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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 September 2, 2016, which held that the appellant did not meet 3 of the 5 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 a medical practitioner confirmed that the appellant has an impairment that is likely to continue for at least 2 years. However, the ministry was not satisfied that:

- the evidence establishes that the appellant has a severe physical or mental 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 those restrictions, in the opinion of a prescribed professional, the appellant requires an assistive device, the significant help or supervision of another person, 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

Information before the ministry at reconsideration 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 18, 2016, in which the appellant states his medical condition is chronic back pain, with 3 herniated discs and 1 bulging disc, which affects his ability to work and sleep;
 - The Physician Report ("PR") dated January 4, 2016 and an undated Assessor Report ("AR") both prepared by the appellant's GP of 1 year, who treated the appellant 11 or more 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" and "file/chart information";
2. Request for Reconsideration (RFR), which is signed and dated August 20, 2016, and states in part, "I can no longer do the job I was trained to do. "Just because I can walk down the street doesn't mean I can walk in the bush with all my equipment on";

Diagnoses

In the PR, the GP notes that the appellant has been diagnosed with Degenerative disc disease (DDD) (onset January 2015), and depression (onset date unspecified).

Mental Impairment

In the SR the appellant did not address his depression.

In the PR, the GP indicated the following:

- Under health history, the GP discusses only the appellant's health history as it relates to his back;
- There are no difficulties with communication;
- Significant deficits with cognitive and emotional function with emotion and attention or sustained concentration; and
- The appellant is restricted in the area of social functioning continuously and comments "in pain, rarely socializes" and "lives with girlfriend" when asked about the assistance required.

In the AR, the GP indicated the following:

- Good speaking, reading and writing, and poor hearing; and
- Under cognitive and emotional functioning: major impact to motivation, moderate impact to bodily function, attention/concentration, and other emotional or mental problems, a minor impact to emotion (including depression), with all other listed areas indicated as 'no impact'.

Physical Impairment

In the SR, the appellant describes his physical disability as chronic back pain, with 3 herniated discs and 1 bulging disc. He stated that he cannot sleep or work.

In the PR, the GP indicated the following:

- Unaided can walk 2-4 blocks and climb 5+ steps, can lift 5-15lbs and remain seated for 1-2 hours.

In the AR, the GP indicated the following:

- Independent in walking indoors and outdoors, climbing stairs, standing, lifting, and requires periodic assistance with carrying and holding. There were no comments provided.

Daily Living Activities

In the SR the appellant did not directly or specifically address DLA but did state that he can no longer effectively do his union labourer job.

In the PR, the GP indicated that medication or treatments do not interfere with the appellant's ability to perform his DLA. The GP also indicated that the appellant has restrictions with basic housework, daily shopping, mobility outside the home, and social functioning, and that the restriction is continuous for all but mobility outside the home which is not indicated as either continuous or periodic. All other listed areas of DLA are indicated as having no restrictions (personal care, meal preparation, management of medications, mobility inside the home, use of transportation and management of finances).

In the AR, the GP indicated that the appellant is independent in all DLA except where he needs periodic assistance from another person with transfers (in/out of bed), laundry, basic housekeeping, going to and from stores, carrying purchases home, food preparation, cooking, and getting in and out of a vehicle, and no comments are provided. Under social functioning, the GP indicated that the appellant requires periodic assistance from another person with 'able to develop and maintain relationships', with the comment "mood [decreased], doesn't socialize". It is also indicated that the appellant has marginal functioning with immediate and extended social networks.

Need for Help

In the SR, the appellant did not speak to the level of help he requires either periodically or continuously. 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 assistance from his friends and that he occasionally uses a cane.

Evidence at Appeal

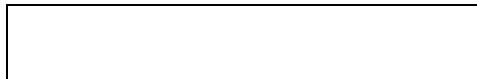
Notice of Appeal (NOA), which is signed and dated October 11, 2016, and states in part, "CT scan clearly proves I can no longer do the job I use to do".

