

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated October 4, 2016 in which the ministry found that the appellant incurred an overpayment of \$3,133.09 over the period February through November 2013 because the disability assistance for the appellant's family unit must be reduced by the family unit's net income received from undeclared employment income and Old Age Security (OAS) payments, pursuant to Section 24 of the *Employment and Assistance for Persons With Disabilities Regulation* (EAPWDR), and, the appellant is not eligible for disability assistance when the net income of his family unit exceeded the disability assistance rate, pursuant to Section 9 of the EAPWDR

The ministry found that there are no exemptions or deductions for employee charge-backs and OAS payments under the EAPWDR Schedule B and that the appellant is liable to repay the government pursuant to section 18 of the *Employment and Assistance for Persons With Disabilities Act* (EAPWDA).

PART D – Relevant Legislation

Employment and Assistance for Persons With Disabilities Regulation (EAPWDR), Sections 1, 9, 24, and Schedules A and B

Employment and Assistance for Persons With Disabilities Act (EAPWDA), Section 18

PART E – Summary of Facts

The evidence before the ministry at the time of the reconsideration decision included:

- 1) Undated Calculator B, Non-PWD;
- 2) Requirement to Pay to the Receiver General dated September 1, 2012 on account of the tax debtor's liability to a maximum of \$18,382.53 at the rate of 30% of each payment;
- 3) Hourly Time & Wages Sheet BC for pay period February 24 to March 9, March 10 to March 23, 2013, showing total pay less "3rd party demand 30%";
- 4) Confirmation of Earnings statement dated June 10, 2016 showing amounts earned by the appellant in February, March, June, July, August, September, October and November 2013;
- 5) Overpayment Chart covering the assistance months of April 2013 through January 2014 and resulting in a total overpayment amount of \$3,133.09;
- 6) Pay statements from the appellant's employer for the months of February, March, June, July, August, September, October, November 2013 and July, August and September 2015;
- 7) Letter dated July 15, 2016 to the appellant in which Service Canada confirmed that the monthly gross amount for the OAS pension is \$570.52 and that the effective date of the benefit was June 2013;
- 8) Letter dated August 8, 2016 in which the ministry advised of the overpayment amount and enclosed the Overpayment Chart; and,
- 9) The appellant's Request for Reconsideration dated September 17, 2016.

In his Request for Reconsideration, the appellant wrote that:

- The employee charge-backs were for income tax and income tax is one of the allowed exemptions in the Regulations.
- The ministry is already currently deducting a hydro security deposit from the monthly cheque, as well as the CPP and OAP.
- They feel the legislation is unconstitutional since they spent a lifetime paying into these pensions.

Additional Information

In his Notice of Appeal dated October 11, 2016 the appellant expressed his disagreement with the ministry's reconsideration decision and wrote that the Act states that "2. The only deductions permitted from earned income are the following: (a) any amount deducted at source for (i) income tax." The ministry is putting an interpretation on this that does not actually exist in the legislation.

At the hearing, the appellant's advocate, his spouse, and the appellant stated that:

- Looking at the pay statements from the appellant's employer, it can be seen that an amount is taken off for each period for income tax. Although the entry says "employee chargeback," it was clearly being deducted for income tax.
- The Requirement to Pay shows the money is owed to Canada Revenue Agency for taxes.
- The employer has taken all this money off his pay so if the government also takes it off his assistance, this would amount to a "double claw-back."
- They are not contesting the deduction of the OAS payments because for the first few months they did not realize that the payments were deductible since the appellant had paid into the fund for years. Even though they feel that the legislation is wrong to require that these payments be deducted, they realize they are not going to change the legislation.
- The Requirement to Pay is from self-employment income that they earned many years ago when they went into a higher income bracket during the oil boom years, around 2006, and the

debt was incurred.

- The amount owed to Revenue Canada includes the taxes plus some interest and possibly some penalties.
- The appellant is currently retired from his previous employer.

