

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) Reconsideration Decision dated August 8, 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 an impairment that is likely to continue for at least two years. However, the ministry was not satisfied that the evidence established that:

- the appellant has a severe mental or physical 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 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

## PART E – Summary of Facts

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*.

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 March 12, 2016; and
  - The Physician Report ("PR") dated March 2, 2016 and the Assessor Report ("AR") dated March 2, 2016, both prepared by the appellant's general practitioner ("GP") of over 30 years, who treated the appellant 2-10 times in the 12 months prior to completing the PR and AR, and that the source of the information used to complete the PWD application was "office interview with applicant" and "file/chart information – e.g. his blood test for diabetes";
2. Letter from a medical practitioner (doctor), signed and dated June 29, 2016, which reads "This is to confirm that the [appellant] sustained a right sided CVA April 7, 2016 with left hemiparesis and speech also affected";
3. Request for Reconsideration (RFR), signed and dated July 5, 2016, which states, in part, that the appellant:
  - had a stroke on April 7, 2016 and was sent to hospital, and then had intense rehabilitation for about a month;
  - now he can walk about 6 or 7 steps with a walker;
  - is paralyzed in the left arm and leg;
  - is disabled for at least 2 years; and
  - goes to the hospital for speech therapy and soon physiotherapy;
4. A signed but undated letter from the appellant which in part states that the appellant:
  - can only take a couple of steps with a walker and is then tired out;
  - is going to physiotherapy and speech therapy at the hospital;
  - cannot walk or speak very well;
  - could take up to 2 years to recover fully;
  - is also diabetic and could use help with supplies, i.e. needles and insulin; and
  - has medication costs \$70 per week;
5. A fax sent from the reconsideration officer to the doctor who wrote the letter dated June 29, 2016, who was not the appellant's long-time GP who completed the AR and PR, to request further information regarding the appellant's post-stroke condition.

### **Diagnoses**

In the PR, the GP diagnosed the appellant with ischemic heart disease (2014), chronic obstructive pulmonary disease (COPD) (onset 2012), diabetes (onset 2014) and diabetic neuropathy – feet and hands (onset 2010). "Stroke" has been added to the PR as a diagnosis and it is noted that the June 29, 2016 letter from the appellant's doctor confirms the diagnosis of a stroke and the ministry has

accepted this diagnosis.

### ***Physical Impairment***

In the SR, the appellant describes his disability as heart condition, diabetes, nerve damage to the feet, nerve damage to the hands, and later added "stroke April 7, 2016". He describes his limitations as:

- prohibited from riding a bike and any sports related activities;
- cannot do anything strenuous without being short breath;
- nerve damage in feet is very painful and limits the amount of time he can stand;
- nerve damage to left thumb and to 2 fingers on the right hand which prohibits he from playing a guitar which he used to do for a living;
- his heart condition stresses him out as he worries he will die from a heart attack;
- he has an irregular heartbeat, chest pain, shortness of breath, and feels exhausted all the time;
- he has bad pain in his feet with no feeling in some spots; and
- he has nerve damage in his right hand and no feeling in 2 fingers.

In the PR, the GP states that the appellant's diabetes is out of control, he has on and off chest pains, he is short of breath on exertion and diabetic neuropathy causes severe pain and numbness in his feet and hands. The GP also indicates that the appellant's medication interfere with his ability to perform DLA due to muscle aches. In the PR, the GP indicates that the appellant can walk 4+ blocks unaided and climb 5+ steps unaided (with comment "he is short of breath and his feet hurt"), lift 15-35lbs, remain seated with no limitation and no difficulties with communication. In the additional comments to the PR, the GP wrote: "Hard to walk, he has shortness of breath, his is exhausted and his feet hurt."

In the AR, the GP indicates that the appellant has good speaking, reading, writing and hearing. The GP also indicates that with walking indoors and outdoors, climbing stairs and standing the appellant is independent and takes significantly longer, with the comment "he cannot walk much because of pain and shortness of breath. In terms of lifting, and carrying and holding, the GP did not make an assessment and states "cannot lift heavy things, e.g. 50lbs or more".

### ***Mental Impairment***

The appellant has not commented on any conditions or symptoms related to mental impairment in the RFR. In the SR, he wrote that he is stressed out.

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 part F of the PR, the GP states that the appellant "is stressed out all [of] the time", but does not provided any additional information related to the appellant's stress.

In the AR, the GP notes that the appellant's ability to speak, read, write and hear is good. In response to the question of whether the appellant is impacted by way of a mental impairment or brain injury the GP has responded "no impact" with all listed areas of mental impairment. The GP also notes that the appellant is independent with good functioning in all aspects of social functioning listed

on the PWD application.

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

In the SR or his subsequent submissions, the appellant does not make specific reference to DLA as they are listed in the PWD application or legislation. However, in his SR and subsequent submissions, the appellant states that he cannot walk more than 6-7 steps, speak well, enjoy sporting or outdoor activities or play a musical instrument.

The GP addresses the DLA in the AR and lists the appellant as being independent in all listed tasks of daily living, which includes social functioning. Going to and from stores is listed as independent and “takes a longer time.” There are no other comments provided by the GP regarding specific DLA and he provided additional information to the AR that the appellant “cannot work because of his Ischemic Heart Disease and his nerve damage at his feet and hands.”

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

In the PR, the GP notes that the appellant does not require any prostheses or aids for his impairment. In the AR, the GP indicates that the appellant receives help required for DLA from family members but does not indicate if assistive devices or animals are utilized.