Prior to the hearing the appellant submitted the follow information:

1. 1-page signed but undated letter (letter) from the appellant which in part states:
 - "everything I do to maintain my home is a challenge...sweeping, mopping etc;
 - "shoveling snow is impossible, shopping is a real burden as I can't carry too much";
 - In the summer he can only cut a portion of the lawn and a friend finishes the rest;
 - "its been 4 years since I have had a full night's sleep"; and
 - "I am constantly getting spasms in my lower back".
2. A note from his GP signed and dated November 9, 2016, which in part states that the appellant has a chronic back pain and cannot use narcotic based medication due to an allergy.

At the hearing the appellant read out the letter and then stated the following:

- He has no relief from his pain, as others may with the same condition, because he is allergic to



narcotics and therefore narcotic based medications;

- He walks 2-4 block unaided to relieve some of the severe pain he experiences. Moving around helps but he is still in pain;
- A CT scan from February 13, 2015 confirms that he has 3 herniated and 1 bulging disc;
- Hearing is also a problem as he is almost completely deaf in his right ear and this acts as a barrier;
- The GP has already stated that the back pain is chronic and proof of this is that he has claimed disability benefits via employment insurance 6 times from June 2008 to May 2014 which lasted anywhere from 2-15 weeks at a time. In 2015, his claim was rejected based on the finding of the DDD as a pre-existing condition;
- He returned to work several times despite his back pain and this made it worse;
- He has been in the same field of work for 35 years and has a grade 9 education, but is willing to work but cannot because he cannot sit or stand for long and cannot lift due to pain;
- Going back to school would be difficult at his age;
- He cannot bend to pick up things;
- He uses a cane when the pain is too much, early in the morning or after a back spasm;
- Pain is always there and shoots from his back down to his left leg, therefore he cannot sleep through the night or bend quickly;
- He does not always communicate due to poor hearing but he also is not a people person and does not make friends and has not for years as he finds people irritating;
- He receives assistance with transportation, shopping, shoveling snow, his morning routine and his roommate does the majority of the DLA; and
- The frequency and duration of the assistance he needs varies from week to week and month to month.

At the hearing the ministry relied on its reconsideration decision.

Admissibility of Additional Evidence

The panel found that the undated letter from the appellant and the note from his GP dated November 9, 2016, 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 additional information as being in support of information and records that were before the ministry at the time of reconsideration, in accordance with s. 22(4) of the *Employment and Assistance*.

However, the panel found that both the letter and the GP's note mentioned here, indicate that the appellant has an allergy to narcotics/opiates. The panel found that this information is new information and was not before the ministry at the time of the reconsideration decision. Accordingly, the panel did not admit any reference to narcotics/opiates as being in support of information and records that were before the ministry at the time of reconsideration, in accordance with s. 22(4) of the *Employment and Assistance*.

PART F – Reasons for Panel Decision

The issue on appeal is whether the ministry's decision to deny the appellant designation as a PWD was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. In particular, was the ministry reasonable in determining that:

- a severe physical or mental impairment was not established;
- the appellant's DLA are not, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and
- as a result of those restrictions, in the opinion of a prescribed professional, the appellant does not require an assistive device, the significant help or supervision of another person, 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 has a mental 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. The ministry notes that in the AR, the GP reports that the appellant has a minimal impact with emotions (including depression), there are no treatments indicated for the depression and that the majority of the PWD application focuses on the appellant's physical condition of back pain.