The ministry relied on its reconsideration decision. The ministry provided information that:

- The appellant is a recipient of disability assistance with his spouse who has Persons With Disabilities (PWD) designation as of November 1, 2013.
- The disability assistance rate for the appellant's family unit was \$877.22 for the months of January to April 2013, \$1,270.56 for May to October 2013, and \$1,519.06 from November 2013 as the appellant's spouse received her PWD designation.
- The ministry indicated that the appellant's employer provided a breakdown of the appellant's earnings for the period February through November 2013, which indicated employee charge-back amounts. The employer identified that employee charge-backs are either a garnishee for a third party demand, government, or due to purchases from the company or money owed to the employer.
- The ministry had information that the appellant received the monthly amount of \$550.99 in OAS payments for the period of June through October 2013.

Admissibility of Additional Information

The ministry did not object to the admissibility of the oral testimony on behalf of the appellant. The panel considered the information provided about the nature of the deductions from the appellant's employment earnings to corroborate the information provided in the appellant's Request for Reconsideration, which was before the ministry at reconsideration. Therefore, the panel admitted this additional information as being in support of information and records that were before the ministry at the time of the reconsideration, in accordance with 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 reasonably determined that the appellant incurred an overpayment because the disability assistance for the appellant's family unit must be reduced by the family unit's net income received from undeclared employment income and Old Age Security (OAS) payments, pursuant to Section 24 of the *Employment and Assistance for Persons With Disabilities Regulation* (EAPWDR) and, the appellant is not eligible for disability assistance when the net income of his family unit exceeded the disability assistance rate, pursuant to Section 9 of the EAPWDR. The panel will determine whether the ministry reasonably found that there are no exemptions or deductions for employee charge-backs and OAS payments under the EAPWDR Schedule B and that the appellant is liable to repay the government pursuant to section 18 of the EAPWDA.

The relevant sections of the legislation are as follows:

Section 18 of the EAPWDA provides:

Overpayments

- 18 (1) If disability assistance, hardship assistance or a supplement is provided to or for a family unit that is not eligible for it, recipients who are members of the family unit during the period for which the overpayment is provided are liable to repay to the government the amount or value of the overpayment provided for that period.
- (2) The minister's decision about the amount a person is liable to repay under subsection (1) is not appealable under section 16(3) [*reconsideration and appeal rights*].

Section 1 of the EAPWDR defines "earned income" as:

"earned income" means

- (a) any money or value received in exchange for work or the provision of a service, . . .

Section 1 of the EAPWDR defines "unearned income" as:

"unearned income" means any income that is not earned income, and includes, without limitation, money or value received from any of the following:

- (a) money, annuities, stocks, bonds, shares, and interest bearing accounts or properties;
- (b) cooperative associations as defined in the Real Estate Development Marketing Act;
- (c) war disability pensions, military pensions and war veterans' allowances;
- (d) insurance benefits, except insurance paid as compensation for a destroyed asset;
- (e) superannuation benefits;
- (f) any type or class of Canada Pension Plan benefits;
- (g) employment insurance;
- (h) union or lodge benefits;
- (i) financial assistance provided under the Employment and Assistance Act or provided by another province or jurisdiction;
- (j) workers' compensation benefits and disability payments or pensions;
- (k) surviving spouses' or orphans' allowances;
- (l) a trust or inheritance;



- (m) rental of tools, vehicles or equipment;
- (n) rental of land, self-contained suites or other property except the place of residence of an applicant or recipient;
- (o) interest earned on a mortgage or agreement for sale;
- (p) maintenance under a court order, a separation agreement or other agreement;
- (q) education or training allowances, grants, loans, bursaries or scholarships;
- (r) a lottery or a game of chance;
- (s) awards of compensation under the Criminal Injury Compensation Act or awards of benefits under the Crime Victim Assistance Act, other than an award paid for repair or replacement of damaged or destroyed property;
- (t) any other financial awards or compensation;
- (u) Federal Old Age Security and Guaranteed Income Supplement payments . . .

Section 9 of the EAPWDR provides:

Limits on income

- 9** (1) For the purposes of the Act and this regulation, "income", in relation to a family unit, includes an amount garnished, attached, seized, deducted or set off from the income of an applicant, a recipient or a dependant.
- (2) A family unit is not eligible for disability assistance if the net income of the family unit determined under Schedule B equals or exceeds the amount of disability assistance determined under Schedule A for a family unit matching that family unit.

Section 24 of the EAPWDR provides:

Amount of disability assistance

- 24** Disability assistance may be provided to or for a family unit, for a calendar month, in an amount that is not more than
- (a) the amount determined under Schedule A, minus
 - (b) the family unit's net income determined under Schedule B.

