

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) Reconsideration Decision dated August 11, 2016 which found that the appellant did not meet all of the statutory requirements of section 2 of the *Employment and Assistance for Persons with Disabilities Act* for designation as a Person With Disabilities (PWD). The ministry found that the appellant met the age requirement and that he has a severe physical impairment. However, the ministry was not satisfied that the evidence established that:

- the appellant has a severe mental or physical impairment that is likely to continue for at least two years;
- the appellant's daily living activities (DLA) are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and
- as a result of these restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

## PART D – Relevant Legislation

*Employment and Assistance for Persons with Disabilities Act (EAPWDA)*, section 2  
*Employment and Assistance for Persons with Disabilities Regulation (EAPWDR)*, section 2(1)(a)

## PART E – Summary of Facts

The evidence before the ministry at the time of the Reconsideration Decision included:

1. The appellant's Persons With Disabilities ("PWD") Application comprised of:
  - The Applicant Information and Self-report ("SR") completed by the appellant and dated April 18, 2016; and
  - The Physician Report ("PR") dated April 4, 2016 and the Assessor Report ("AR") dated April 4, 2016, both prepared by the appellant's general practitioner ("GP") of 14 years, who treated the appellant 2-10 times in the 12 months prior to completing the PR and AR, and indicated that the source of the information used to complete the PWD application was "office interview with applicant";
2. Discharge summary and instructions and follow up care dated July 5, 2016, with a surgery date of July 5, 2016. It lists instructions for physio/OT and indicates that the patient should be full weight bearing and indicates a sling immobilizer.
3. Request for Reconsideration (RFR), signed and dated July 19, 2016, which describes the appellant's medical condition, related pain, effects on DLA and need for assistance.

### ***Diagnoses***

In the PR, the GP notes that the appellant has been diagnosed with osteoarthritis of the knees with a date of onset of 2013.

### ***Duration***

In the RFR, the appellant does not address the issue of the duration of his medical condition. In the SR, the appellant wrote that he is currently waiting for double knee replacements and he is aware that, even with the surgery, he "will be forever affected" by his knees and his condition.

In the PR, for the question "is the impairment likely to continue for 2 years or more from today", the GP indicates "no" and states "impairment for one year, awaiting total knee replacements".

### ***Mental Impairment***

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

In the PR, the GP has not diagnosed the appellant with a mental disorder and has answered "No" to the question of whether the appellant has any significant deficits with cognitive and emotional function. In the AR, the GP notes that the appellant's ability to speak, read, write and hear is satisfactory, with a query regarding "writing English". The GP had not responded to the question whether the appellant is impacted by way of a mental impairment or brain injury. The GP also did not respond to the appellant's level of social functioning as listed on the PWD application.

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

In his SR, the appellant wrote that he can no longer bathe and standing in the shower is difficult because it puts too much pressure on his knees and causes severe pain. The appellant wrote that since he has limited mobility, his landlord helps him with housework and does most of the cooking. He wrote that trying to get groceries is also difficult as carrying anything puts extra pressure on his knees. Walking on uneven ground is really difficult and walking up hills is almost impossible. The appellant wrote that this condition with his knees not only makes it impossible to be employed, but it means he cannot do things he used to do in the outdoors.

In the AR the GP has indicated that the appellant is independent in all listed tasks of daily living except walking indoors, which takes significant longer, and walking outdoors, for which the appellant requires periodic assistance from another person and takes significantly longer, as well as bathing, which is indicated as requiring an assistive device and taking significantly longer to complete. The GP does not indicate how much longer it takes the appellant to complete these tasks and does not comment regarding how often or for how long the periodic assistance is required with walking outdoors. The tasks of transferring in and out of bed and transferring on and off of a chair are listed as both independent and requiring the use of an assistive device. Of DLA that are listed as independent, dressing, toileting, laundry, basic housekeeping, food preparation, cooking and getting in and out of a vehicle are also indicated as taking significantly longer without indication by the GP of how much longer.

### ***Need for Help***

In the PR, the GP notes that the appellant requires crutches or a walker and occasionally a cane for his impairment. In the AR, the GP indicates that the appellant receives help with DLA from friends and through the use of walker, cane, crutches, and toileting and bathing aids but not assistance animals.

