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 July 13, 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

The documents before the ministry at reconsideration included:

1) PWD application comprised of the appellant's Self-report (SR) dated October 29, 2015, and a Physician Report (PR) and an Assessor Report (AR), both dated October 29, 2015.. Both the PR and AR were completed by the appellant's internal medicine specialist (the internist) who has known the appellant since May 2015.
2) September 23, 2015 letter from the internist.
3) An undated 2 page typewritten letter from an outreach worker.
4) A May 25, 2016 referral letter from a nurse practitioner (NP) to a cardiologist.
5) A June 27, 2016 letter from a general practitioner (GP) of whom the appellant had recently become a patient.
6) The appellant's June 27, 2016 Request for Reconsideration which includes information "dictated by pt to MD."

On appeal, in the Notice of Appeal, the appellant provided additional information "dictated to MD by pt" which is initialed by the GP. The ministry did not provide additional evidence on appeal, and relied on its reconsideration summary.

Summary of relevant evidence

Diagnoses

In the PR, the internist diagnoses cardiomyopathy with an onset date of May 2015, adding that he suspects undiagnosed depression. In her June 27, 2016 letter, the GP writes that the appellant suffers from significant depression and anxiety.

Physical Impairment

In his September 23, 2016 letter, the internist writes that despite optimal medical therapy the appellant remains symptomatic and his medical condition precludes searching for or obtaining employment.

The internist provides the following information in the PWD application.

- At the time of diagnoses, in May 2015, the appellant was severely dyspneic with NYHA 4 symptoms and an ejection fraction rate of 20-25%; with therapy, his ejection fraction rate is up to 40-45% and he continues to have NYHA II symptoms.
- Height and weight are indicated as relevant to the impairment: 1.81m and 114.5 kg.
- Likely have some degree of impairment lifelong.
- No aids or prostheses required.
- Functional skills:
    - walk 1 to 2 blocks unaided on a flat surface;
    - climb 5+ steps unaided;

    - no lifting limitations in terms of weight; and
    - no limitation for remaining seated.
- Walking indoors is managed independently. Walking outdoors, climbing stairs, lifting, and carrying/holding take significantly longer than typical due to fatigue and dyspnea.
- Therapy for cardiomyopathy limits ability to stand for prolonged periods.
- Limited exertional capacity. Has difficulty with any strenuous activity due to heart failure.
- Limited from doing any significant physical exertion, which limits employment prospects especially given lower education.

In his SR, the appellant writes that an enlarged heart causes chest pain and hard breathing. He cannot go for long walks, as this results in too much stress on his heart. He is easily tired and it is hard to do much in a day. It makes him dizzy.

The outreach worker provides general information respecting cardiomyopathy, commenting that the appellant's morbid obesity makes everything very challenging. A recreation centre pass will allow the appellant to get exercise.

At reconsideration, the appellant stated that he can only walk ½ - 1 block without rest, he is unable to lift or carry, and must stop after climbing 2-5 stairs.

The NP writes that the appellant denied chest pain, shortness of breath at rest, dizziness, and diaphoresis. The NP noted that when asked to walk a short distance from the shelter to a health centre, the appellant was short of breath on exertion and had to walk slowly. The appellant admitted finding it challenging to walk distances and having difficulty with exertion.

In his Notice of Appeal, the appellant reports that he is unable to walk more than 1 block most days.

Mental Impairment

The internist provides the following information.

- No difficulties with communication. Speaking and hearing are satisfactory. Reading and writing are poor.
- Significant deficit with cognitive and emotional function in 1 of 11 listed areas – emotional disturbance (suspects undiagnosed depression).
- In the section of the AR listing 14 areas of cognitive and emotional functioning, a moderate impact on daily functioning is reported for motivation and a minimal impact is reported for motor activity. There is no impact for the remaining areas.
- Social functioning is managed independently.

The outreach worker explains that the appellant and his father moved to a new and much larger city in early 2016 to get proper medical care for the appellant's cardiac condition. She describes the risk of homelessness facing the appellant and his father and that the appellant never has money to do much of anything. The appellant is reported as having FAS, ADHD and OCD. PWD designation will provide the appellant with extra money and bus and recreation centre passes will allow him to go places and get out in the world.

In her June 27, 2016 letter, the GP notes that the PWD application focused only on the appellant's cardiac disease. She writes that the appellant also suffers from significant depression and anxiety, which severely restrict his activities. When he is symptomatic, he will isolate and not leave the shelter where he resides and communicates with no one. He has great difficulty with reading and writing. The appellant has lost both his close family relationships and support, as well as broader community supports.

The appellant did not address mental impairment in his SR but in his Notice of Appeal indicates that he can often do nothing and isolates.

DLA

In the PR, the internist reports that personal self-care, meal preparation, management of medications, basic housework, daily shopping, and mobility inside the home are managed independently. No information is provided for use of transportation. Mobility outside the home is continuously restricted. Management of finances is "unknown." Social functioning is periodically restricted. NYHA II HF symptoms of fatigue and dyspnea with ordinary activities.

