

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) Reconsideration Decision dated November 29, 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

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 June 18, 2016;
- The Physician Report ("PR") dated June 15, 2016 and the Assessor Report ("AR") dated June 15, 2016, both prepared by the appellant's general practitioner ("GP") of 10 years and 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";

2. Questionnaire prepared by the appellant's advocate for the GP, and signed dated by the GP on November 1, 2016. In it the GP confirms the diagnosis of migraine headaches and degenerative disc disease (DDD) (lumbar spine). When asked if the appellant has a severe impairment which impacts his performance with DLA, the GP stated "when patient has back pain, it can be severe Same with the migraines. Together these can amount to 7-10 days per month. Patient walks slowly, can only climb a few stairs, has limitations in lifting (10lbs), as well as bending and carrying".

When asked about the appellant's restrictions with DLA and whether they are continuous or periodic, the GP stated "shopping is difficult (friends and family do this), house work is also difficult (again friends and family help)".

When asked about the appellant's need for assistance, the GP stated "shower chair in shower, occasionally a cane for ambulation. Lives with sister's family as unable to live independently. Requests support for [DLA] (groceries, housework, mobility)".

2. The appellant's Request for Reconsideration (RFR), signed and dated November 15, 2016 in which he state that he submits that he meets all of the PWD eligibility criteria.

3. 1-pg letter from advocate, signed and dated November 15, 2016, which in part stated that the appellant suffers from a severe physical impairment, has several ongoing and significant restrictions performing DLA and requires assistance from other people, use of cane and use of a shower chair.

### ***Diagnoses***

In the PR, the GP notes that the appellant has been diagnosed with DDD (onset 2002) and migraine headaches (onset 2002).

### ***Physical Impairment***

SR:

- Appellant described his disability as including chronic lower back pain due to DDD, which flares up at times that lasts from a few hours to a few months before returning to its chronic level, and severe headache attacks from migraines, with each episode lasting for hours to 2-3 days.

PR:

- GP stated that the appellant has chronic back pain resulting in difficulty walking and in performing many DLA and physical activities. Gets a few migraines per month where he is incapacitated for several hours.
- GP indicates that the appellant can walk 1-2 blocks and climb 5+ steps unaided, lift 5-15 lbs and remain seated 1-2 hours.

AR:

- GP indicates that the appellant needs periodic assistance with walking indoors (with the comment 'needs someone to put on his shoes'), climbing steps, standing (with the comment 'can only stand 10 minutes'), lifting and carrying/holding, and takes significantly longer with walking outdoors.

### ***Mental Impairment***

SR:

- The appellant did not argue that he suffers from a severe mental impairment.

PR:

- The GP did not diagnose the appellant with a mental impairment. The GP responded "no" when asked whether or not there are any significant deficits with cognitive and emotional function.

AR:

- The GP crossed out the section regarding impacts to cognitive and emotional functioning. The abilities of speaking, hearing, writing and reading are indicated as good.
- All listed areas of social functioning are indicated as independent with good functioning with both immediate and extended social networks.

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

PR:

- The GP did not address DLA in the PR.
- The GP indicated that the appellant has not been prescribed any medication and/or treatment that interfere with his ability to perform DLA.
- In the additional comments, the GP wrote that the appellant is "not working because of back pain."

AR:

- All listed areas of DLA are indicated as independent functioning with the exception of those that are indicated as requiring:
- Periodic assistance: dressing (with the comment 'putting on shoes'), going to and from stores (with the comment 'someone else does carrying'), caring purchases home (with the comment 'needs assistance'), food preparation and cooking (the latter two with the comment 'sister helps'):
- Continuous assistance: laundry and basic housekeeping
- Takes significantly longer: grooming, food preparation, cooking (the latter two with the

comment 'sister helps'), getting in and out of a vehicle, and using public transportation (with the comment 'needs a seat'); and

- Uses assistive device: bathing (with the comment 'grab bars').

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

PR:

- The GP noted that the appellant does not require any prostheses or aids for his impairment.

AR:

- The GP noted that the appellant receives assistance from his family but did not provide further comments;
- The GP did not indicate if the appellant uses assistive devices and stated 'no' to the use of assistance animals.

### **Evidence on Appeal**

Notice of Appeal, signed and dated December 12, 2016, which stated that the appellant does not agree with the ministry's decision.

### **Evidence at the Hearing**

The appellant submitted an imaging report. The report is of the appellant's cervical spine and pelvis, and is dated December 15, 2016.