### ***Evidence On Appeal***

The Notice of Appeal (NOA), which is signed and dated August 23, 2016, describes the challenges he faces due to his medical condition, and the assistance he requires from others and devices. This information is confirmed by his GP.

Prior to the hearing the appellant submitted a signed but undated letter from his landlord, which states that the appellant needs help with cooking, laundry, shopping, transportation to medical appointments and cleaning his room. The letter also lists the appellant's medications.

### ***Evidence At Hearing***

The appellant's witness, who is also his landlord, stated that she helps the appellant with cooking and driving on a daily basis and cleans and does laundry for him every couple of days. She also stated that she helps the appellant more frequently with whatever he needs when he is in pain and will pick up medications for him and helps with whatever he needs..

At the hearing the appellant and the appellant's advocate re-iterated the information provided in the

appellant's RFR and NOA and added the following:

- The appellant has not been able to work since 2013;
- The appellant had the surgery on one knee in July 2016.
- The GP was vague in his assessment and has not set a surgery date for the second knee. The surgeon has said they are trying to schedule the surgery before Christmas. Even when the date is set it will take time for the appellant to recover, at least 6 months, and he will continue to live with his condition for more than 2 years;
- The appellant was diagnosed with osteoarthritis of the knees in 2013 which is longer than 2 years;
- The appellant uses his cane 95% of the time to stabilize himself;
- The appellant gets dizzy when he takes his medication.
- The appellant's landlord is not a prescribed professional; and
- The appellant was not with his GP when the PWD application was completed.
- There is no further information available from the GP.

At the hearing the ministry relied on its reconsideration decision.

#### ***Admissibility of Additional Information***

The panel found that the undated letter from the appellant's landlord provided additional detail or disclosed information that was in support of the information or corroborated the information addressed in the reconsideration. Accordingly, the panel has admitted this new information as being 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*.

## PART F – Reasons for Panel Decision

The issue on the appeal is whether the ministry's Reconsideration Decision, which found that the appellant is not eligible for designation as a PWD under section 2 of the *EAPWDA*, was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. The ministry found that the appellant met the age requirement and that he has a severe physical impairment. However, the ministry was not satisfied that the evidence establishes that:

- the appellant has a severe mental or physical impairment that is likely to continue for at least two years;
- the appellant's DLA are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and,
- as a result of these restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

The criteria for being designated as a PWD are set out in Section 2 of the *EAPWDA* as follows:

### Persons with disabilities

2 (1) In this section:

"**assistive device**" means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform;

"**daily living activity**" has the prescribed meaning;

"**prescribed professional**" has the prescribed meaning.

(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person has a severe mental or physical impairment that

(a) in the opinion of a medical practitioner is likely to continue for at least 2 years, and

(b) in the opinion of a prescribed professional

(i) directly and significantly restricts the person's ability to perform daily living activities either

(A) continuously, or

(B) periodically for extended periods, and

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

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

(a) a person who has a severe mental impairment includes a person with a mental disorder, and

(b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires

(i) an assistive device,

(ii) the significant help or supervision of another person, or

(iii) the services of an assistance animal.

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

Section 2(1)(a) of the *EAPWDR* defines DLA for a person who has a severe physical or mental impairment as follows:

## Definitions for Act

2 (1) For the purposes of the Act and this regulation, "**daily living activities**" ,

(a) in relation to a person who has a severe physical impairment or a severe mental impairment, means the following activities:

- (i) prepare own meals;
- (ii) manage personal finances;
- (iii) shop for personal needs;
- (iv) use public or personal transportation facilities;
- (v) perform housework to maintain the person's place of residence in acceptable sanitary condition;
- (vi) move about indoors and outdoors;
- (vii) perform personal hygiene and self care;
- (viii) manage personal medication, and

(b) in relation to a person who has a severe mental impairment, includes the following activities:

- (i) make decisions about personal activities, care or finances;
- (ii) relate to, communicate or interact with others effectively.

## **Positions of the Parties**

The appellant argued that his extreme knee pain significantly restricts him from completing his DLA and he requires help from his landlord or the use of an assistive device to complete his DLA.

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

## **Severity of impairment**

Section 2(2)(a) of the *EAPWDA* provides that when addressing the issue of a severe physical or mental impairment in the context of a person applying for a PWD designation, that person must be found to have a severe physical or mental impairment that, in the opinion of a medical practitioner, is likely to continue for at least 2 years.