In the AR, the internist provides the following information:

- Move about indoors and outdoors – standing and walking indoors managed independently. Walking outdoors and climbing stairs take significantly longer due to fatigue and dyspnea.

All listed tasks of the remaining DLA are managed independently:

- Personal care – dressing, grooming, bathing, and toileting, transfers in/out of bed and on/off of chairs, feeding self, and regulate diet are all managed independently without any noted limitation
- Basic housekeeping – laundry and basic housekeeping
- Shopping – going to and from stores, reading prices and labels, making appropriate choices, paying for purchases, and carrying purchases home
- Meals – meal planning, safe storage of food, food preparation, and cooking
- Paying rent and bills – banking budgeting, pay rent and bills
- Medications – filling/refilling prescriptions, taking as directed, safe handling and storage
- Transportation – getting in and out of a vehicle, using public transit, and using transit schedules/arranging transportation
- Social functioning – appropriate social decisions, develop and maintain relationships, interact appropriately with others, deal appropriately with unexpected demands, secure assistance from others

The GP reports that depression and anxiety severely restrict independent ADLs. When symptomatic, the appellant will not bathe or wash, and as noted above isolates and will not leave the shelter or communicate with others. The appellant does not do any household ADLs, as these are done by staff at the shelter. He is unable to independently shop, arrange transit or use transit.

Need for Help

The internist reports that the appellant does not require aids, prostheses or an assistance animal for his impairment. The internist indicates that assistance is provided by family but also comments “nil” respecting help provided for DLA. As noted above, the GP reports that the appellant does not do any household ADLs, as these are done by staff where the appellant resides.

PART F – Reasons for Panel Decision

Issue on Appeal

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?

Relevant Legislation

EAPWDA

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).

EAPWDR

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.

(2) For the purposes of the Act, **"prescribed professional"** means a person who is authorized under an enactment to practice the profession of

(a) medical practitioner,

(b) registered psychologist,

(c) registered nurse or registered psychiatric nurse,

(d) occupational therapist,

(e) physical therapist,

(f) social worker,

(g) chiropractor, or

(h) nurse practitioner.

Severe Impairment

The legislation provides that the determination of severity of impairment is at the discretion of the minister, taking into account all of the evidence including that of the appellant. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a prescribed professional respecting the nature of the impairment and its impact on daily functioning. While the legislation does not define “impairment”, the PR and AR define “impairment” as a “loss or abnormality of psychological, anatomical or physiological structure or functioning causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration.” While this is not a legislative definition, and is therefore not binding on the panel, in the panel’s opinion, it reflects the

legislative intent and provides an appropriate analytical framework for assessing the degree of impairment resulting from a medical condition.

Physical Impairment

The appellant argues that he is severely impaired due to cardiomyopathy, which leaves him unable to do any lifting and is unable to walk more than one block most days.

The ministry points to the internist's assessment of physical functioning, including that the appellant can walk 1-2 blocks unaided on a flat surface and climb 5+ steps, and that although the appellant is continuously restricted outside the home, there are no restrictions with other DLA. The ministry argues that the information indicates that the appellant is independent in most areas of daily living with minimal functional impairment and that taking significantly longer walking outdoors or with strenuous activity is not a severe physical impairment.

Panel Decision

The internist diagnoses the appellant with cardiomyopathy. While there is evidence that at the time the appellant was originally diagnosed, he was severely symptomatic, the internist reports that treatment has resulted in significant improvement as reflected by both the classification of mild symptoms and the appellant's physical functional skills. Additionally, and as the ministry notes, the internist assesses the appellant as able to independently manage most DLA with minimal functional impairment. The NP observed that the appellant was short of breath after walking a "short distance" from one location to another, but it is unclear what distance the NP regards as short. The appellant's self-assessment of physical functioning is not supported by the physical abilities reported by the internist or the internist's comments indicating difficulties only when performing "strenuous tasks" and being unable to stand for "prolonged" periods.

Based on the above information, the panel finds that while the information establishes that the appellant has limitations to his physical functioning from his cardiomyopathy, the ministry reasonably determined that the information provided is not evidence of a severe physical impairment.

Mental Impairment

The appellant's position is that his depression and anxiety result in a severe mental impairment as he is unable to function independently and often can do nothing and isolates.

The ministry notes that while the internist suspects depression, he did not diagnose a mental impairment and reported no significant deficits with cognitive and emotional function except for the suspected depression and a moderate impact on daily functioning with motivation only. The ministry concludes that this is indicative of a mild mental impairment. The ministry was unable to consider the reports of FAS, anxiety disorders and OCD because they were not reported by a medical practitioner.

Panel Decision

The internist, suspecting undiagnosed depression, reported a significant deficit in 1 of 11 areas of

cognitive and emotional function – emotion – as well as a moderate impact on daily functioning in the area of motivation. A major impact on daily functioning is not reported in any of the 14 listed areas.