Schedule A of the EAPWDR sets out the total amount of disability assistance payable as the sum of the monthly support allowance for a family unit matching the family unit of the applicant or recipient plus the applicable shelter allowance. In calculating the net income of a family unit under Schedule B, various exemptions from income are provided for but, otherwise, all earned and unearned income must be included.

Section 1 of Schedule B of the EAPWDR provides as follows:

When calculating the net income of a family unit for the purposes of section 24 (b) [*amount of disability assistance*] of this regulation, . . .

- (b) any amount garnished, attached, seized, deducted or set off from income is considered to be income, except the deductions permitted under sections 2 and 6,
- (c) all earned income must be included, except the deductions permitted under section 2 and any earned income exempted under sections 3 and 4, and
- (d) all unearned income must be included, except the deductions permitted under section 6 and any income exempted

under sections 3, 7 and 8.

Section 2 of Schedule B of the EAPWDR provides as follows:

Deductions from earned income

2 The only deductions permitted from earned income are the following:

- (a) any amount deducted at source for
 - (i) income tax,
 - (ii) employment insurance,
 - (iii) medical insurance,
 - (iv) Canada Pension Plan,
 - (v) superannuation,
 - (vi) company pension plan, and
 - (vii) union dues . . .

Ministry's position

The ministry's position, as set out in the reconsideration decision, is that an overpayment occurred for the months of February through November 2013 and, under Section 18 of the EAPWDA, the appellant is liable to repay disability assistance that he was not eligible to receive during this period. The ministry argued that the family unit's disability assistance must be reduced by the amount of net income, pursuant to Section 24 of the EAPWDR, and the family unit is not eligible for disability assistance if the family unit's net income exceeds the amount of disability assistance payable, under Section 9(2) of the EAPWDR. The ministry wrote that the assistance rate for the family unit from January to April 2013 was \$877.22, which increased to \$1,270.56 in May 2013 when the appellant turned 65 years of age, and increased to \$1,519.06 in November 2013, when the appellant's spouse received her PWD designation. The ministry argued that all earned and unearned income must be included in the calculation of the appellant's net income and "unearned income" includes money or value received from federal OAS payments and "earned income" means any money or value received in exchange for work and also includes an amount garnished, attached, seized, deducted, or set off from income under Section 9(1) of the EAPWDR. The ministry argued that the appellant failed to accurately declare his income from employee charge-backs as part of his employment income, as these are considered as an amount garnished, attached, seized, deducted or set off from income, to be included in the calculation of net income.

The ministry argued that money received from OAS payments is not listed as income that is exempted under Schedule B of the EAPWDR. The ministry wrote that from January to October 2013, prior to the PWD designation of the appellant's spouse, an employment earnings exemption of \$200 per month applied under the Employment and Assistance Regulation (EAR) for a family unit with no PWD designation and no dependent children. The ministry wrote that as of November 2013 an employment earnings exemption of \$1,000 per month applied, under the EAPWDR, for a family unit with one recipient having PWD designation. The ministry argued at the hearing that the deduction from earned income as set out in Section 2 of Schedule B of the EAPWDR is only for income tax that is deducted 'at source.' The ministry acknowledged that there is no definition for "at source" in the legislation but interpreted this to mean a deduction for income tax relating to the income currently earned and not to the income tax that should have been deducted from income earned in a previous period.

Appellant's position

The appellant does not dispute that he was in receipt of OAS payments in the period June to October 2013 and acknowledged that these must be included in unearned income according to Section 1 of the EAPWDR, although he stated that he believes this legislation is unfair. In his Request for Reconsideration the appellant wrote that he feels the legislation is unconstitutional since he spent a lifetime paying into these pensions. The appellant does not dispute that there are amounts for "employee charge-backs" on his pay statements for the period February to November 2013, but he argued that these amounts were all deducted by his employer for income tax and that he is entitled to have these deducted from his earned income under Section 2(a)(i) of Schedule B of the EAPWDR. The appellant argued that the Requirement to Pay shows the money is owed to Canada Revenue Agency for income taxes and the employer has taken all this money off his pay so if the government also takes it off his assistance, this would amount to a "double claw-back." The appellant argued that the ministry's interpretation of Section 2 of Schedule B is too restrictive and is not supported by the wording in the legislation and is, therefore, unreasonable.