Panel Decision

On review of the evidence, the panel notes that the GP has diagnosed the appellant with depression and in the PR indicated that the appellant has significant deficits with cognitive and emotional function in the areas of emotions and attention/concentration, and that he needs periodic assistance with

social functioning. However, in the PR, the GP does not indicate the frequency or duration of the periodic assistance that is required or even mention depression in the health history section of the PWD application. The GP also indicates that the appellant is not restricted with the management of medications or finances, and in the PR, reports no difficulties with communication. In the AR the GP indicates that the appellant has good speaking, reading and writing but poor hearing. He also indicates that there is a moderate impact to attention/concentration and minimal impact to emotions (including depression). In terms of social functioning, the GP indicated that the appellant is independent in all aspects except the ability to develop and maintain relationships. The GP does not indicate how much or how often he requires assistance to develop or maintain relationships. It is also indicated that the appellant has marginal functioning with immediate and extended social networks. By the appellant's own admission he has not been and is not a social person, and makes very few friends as he finds people to be irritating.

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 and the appellant does not clearly establish that the appellant suffers from severe mental impairment. 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.

Severity of physical impairment

The appellant takes the position that he is in chronic pain due to his DDD, which includes 3 herniated discs and 1 bulging disc.

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 but rather a moderate impairment.

Panel Decision

As mentioned above, diagnoses of serious medical conditions do not by themselves determine that the physical impairment is severe. It is helpful to identify the restrictions to functional ability to determine its severity. The information provided in the PR by the GP, who conducted an office interview and referred to file/chart information, indicates that the appellant has good functional skills. In the PR, the GP indicates that the appellant can walk unaided 2-4 blocks and climb 5+ steps, lift 5-15 lbs and remain seated for 1-2 hours. In the AR the GP indicates that the appellant is independent in all listed areas of mobility and physical functioning except carrying and holding, which requires periodic assistance but there is no indication of the frequency and duration of the assistance that is required. The panel notes that the GP identifies chronic back pain as a result of DDD but does not describe its severity. Nor has the GP explained why the appellant cannot periodically perform his DLA given his degree of functional ability.

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 and the appellant does not clearly establish that the appellant suffers from severe physical impairment. 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 physical impairment.

Restrictions in the ability to perform DLA

The appellant argues that he is restricted in his ability to perform tasks of DLA due to his physical and condition, which includes sweeping, mopping, shoveling snow and mowing the lawn.

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*. In particular, the ministry argued that the appellant's GP indicates that he has good functional ability but did not explain why the appellant requires assistance with his DLA. Also, the ministry argued that in the PR the GP noted that some DLA were restricted continuously but in the AR those same DLA required periodic assistance without noting the frequency or duration of the assistance required.

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 there must be confirming evidence 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 PR and AR. In the PR the GP has indicated that the appellant has restrictions with basic housework, daily shopping, mobility outside the home, and social functioning, and that the restriction is *continuous* for all but mobility outside the home which is not indicated as either continuous or periodic. All other listed areas of DLA are indicated as no restriction and they include personal care, meal preparation, management of medications, mobility inside the home, use of transportation and management of finances. In the AR, the GP indicates that the appellant is independent in all listed DLA except those which require *periodic assistance* from another person and they include transfers (in/out of bed), laundry, basic housekeeping, going to and from stores, carrying purchases home, food preparation, cooking, and getting in and out of a vehicle, and no comments are provided. The GP does not explain why in the PR meal preparation is listed as no restriction and in the AR the appellant requires periodic assistance with food preparation and cooking. The same is true for use of transportation and mobility inside the home (which are indicated as no restriction in the PR) and getting in and out of a vehicle, going to and from stores, and transfers in/out of bed (which are indicated as requiring periodic assistance from another person in the AR). Furthermore, in the

GP does not explain why in the PR the restriction to some DLA is listed as continuous and in the AR, most of the same DLA require only periodic assistance from another person. The GP does not explain why some of the listed DLA are restricted either continuously or periodically and require the assistance from another person periodically if the appellant has good functional mobility such as walking 2-4 blocks and climbing 5+ steps unaided, lifting 5-15 lbs and remaining seated for 1-2 hours.

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 and that help comes from his 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, 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 available to the ministry at the time of reconsideration 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.