Subsequently, the GP confirms a diagnoses of depression, as well as anxiety, which she reports severely impact the appellant. The GP reports that when the appellant is symptomatic, he will isolate and not leave the shelter where he resides and communicates with no one; however, there is no information respecting how often or for how long he is symptomatic, a consideration when assessing severity. The outreach worker identifies the lack of a bus pass and money as impediments to the appellant's ability to get out and socialize, which indicates reasons other than mental impairment as limiting social functioning. The NP's information does not address mental impairment. Both the internist and the GP report difficulties with reading and writing but neither identifies the cause, though it is possible that the internist's comment that the appellant is impacted by a low level of education is related.

Based on the above information, the panel finds that the ministry reasonably determined that while the information is sufficient to establish a mild mental impairment, it does not establish that the appellant has a severe mental impairment.

Restrictions in the ability to perform DLA

The appellant argues that he does not do independent ADLs, which are done by staff where he resides, and that he often can do nothing and isolates.

The ministry notes that the prescribed professional's opinion is fundamental in the determination of whether the ministry is satisfied that impairment directly and significantly restricts DLA. The ministry acknowledges that the appellant may experience some fatigue, but that the internist reports that the appellant has no restrictions with DLA, other than mobility outside the home, and functions independently without the need for assistance. As such, the appellant's ability to perform DLA is not directly and significantly restricted and the ministry finds that the information does not establish that a severe impairment significantly restricts DLA either continuously or periodically for extended periods.

Panel Decision

The legislative requirement respecting DLA set out in section 2(2)(b) of the EAPWDA is that the minister be satisfied that as a result of a severe physical or mental impairment a person is, in the opinion of a prescribed professional, directly and significantly restricted in the ability to perform DLA either continuously or periodically for extended periods. Consequently, while other evidence may be considered for clarification or support, the ministry's determination as to whether or not it is satisfied, is dependent upon the evidence from prescribed professionals. DLA are defined in section 2(1) of the EAPWDR and are listed in both the PR and the AR sections of the PWD application with the opportunity for the prescribed professional to check marked boxes and provide additional narrative.

In this case, the internist, GP, and the NP are all prescribed professionals as defined in the EAPWDR. The information from the internist, which specifically addresses each prescribed DLA, including individual tasks within each DLA, is that the appellant is limited in the distance he can walk

and that he takes significantly longer walking outdoors, consistent with the NP's observation that the appellant was short of breath walking and walked slowly. The internist reports that the appellant independently manages all listed tasks of all other DLA. The NP does not provide information respecting the appellant's ability to perform other DLA.

The GP reports that cardiomyopathy makes it difficult for the appellant to do activities in a timely fashion, or even at all. It is unclear which prescribed DLA are being referenced and furthermore, this level of impairment of physical functioning due to cardiomyopathy is not supported by the internist who classifies the appellant as having mild symptoms which have a minimal impact on physical functioning. While the GP comments that the appellant does not do any household DLA, as these are performed by shelter staff, this does not indicate physical restrictions in the ability to perform household DLA.

The GP reports that depression and anxiety severely restrict activities, including independent ADLs. The GP reports that the appellant is unable to independently shop, arrange transit or use transit but it is unclear if the ability to shop and use transit relate to the appellant's physical limitations, which as the panel previously discussed, do not indicate a severe level of impairment, or whether they relate to the appellant's mental conditions. The GP also reports that when the appellant "is symptomatic" due to depression, he will not bathe or wash (one of 7 aspects of the DLA personal care listed in the AR or the DLA make decisions about personal activities, care or finances) and will isolate and not leave the shelter or communicate with others (the DLA relate to, communicate or interact with others effectively). However, the GP does not indicate how often or for how long the appellant is symptomatic in order to assess both the significance and the duration of these restrictions.

Based on the above analysis, the panel concludes that the ministry reasonably determined that the information did not establish that as a result of a severe impairment, the appellant's ability to perform DLA is directly and significantly restricted, either continuously or periodically for extended periods as required by section 2(2)(b)(i) of the EAPWDA.

Help to perform DLA

The appellant argues that he does not do independent ADLs.

The ministry's position is that because it has not been established that DLA are significantly restricted, it cannot be determined that 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. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform DLA.

The establishment of direct and significant restrictions with DLA are a precondition of the need for help criterion. As the panel found that the ministry reasonably determined that direct and significant

restrictions in the appellant's ability to perform DLA have not been established, the panel also finds that the ministry reasonably concluded that it cannot be determined that the appellant requires help to perform DLA as required by section 2(2)(b)(ii) of the EAPWDA.

Conclusion

The panel finds that the ministry's reconsideration decision, which determined that the appellant was not eligible for PWD designation, was reasonably supported by the evidence, and therefore confirms the decision. The appellant is not successful on appeal.