Panel's decision

Under Section 1(d) of Schedule B of the EAPWDR, all unearned income must be included in the calculation of net income unless there is an allowed deduction or an amount is specifically exempted and, according to Section 1(u) of the EAPWDR, "unearned income" is defined to include "...Federal Old Age Security and Guaranteed Income Supplement payments." The appellant does not dispute that he was in receipt of OAS payments in the period June to October 2013 although he wrote in his Request for Reconsideration that he feels the legislation is unconstitutional since he spent a lifetime paying into these pensions. According to Section 19.1 of the *Employment and Assistance Act (EAA)*, Section 44 of the *Administrative Tribunals Act* applies and the Tribunal does not have jurisdiction over constitutional questions and the constitutional validity of the legislation, therefore, cannot be decided by the panel. The panel finds that the ministry reasonably included the amount of the OAS payments received by the appellant in the period June to October 2013 in the calculation of his net income for the period as unearned income for which there were no applicable deductions or exemptions.

Under Section 1(c) of Schedule B of the EAPWDR, all earned income *must* be included in the calculation of net income unless there is an allowed deduction or an amount is specifically exempted and, according to Section 1 of the EAPWDR, "earned income" is defined to mean "...any money or value received in exchange for work or the provision of a service." The appellant does not dispute that he was in receipt of employment income for the period February through November 2013, and the ministry applied an employment earnings exemption of \$200 per month from January to October 2013 under the EAR and an employment earnings exemption of \$1,000 as of November 2013 for a family unit with one recipient having PWD designation. The appellant acknowledged that there were amounts indicated for "employee charge-backs" on his pay statements, which had been deducted by his employer and which the ministry had included in the calculation of his net income, and he argued that these amounts were all deducted by his employer specifically for income tax and that he is entitled to have these amounts also deducted from his earned income under Section 2(a)(i) of Schedule B of the EAPWDR and not included in the calculation of the net income of his family unit.

Section 2 of Schedule B of the EAPWDR stipulates that the only deduction permitted from earned income are "...any amount deducted at source for (i) income tax." The appellant referred to the Requirement to Pay from the Canada Revenue Agency to show that the amounts being deducted by the employer as "employee charge-backs" were to pay for income taxes, which the appellant admitted

related to previous tax years and applied to self-employment income earned around 2006. The appellant also acknowledged that the total amount indicated on the Requirement to Pay of \$18,382.53 may include amounts for interest and possible penalties as well as for the income tax originally due.

While the legislation does not include a definition for 'deducted at source,' as argued by the appellant, the panel finds that the ministry reasonably interpreted this to mean the income tax that is connected to the employment income earned in that particular pay period. On the pay statement from the appellant's employer for July 19, 2013, for example, there are deductions for the period for CPP, EI and tax (\$148.61) as well as an amount for employee charge-backs (\$466.12), which the appellant explained is for taxes owing on income from approximately 2006. Rather than being income tax that applies to the employment income earned in that period, the employee charge-back is a garnishment by Canada Revenue Agency for a previous debt owed, and this is specifically included in net income under Section 9(1) of the EAPWDR. Although the employer has taken all this money off the appellant's pay, as he pointed out, these funds were remitted to Canada Revenue Agency to reduce a debt owing by the appellant and he has, therefore, received the benefit of these payments even though he did not receive the payment directly.

The panel notes that the use of the word "must" in Schedule B of the EAPWDR requires the ministry to include all earned income in the calculation of the net income of a family unit, except for permitted deductions and applicable exemption amounts as specifically set out in the Schedule, and does not give the ministry the discretion to do otherwise. The panel finds that the ministry reasonably determined that the disability assistance for the appellant's family unit must be reduced by the family unit's net income received from undeclared employment income and OAS payments, pursuant to Section 24 of the EAPWDR, and the appellant is not eligible for disability assistance when the net income of his family unit exceeded the disability assistance rate, pursuant to Section 9 of the EAPWDR.

Conclusion

The panel finds that the ministry conclusion that the appellant has an overpayment of disability assistance under section 18 of the EAPWDA is a reasonable application of the applicable enactment in the appellant's circumstances and confirms the decision pursuant to Section 24(2)(b) of the *EAA*. The appellant is therefore not successful in his appeal.