requires any of the listed aids to compensate for his impairment.

Under additional information, the GP writes: “Requires ongoing assistance from family members for activities of daily living secondary to pain/mobility problems.”

### Self report

In his SR, the appellant describes his disability as osteoporosis with vertebral fractures (T4, T5 and T7), chronic pain syndrome, scoliosis and spinal bifida.

In describing how his disability affects his life and his ability to take care of himself, the appellant writes:

- “Disrupted sleep.
- Very slow to get out of bed – everything seizes up when I have been sleeping.
- Dressing has to be done slowly
- The warm shower is helpful to assist.
- Limited ability to bend. I live at the [hotel], so I am limited by ability to cook (no kitchen).
- I depend on frozen meals because of pain restrictions.
- My grandmother provides transportation to appointments and she does my laundry.
- Can't lift over 20 pounds.
- I can walk for about an hour but then I have to sit down for quite a while.
- I have been advised to get a back brace but haven't been able to afford one.
- Walk with a limp which slows me down.
- I have to go to [store] pick up prescription daily.
- I get drug and alcohol counselling but require assistance to get to and from appointments.
- 3 times a week I have too much pain to get out of bed.
- My grandmother is helping me manage financially – and helps me shop (lifting & transportation).
- I am a very clean person but periodically need help with cleaning that involves bending & kneeling due to pain.”

### **Request for Reconsideration**

In his Request for Reconsideration, under Reasons, the appellant writes that he would like to see his specialist in another city for a new update and bone density testing due to new fractures in his back. He attached the previously submitted results of the CT scan of the thoracic spine dated 11 February 2016. He also attached a letter from the Canada Revenue Agency dated 25 April 2016 advising him that he is eligible for the Disability Tax Credit for the tax years 2013 to 2012, with instructions.

### **Notice of Appeal**

The appellant's Notice of Appeal is dated 24 August 2016. Under Reasons, he writes: “I should meet the three criteria needed. Will provide new update records from doctors.”

### **The hearing**

At the hearing, the appellant noted that the ministry had found that he had not met 3 of the 5 criteria for PWD designation. He had however met the criteria for the disability tax credit and while

he recognizes that the criteria were somewhat different, since both sets of criteria dealt with his disability, he was looking forward to an explanation of why he did not meet all of the PWD criteria.

The appellant referred to the results of the CT scan dated 11 February 2016 that showed pre-existing compression fractures at T4 and T5 and new compression fractures at T2 and T6, with a corresponding significant loss of posterior vertebral body height. He stated that his application would have benefited from new tests and updated information, but the ministry had denied his request for a medical transportation supplement to the costs of travel to see his specialist in another city.

He stated that his GP's estimate that he can lift only up to 5 to 10 lbs. seems reasonable and is based on medical evidence that his GP had when he completed the PR. This limitation makes life difficult for him, for instance when carrying groceries, particularly as he can walk only so far as he does not have a vehicle and relies on his grandmother to drive him any distance. He described his main restrictions as relating to lifting/carrying and bending, and he has to be careful not to lift too much or risk a fall when moving about.

His long-term goal is to return to work. He had been on narcotic painkillers to manage the pain, and this was an issue with his employer as his job involved working with heavy equipment, often alone. He has now been free of the narcotics for 4 months, and there has been some healing of the fractures, but continued improvement depends on ongoing treatment, including drug therapy for which MSP has so far been unwilling to cover. Meanwhile, at the suggestion of his GP, he has been walking more, for the cardio benefits, and having some physiotherapy.

The appellant submitted a copy of a "Medical Report — Employability," requested by the ministry in connection with the appellant's PPMB status and completed by his GP that day. The diagnosis provided by the GP is substantially the same as that in the PR, and the GP describes the appellant's restrictions as "Sedentary activity only. No lifting/bending/carrying."

The ministry stood by its position at reconsideration.

#### **Admissibility of additional information**

The panel finds the information contained the Medical Report — Employability submitted at the hearing; and the testimony of the appellant at the hearing is in support of the information and records before the ministry at reconsideration. The panel therefore admits this information as evidence pursuant to section 22(4)(b) of the *Employment and Assistance Act*.

## PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry decision that determined that the appellant did not meet three of the five statutory requirements of Section 2 of the *EAPWDA* for designation as a person with disabilities (PWD) is reasonably supported by the evidence or is a reasonable application of the legislation in the circumstances of the appellant. The ministry found that the appellant met the age requirement and that, in the opinion of a medical practitioner, his 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 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 following section of the *EAPWDA* applies to this appeal:

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 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.

The following section of the *EAPWDR* applies to this appeal:

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
- (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.