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

A Notice of Appeal (NOA), signed and dated August 10, 2016, which states “stroke on April 7, 2016. Harshly disabled”.

Prior to the written hearing the appellant submitted a signed but undated letter which, in part, states the that appellant:

- has taken a turn for the worse;
- keeps falling down and has to call someone to pick him up because his mother cannot;
- used to earn \$3200 per month but now makes \$600;
- wants to work but he can barely stand;
- cannot hold a cup of coffee and that his muscles are atrophying slowly;
- finds it very hard to walk and speak;
- cannot do the things he used to, such as outdoor activities and sports, and can barely play the musical instrument that he played for 35 years; and
- can fall due to no sense of balance.

### ***Admissibility of Additional Evidence***

The ministry did not raise objection to the submission of the new information provided by the appellant in his letter. The panel notes that the appellant’s undated letter was not “new evidence” but rather, it specifically related to the diagnosis of a stroke and therefore the pane finds that the appellant’s letter is admissible as it is in support of or corroborates the information and records that were before the minister when the decision being appealed was made, pursuant to section 22(4)(b) 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 an impairment that 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 mental or physical 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 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's position is that he has taken a turn for the worse and his medical conditions, including his stroke, have severely impaired his ability to work, walk, stand, use his hands or participate in activities that he previously participated in.

The ministry's position as set out in the Reconsideration Decision is that the appellant is ineligible for designation as a Person With Disabilities 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 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*

On review of the evidence, the GP has not diagnosed the appellant with a mental impairment or condition. In the PR, the GP answers “No” to the question of whether the appellant has any significant deficits with cognitive and emotional function and similarly in the AR, the GP indicates that there is no impact on the appellant’s daily functioning as a result of a mental impairment or brain injury. In part F of the PWD application the GP states that the appellant “is stressed out all [of] the time”, but does not provided any additional information related to the appellant’s stress.

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*.

**Severity of physical impairment**

The appellant takes the position that he is severely impaired and cannot stand, hold a cup of coffee, work, walk more than 6-7 steps without the use of a walker and without shortness of breath.

The ministry’s position as set out in the Reconsideration Decision is that the evidence as a whole, including the appellant’s functional skill limitations, does not support a finding that the appellant has a severe physical impairment. Furthermore, though the appellant has suffered a stroke since his PWD application was submitted, there is not enough information to determine that he suffers from a severe impairment.

*Panel Decision*

At the time that the PR and the AR were completed by the appellant’s long-time GP, the impacts to the appellant’s physical functioning were assessed as a result of his diagnosed conditions of ischemic heart disease (IHD), COPD, and diabetic neuropathy in his feet and hands. Although the GP referred to the appellant’s COPD as “moderate”, he also wrote that the appellant’s diabetes is “out of control,” that his diabetic neuropathy is causing severe pain and numbness in his feet and numbness in his hands, and that he experiences shortness of breath and chest pains due to his IHD. At that time, the GP assessed the appellant with functional skills at the high end of the scale but the GP also commented that the appellant is short of breath and his feet hurt and, in the additional comments to the PR, wrote: “(h)ard to walk, he has shortness of breath, his is exhausted and his feet hurt.” In the AR, the GP assessed the appellant as taking significantly longer with all mobility, specifically walking indoors and outdoors, climbing stairs and standing, and wrote that he “cannot walk much because of pain and shortness of breath.”

As set out in the letter dated June 29, 2016, a medical practitioner confirmed that the appellant subsequently sustained a right-sided CVA in April 2016 “with left hemiparesis and speech also affected.” Although there was no further functional skills assessment provided by the GP, the appellant provided information in his letter that he has “taken a turn for the worse.” Whereas he was previously assessed as walking 4 or more blocks or climbing 5 or more steps unaided, the appellant wrote that, since having a stroke, his left arm and left leg are paralyzed, he can only take a couple of

steps using a walker and he is tired out. He wrote that he has no sense of balance and keeps falling down and has to call someone to pick him up. While he was previously assessed by the GP as lifting 15 to 35 lbs., the appellant wrote that he cannot hold a coffee of cup and he can barely stand. The appellant wrote that he finds it very hard to walk and to speak and he is attending physio and speech therapy at the hospital. The panel finds that the functional skills described by the appellant are consistent with the confirmation by the medical practitioner that the appellant has “left hemiparesis and speech also affected” as a result of a recent stroke and, that this new information together with his other medical conditions, the ministry’s determination that the evidence is insufficient to establish a severe physical impairment is not reasonable.

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

The appellant does not specifically comment on his ability to complete DLA as they are listed in the PWD application and legislation but does state that he cannot walk more than 6-7 steps, speak, hold a cup, ride bike or play guitar.

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*.

#### *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 in order 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.

The GP addresses DLA’s in the AR and has indicated that the appellant is independent in all listed tasks of daily living with the exception of going to and from stores and move about indoors and outdoors, which are indicated as both independent and takes significantly longer. Since the appellant’s stroke, neither the GP nor the doctor has provided additional information regarding the appellant’s ability in terms of DLA. Though the appellant provides some information of his reduced mobility since his stroke, this information is not confirmed in the opinion of a prescribed medical professional as the legislation requires.

In making its decision in this matter the ministry must consider the evidence provide 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 was insufficient to establish that the appellant's impairment significantly restricts his ability to perform tasks of DLA either continuously or periodically for extended periods.

### **Help with DLA**

The appellant argues that he requires help with various tasks of DLA with that help coming from his family.

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.