A diagnosis of a serious medical condition or conditions does not in itself determine PWD eligibility or establish a severe impairment. An "impairment" is a medical condition that results in restrictions to a person's ability to function independently or effectively.

To assess the severity of an impairment one must consider the nature of the impairment and the extent of its impact on daily functioning. In making its determination, the ministry must consider all the relevant evidence, including that of the appellant. However, the legislation is clear that the fundamental basis for the analysis is the evidence from prescribed professionals – in this case, the GP.

## **Severity of mental impairment**

The appellant did not argue that he suffers from a specific mental condition or impairment. The GP did not diagnose the appellant with a mental impairment and did not respond to the questions regarding mental impairment in the PWD application.

The ministry's position as set out in the reconsideration decision is that the evidence does not support a finding that the appellant suffers from a severe mental impairment.

### *Panel Decision*

The GP has not diagnosed the appellant with a mental impairment or condition. In the PR and AR the GP does not respond to any questions regarding mental impairment. After reviewing the evidence as a whole as set out above, the panel finds that the ministry was reasonable in its determination that the evidence did not support a finding that the appellant suffers from a severe mental impairment as provided by section 2(2) of the *EAPWDA*.

## **Duration of the Impairment**

The appellant argues that he was diagnosed with osteoarthritis of the knees in 2013 and a date of surgery for the second knee has not been determined. After the surgery it will take him 6 months to recover, he "will be forever affected" by his knees and his condition and therefore he has met the required 2 year duration period.

The ministry argues that the GP has indicated in the PR that the appellant's impairment is not likely to *continue* for 2 or more years from from the date of the PR by his GP and therefore the appellant does not meet the duration requirement pursuant to section 2(2)(a) of the *EAPWDR*.

### *Panel Decision*

As stated previously section 2(2)(a) of the *EAPWDA* provides that when addressing the issue of a severe physical or mental impairment in the context of a person applying for a PWD designation, that person must be found to have a severe physical or mental impairment that, in the opinion of a medical practitioner, is likely to *continue* for at least 2 years. This continuation is not from the date of onset but rather from the date of the PWD application. While the appellant stated that he will continue to live with his condition for more than 2 years, the requirement in section 2 is for the medical practitioner to provide an opinion that the severe impairment is likely to continue for at least 2 years. In this case, the GP has clearly indicated in the PR that the appellant's impairment is not likely to continue for 2 or more years and then goes on to specifically state that the impairment is for one year and that the appellant is "awaiting total knee replacements". The appellant confirmed at the hearing that he had one of the knee replacements in July 2016, and there was no further information from the GP submitted on the appeal to provide an update on the appellant's prognosis.

The panel finds that the ministry reasonably concluded that the evidence does not establish that the appellant's impairment is likely to continue for 2 or more years as required by the legislation.

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

The appellant argues that he is significantly restricted in performing DLA and must rely on his landlord for essential tasks such as cooking, cleaning and shopping, or the use of an assistive device. He argues that his GP has indicated that he takes significantly longer to complete several listed tasks of daily living and that he requires assistive devices to complete several listed task of daily living. Additionally, he argues that the GP indicated that his pain is aggravated by walking or prolonged standing and that this impairs his DLA. Finally he argues that when the SR, PR and AR are read as a whole, they show that he lives with extreme pain and significant limitations to his DLA due to his disability.

The ministry's position as set out in the Reconsideration Decision is that it has not been established by the evidence of a prescribed professional that the appellant's ability to perform DLA has been directly and significantly restricted by his physical or mental impairments either continuously or periodically for extended periods as required by section 2(2) of the *EAPWDA*. The ministry wrote that the GP indicates that the appellant is independent in a majority of tasks of daily living with some tasks taking significantly longer but with no indication as to how much longer those tasks take to complete, and a few tasks also requiring the use of an assistive device.

#### *Panel Decision*

Section 2(2)(b) of the *EAPWDA* requires that a prescribed professional provide an opinion that an applicant's severe impairment directly and significantly restricts his or her DLA, continuously or periodically for extended periods. In the present case, while the appellant has provided evidence of the challenges that he faces with DLA, the legislation is clear that to satisfy the criteria the evidence must come from a prescribed professional. In the present case, this evidence has been provided by one prescribed professional - the GP.