## **The positions of the parties**

### **The appellant's position**

The appellant's position is that he is been diagnosed with osteoporosis and multiple vertebral compression fractures. As his GP has reported, the resulting chronic back pain significantly restricts his ability to bend, lift and carry and hold. More specifically, he is limited to lifting only 5 to 10 pounds. The severity of this impairment is reflected in his having been found eligible for the disability tax credit. He submits that it is unreasonable for the ministry to have found that he does not have a severe physical impairment.

In terms of his ability to manage daily living activities, in his GP's opinion because of his severe impairment it takes him significantly longer than typical to do several important aspects of personal care, such as dressing and transfers in/out of bed and on/off of chair. He also requires continuous assistance from his family for laundry and the shopping related activities of going to and from stores and carrying purchases home. Considering this evidence, the ministry was unreasonable in determining that in the opinion of his GP his severe impairment is not directly significantly restrict his ability to perform delay on a continuous basis.

As a result of these restrictions in his ability to perform DLA, he has to rely on the help of his grandmother, particularly for shopping and transportation. This demonstrates that he also meets the "help required" criterion.



## **The ministry's position**

The position of the ministry, as set out in the reconsideration decision, is that, while acknowledging that the appellant is limited with regard to lifting, a severe physical impairment has not been established. The ministry noted that in the PR, the GP reported that the appellant can walk 4+ blocks unaided, climb 5+ stairs unaided, is limited to lifting under 5 lbs. and can remain seated for 1 to 2 hours. The ministry was of the view that these assessments for walking, climbing stairs and remaining seated were not indicative of a severe impairment of physical functioning. The ministry noted that in the AR, under mobility and physical abilities, the GP stated that the appellant is unable to lift/carry anything over 5 - 10 lbs. due to his back pain, requiring family assistance, and indicated that he required continuous assistance from another person with lifting and periodic assistance from another person with carrying/holding, without indicating the frequency or duration of such periodic assistance. However, the ministry also noted that the GP assessed the appellant as independent for walking indoors, walking outdoors, climbing stairs, and standing.

In terms of mental impairment, the ministry noted that in the PR the GP indicated that the appellant has no significant differences with cognitive and emotional functioning, that in the PR and AR the GP indicates no difficulties with communication. In the AR the GP assesses a major impact to cognitive and emotional functioning in the area of motor activity, but in the ministry's view the GP's comment that "Mobility, daily activities slowed/limited due to back pain. Worse with any walking, sitting, lifting, bending or carrying" suggests the impacts to motor activity are due to impairment of physical functioning as opposed to an impairment of mental functioning. The ministry also noted that the GP did not report any other impacts to the remaining 13 listed areas of cognitive and emotional functioning and that the GP assessed the appellant as independent with all listed areas of social functioning. Based on these assessments, the position of the ministry is that a severe impairment of the appellant's mental functioning has not been established.

With respect to the appellant's ability to manage DLA, the ministry reviewed the assessments provided by GP in the AR, and noted that the GP did not describe the frequency or duration of periodic assistance from another person required with basic housework and does not describe how much longer than typical the appellant takes with dressing, transferring in/out of bed and transferring on/off chairs. The ministry also noted that the GP assessed the appellant as independent with the majority of listed DLA. Explaining that the ministry relies on the medical opinion and expertise from the appellant's medical practitioner and other prescribed professionals and based on the assessments provided by the GP, the ministry acknowledged that although the appellant is limited with regard to his ability with lifting, a severe impairment of his physical functioning has not been established and that there is not enough evidence to confirm that he has a severe impairment that significantly restricts his ability to perform is DLA continuously or periodically for an extended period.

Regarding the help required criterion, as it has not been established that DLA are significantly restricted, the ministry found that it cannot be determined that significant help is required.

## **Panel decision**

### **Severity of impairment**

A diagnosis of a serious medical condition does not in itself determine PWD eligibility. Under the

legislation, eligibility for PWD hinges on an “impairment” and its severity. An “impairment” is more than a diagnosed medical condition. An impairment is a medical condition that results in restrictions to a person’s ability to function independently, appropriately, effectively or for a reasonable duration.

To assess the severity of 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 the ability to perform 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 medical practitioner and a prescribed professional – in this case, the appellant’s GP.

The legislation requires that for PWD designation, the minister must be “satisfied” that the person has a severe mental or physical impairment. For the minister to be “satisfied” that the person’s impairment is severe, the panel considers it reasonable for the ministry to expect that the information provided presents a clear and complete picture of the nature and extent of the impacts of the person’s medical conditions on daily functioning.

