

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) Reconsideration Decision dated September 2, 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, that he has an impairment that is likely to continue for at least two years and he has a severe physical impairment. However, the ministry was not satisfied that the evidence established that:

- 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 April 15, 2016 in which he describes the problems he faces due to his left knee, left calf muscle, left heel and right side of his neck; and
  - The Physician Report ("PR") dated April 19, 2016 and the Assessor Report ("AR") dated April 19, 2016, both prepared by the appellant's general practitioner ("GP") since July 2015, 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, other professionals and file/chart information".
2. 1-page letter from the GP, signed and dated August 19, 2016, which provides information regarding the appellant's additional medical conditions such as "lower back pain, varicose pains, calf bleeding issues which would cause continuous symptoms, with periodic worsenings for extended periods. That would significantly affect the way that the [the appellant] can function. He also has Osteoarthritis of the knees" that "is severe enough for him to need an unloader brace to help to maintain his functioning."
3. Request for Reconsideration (RFR), signed and dated August 20, 2016, in which the appellant describes the condition of his left leg and back, how they effect his functioning and that problems of his left leg and back "cause [him] periodically and for extended periods of time to lose function and be unable to climb stairs unaided or walk far enough to do my shopping unaided".

### ***Diagnoses***

In the PR, the GP notes that the appellant has been diagnosed with left meniscal injury, left knee instability left heel resected, left foot pain, right neck and shoulder trapezius strain, left leg swelling and degenerative disc disease. In his letter dated August 19, 2016, the GP indicates that the appellant has lower back pains, varicose veins, calf bleeding issues and osteoarthritis of his knees.

### ***Mental Impairment***

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

In the PR, the GP has not diagnosed the appellant with a mental impairment or condition and indicates that the appellant has good cognitive and emotional functional skills. In the AR the GP indicates that the appellant is independent in all areas associated with cognitive and emotional functioning, and that his speaking, reading, writing and hearing are good.

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

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In the AR, the GP has indicated that the appellant is independent in all listed DLA, except going to and from stores, and carrying purchases home, which are indicated as takes significantly longer and uses an assistive device (cane). It is not indicated how much longer the appellant takes to perform these DLA.

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

In the PR, the GP notes that the appellant requires prostheses and/or aids for his impairment; namely a cane and prescribed knee brace. In the AR, the GP indicates that the appellant needs a knee brace to walk and receives help from family and friends for heavy objects.

### **Evidence on Appeal**

Notice of Appeal (NOA), signed and dated September 17, 2016, which details the appellant's medical conditions and states in part that:

- The main issue for him is walking. "Under the best of circumstances [his] ability to walk is very limited, walking even four blocks causes much swelling of the knee affecting [him] for a day or two afterwards and if [he were to] twist or strain [his] knee or calf muscle [he] can have much trouble walking unaided for weeks.

With the NOA, the appellant submitted the following information:

- A copy of the 1-page letter from the GP which was signed and dated August 19 2016 (described above);
- Prescription for knee brace for stabilization of the patella, signed and dated April 5, 2016;
- Undated, signed 1-page letter from the appellant's mother, which states that she provides rides to the appellant for shopping, and doctor and hospital visits;
- Medical report – employability, signed and dated January 9, 2014, which indicates that the appellant has severe constant and continuous pain with the left knee and left heel and it is expected to last 1-3 months;
- Medical report – employability, signed and dated September 15, 2014, which indicates that the appellant has daily moderate heel pain that causes trouble walking and is expected to last 3-6 months;
- Undated, signed 1-page letter from the appellant's neighbor, which states that the neighbor helps the appellant with shopping, lifting and moving things and purchasing a pair of crutches for him;
- Email dated September 30, 2016, in which the appellant explains that he has been exempted from search for or participating in work due to a medical exemption. To receive such exemption he submitted a series of medical reports which he now cannot access without going through Freedom of Information request, which take a long time; and
- Email dated October 4, which includes the appellant description of his medical conditions, their effects on his functioning, his dependency on family and friends for rides, his inability to afford public transit and quotes his GP August 19, 2016 letter.

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

On review of the information submitted with the NOA, the panel notes that the submissions are not "new evidence" but rather, they specifically related to and refer to the documents that were before the



ministry at reconsideration. The panel therefore finds that the appellant evidence submitted with the NOA is admissible as it is in support of 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, that he has an impairment that is likely to continue for at least two years and that he has a severe physical impairment. However, the ministry was not satisfied that the evidence establishes that:

- 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.

### **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 impairment or condition.

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 mental impairment.

### *Panel Decision*

As mentioned above, diagnoses of serious medical conditions do not by themselves determine that the mental impairment is severe. Though the appellant faces challenges, the evidence demonstrates that the challenges he experiences are the result of his physical impairment and not due to a mental impairment. In the PR, the GP has not diagnosed the appellant with a mental impairment or condition and reports that he does not have significant deficits to cognitive and emotional functioning. In the

AR, the GP indicated that the appellant has two moderate impacts to cognitive and emotional functioning with all other listed areas indicated as no impact and that he is depressed about his career. Furthermore, all areas of social functioning are listed as independent.

Section 2(2) of the *EAPWDA* requires that the minister must be satisfied that a person has a severe mental or physical impairment that results in restrictions to a person's ability to function independently or effectively. The evidence given by the GP indicates that the appellant's cognitive and emotional functional ability is good and there is no indication that he requires help. Therefore the panel finds that the ministry was reasonable in its determination that the evidence does not support a finding that the appellant suffers from a severe mental impairment.

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

The appellant argued that due to his left leg and knee, lower back and left heel, he is unable to walk to the store, lift or carry his purchases home.

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*. Specifically the GP indicated the appellant takes significantly longer with going to and from stores, and carrying purchases home, and uses a cane and brace for help. However, the GP has indicated that all other listed areas of DLA are independently managed.

### *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 two prescribed professionals - 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 in the AR. The GP has indicated that the appellant is independent in all listed DLA, except going to and from stores, and carrying purchases home, which are indicated as takes significantly longer and uses an assistive device. However there is no information provided as to how much longer the appellant takes to complete these DLA. The panel notes that in the SR and subsequent evidence from the appellant, his argument is limited to his inability to get to and from the store, lift and carry purchases home. He does not indicate how his medical condition has affected his ability for function on a day to day basis and/or complete his DLA. That is, the appellant does not

provide any evidence as to how the inability to walk or lift has affected his ability to perform DLA such as housekeeping, personal care or meal preparation.

Considering the evidence of the GP, the panel finds 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 going to and from stores, carrying purchases home and lifting with that help coming from his mother and friends.

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, although the ministry acknowledges that the appellant uses both a cane and brace, 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 at the time of the ministry's reconsideration decision 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.