DLA are defined in section 2(1) of the *EAPWDR* and are also listed in the PR and, with additional details, in the AR. Therefore, a prescribed professional completing these forms has the opportunity to indicate which DLA, if any, are significantly restricted by the appellant's impairments, either continuously or periodically for extended periods. Employability is not a listed criterion in the legislation and as such is not a consideration in the determination of whether an applicant's DLA are restricted by a severe impairment.

In the case of the appellant, the GP, who indicated that he conducted an office interview with the appellant to complete the PWD application, indicated that the appellant is independent with all listed tasks of DLA with the exception of walking indoors, which takes significantly longer than typical, and walking outdoors, for which the appellant requires periodic assistance from another person and takes significantly longer, as well as bathing, which takes longer and for which he uses an assistive device. The GP does not indicate how much longer it takes the appellant to complete these tasks and does not comment regarding how often or for how long the periodic assistance is required with walking outdoors in order to allow the ministry to determine that periodic assistance is required for extended periods of time. In his SR, the appellant wrote that walking on uneven ground is really difficult and walking up hills is almost impossible, but the appellant does not indicate how much longer he takes or how often he requires assistance.

The GP reported that the appellant is both independent and that he uses an assistive device for the tasks of transferring in and out of bed and on and off of a chair, and no comments are provided by the



GP to explain this inconsistency. Although the GP reported that some tasks of DLA are performed by the appellant independently and that they take him significantly longer, specifically the tasks of dressing, toileting, laundry, basic housekeeping, food preparation, cooking and getting in and out of a vehicle, there is no indication by the GP of how much longer it takes the appellant with these tasks.

The appellant wrote in his SR that since he has limited mobility, his landlord helps him with housework and does most of the cooking. The appellant wrote that getting groceries is also difficult as carrying anything puts extra pressure on his knees. At the hearing, the appellant's landlord stated that she helps him with cooking and driving on a daily basis and cleans and does laundry for him every couple of days. She also stated that she helps the appellant more frequently when he is in pain and will pick up medications for him. Although the appellant's landlord stated that she assists the appellant with these tasks, the GP reported that the appellant is independent and does not require assistance with the DLA of housework (including laundry), meals (including cooking), shopping (including carrying purchases home), or medications (including filling/refilling prescriptions). There was no further information submitted from the GP or another prescribed professional.

In making its decision in this matter the panel must consider the evidence provided by a prescribed professional and therefore, considering the evidence of the GP as set out in the PR and AR, the panel concludes that the ministry reasonably concluded that the evidence does not establish that the appellant's impairment significantly restricts his ability to perform DLA either continuously or periodically for extended periods as required by the legislation.

### **Help with DLA**

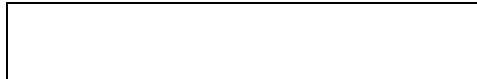
The appellant argues that he requires help with various tasks of DLA with that help coming from his landlord. He also argues that he cannot complete various tasks, including personal tasks, without the use of assistive devices such as a cane, walker, crutches, and toileting and bathing aids, and this information is confirmed by his GP.

The ministry's position as set out in the reconsideration decision is that because it has not been established that the appellant's DLA are significantly restricted, it cannot be determined that significant help is required.

### *Panel Decision*

Section 2(2)(b)(ii) of the *EAPWDA* requires that, as a result of direct and significant restrictions in the ability to perform DLA, a person requires help to perform those activities. Section 2(3) of the *EAPWDA* provides that a person requires help in relation to a DLA if, in order to perform it, the person requires an assistive device, the significant help or supervision of another person, or the services of an assistance animal. In other words, it is a pre-condition to a person requiring help that there be a finding that a severe impairment directly and significantly restricts a person's ability to manage his or her DLA either continuously or periodically for an extended period.

Given the panel's finding that the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established, the panel further finds that the ministry's conclusion that it cannot be determined that the appellant requires help to perform DLA as a result of those restrictions, as defined by section 2(3)(b) of the *EAPWDA*, was reasonable.



**Conclusion**

Having reviewed and considered all of the evidence and relevant legislation, the panel finds that the ministry's Reconsideration Decision which determined that the appellant was not eligible for PWD designation under section 2 of the *EAPWDA* was reasonably supported by the evidence and a reasonable application of the applicable enactment in the circumstances of the appellant, and therefore confirms the decision. The appellant is not successful in his appeal.