### **Physical impairment**

The appellant has been diagnosed with osteoporosis and multiple vertebral compression fractures. In terms of the impact on his physical functioning, in the PR the GP assessed the appellant as being able to walk 4+ blocks unaided, climb 5+ steps unaided, limited to lifting under 5 lbs. and remain seated for 1 to 2 hours. In the AR, the GP assessed the appellant as independent for walking indoors, walking outdoors, climbing stairs, and standing. The GP assessed the appellant as requiring continuous assistance from another person or unable for lifting and requiring periodic assistance from another person for carrying and holding, noting that he is unable to lift/carry anything over 5 - 10 lbs. due to back pain. At the hearing, the appellant stated that the 5 to 10 lbs. lifting limitation is a reasonable estimate of his lifting limitation. Taking into account the assessments of the appellant’s ability to walk, climb stairs, stand and remain seated, and given the 5 to 10 lbs. lifting/carrying restriction shows some limited ability in this respect, in the panel’s view the ministry was reasonable in considering that these assessments were not indicative of a severe impairment of physical functioning. (See also below under Direct and significant restrictions in the ability to perform DLA.)

Based on the foregoing, the panel finds that the ministry was reasonable in determining that the information provided did not establish that the appellant has a severe physical impairment

### **Mental impairment**

The panel notes that the GP has not diagnosed the appellant with a mental health condition or any significant deficits to cognitive and emotional function. The GP has also assessed the appellant with no difficulties in communication and as independent and all relevant aspects of social functioning. While the GP assessed a major impact to cognitive and emotional functioning in the area of motor activity, as the ministry noted in the reconsideration decision, the GPs comment that “Mobility, daily activities slowed/limited due to back pain. Worse with any walking, sitting, lifting, bending or carrying” suggests this impact is due to the appellant’s impairment of physical functioning as opposed to an impairment of mental function.

The panel therefore finds the ministry was reasonable in determining that the information provided did not establish severe mental impairment.

### **Direct and significant restrictions in the ability to perform DLA**

The panel notes that, according to the legislation, the direct and significant restriction in the ability to perform DLA must be a result of a severe impairment, a criterion that has not been established in this appeal. The legislation – section 2(2)(b)(i) of the *EAPWDA* – requires the minister to assess direct and significant restrictions of DLA in consideration of the opinion of a prescribed professional, in this case the appellant’s GP. This does not mean that other evidence should not be factored in as required to provide clarification of the professional evidence, but the legislative language makes it clear that the prescribed professional’s evidence is fundamental to the ministry’s determination as to whether it is “satisfied.”

In the AR, the GP assessed the appellant as independent for walking indoors and outdoors, with the limitation noted above for carrying and holding (the DLA of moving about indoors and outdoors).

The GP assessed the appellant as independent for all aspects all personal care, indicating that it takes him significantly longer than typical for dressing and transfers in/out of bed and on/off of chair, commenting that mobility was affected by chronic back pain but, as the ministry noted, not explaining how much longer than typical: information on how much longer is useful in determining whether these restrictions are “significant.”

For basic housekeeping, the GP assessed the appellant as requiring continuous assistance from another person or unable for laundry, commenting that family assistance was required due to back pain, but did not explain the nature of this assistance. The GP assessed the appellant as requiring periodic assistance from another person for basic housekeeping, but as the ministry noted, did not explain the nature of frequency or duration of such assistance – again, information that would be helpful in determining the extent to which the restriction is significant.

For the shopping DLA, the GP assessed the appellant as requiring continuous assistance from another person or unable for going to and from stores and carrying purchases home, with the same comment: “Family assistance due to back pain.” In his SR the appellant refers to help from his grandmother in this respect (“lifting & transportation”) but it is unclear as to the extent this assistance is required because, as he testified at the hearing, he relies on his grandmother for transportation because he does not have his own vehicle.

The GP assessed the appellant as independent for all other DLA requiring physical effort.

Considering that a severe impairment has not been established, and taking into account the assessments reviewed above, the panel finds that the ministry was reasonable in determining that the information provided does not establish that in the opinion of his prescribed professional the appellant's ability to perform DLA are directly and significantly restricted either continuously or periodically for extended periods.

## **Help with DLA**

Section 2(2)(b)(ii) of the *EAPWDA* requires that, as a result of being directly and significantly restricted in the ability to perform DLA either continuously or periodically for extended periods, a person must also requires help to perform those activities. That is, the establishment of direct and significant restrictions under section 2(2)(b)(i) is a precondition of meeting the need for help criterion. 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.

While the appellant benefits from the assistance of his grandmother, as the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established, the panel finds that the ministry reasonably concluded that under section 2(2)(b)(ii) of the *EAPWDA* it cannot be determined that the appellant requires help to perform DLA.

### **Conclusion**

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.