At the hearing the appellant stated, in part, that he:

- does not agree with the ministry's decision because he is in pain and has difficulties and therefore the decision is not fair. When he received the denial package, he had his family translate it for him;
- For his self-report, he told a family member what to write and the family member wrote it in English for him;
- wants to live a normal life and be active like he was before but the doctor told him that he would face struggles;
- does not want to spend the rest of his life on medication and wants a fix. He tried different therapies like physical therapy but they did not work;
- tried looking for work but the doctor said that he could not do any hard work;
- He cannot lift anything heavy;
- experiences pain that is beyond the limit and does not match his young age;
- had the option of surgery but was told by a specialist that there is no guarantee the pain would go away and the risk is too great;
- in 2016, his pain would 'come and go' but he has experienced a greater level of pain since August 2016 and the PWD application does not reflect this new level of pain;
- now experiences pain not only in his back but throughout his body. It starts in his hands and spreads all over;
- He used to be able to put his shoes on sometimes, but now he needs help all the time or he

cannot do it.

- has had several visits to the hospital emergency department where he is given morphine;
- was given Tylenol 3 and muscle relaxants from his doctor to manage the pain but he did not like feeling dizzy and not in control;
- experiences severe pain with any movement;
- has an appointment with a rheumatologist in April 2017 and at the pain clinic in December 2017;
- has difficulties performing his DLA such as laundry, cleaning and he cannot go to work. His sister, niece and nephew provide help;
- experiences stress due to his limitations;
- is no longer involved in church;
- was a calm and patient person but now is easily agitated;
- does not want to burden his family any longer;
- can confirm that the functional ability demonstrated in the PWD application was what he strove to achieve and represented his optimal functioning when he pushed himself.
- His doctor does not speak his original language.

At the hearing the ministry relied on its reconsideration decision

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

The ministry did not object to admitting the December 15, 2016 imaging report of the appellant's cervical spine and pelvis.

On review of the evidence, the panel notes that the imaging report is in support of or corroborates the information and records that was before the ministry at the time of reconsideration. The panel therefore finds that the appellant's reference to his imaging report 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*. The panel assigned little weight to the imaging report because it did not include an assessment of the findings or relate them to the diagnosis provided by the GP in the PR.

## 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 or nurse 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 or nurse 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 physical impairment**

The appellant takes the position that his medical condition deteriorated since the PWD application was completed in June 2016. He now experiences pain throughout his body and therefore is unable to function as he did in June 2016. This is evident from the imaging report and the information from his self-report and from his GP.

The ministry's position as set out in the Reconsideration Decision is that the evidence as a whole does not support a finding that the appellant has a severe physical impairment. In particular, the ministry argues that the evidence provided failed to demonstrate the frequency, duration and degree of assistance required with activities of mobility and the functional limitations described by the GP are more in keeping with a moderate degree of physical impairment.

### *Panel Decision*

As mentioned above, diagnoses of serious medical conditions do not by themselves determine that the physical impairment is severe. The appellant faces challenges but the evidence provided by the GP does not clearly demonstrate the impact of his physical impairments. In the PR the GP indicates that the appellant suffers from DDD and migraine headaches but can, unaided, walk 1-2 blocks and climb 5+ steps. The GP also indicated that the appellant can lift 5-15lbs and remain seated for 1-2 hours. In the AR, the GP indicated that the appellant needs periodic assistance with walking indoors, climbing stairs, standing, lifting and carrying and holding, but did not indicate the frequency, duration and degree of assistance required. The GP indicated that the appellant takes significantly longer with walking outdoors but did not indicate how much longer.

In his SR, the appellant described his disability as including chronic lower back pain due to DDD, which flares up at times that last from a few days to a few months before returning to its chronic pain level, and severe headache attacks from migraines, with each episode lasting for hours to 2 to 3 days. The appellant argues that the PWD application was completed in June of 2016 but in August 2016 his medical condition became worse and since then his pain has been chronic and spread to other areas of his body. In the supplementary questionnaire (dated November 1, 2016), the GP had an opportunity to provide information addressing the appellant's deteriorated condition and information regarding frequency, duration, and degree of assistance required or how much longer it takes the appellant to walk outdoors. The panel notes that in the questionnaire, the GP stated that "when [the appellant] has back pain it *can* be severe" but did not confirm that the appellant has a severe impairment or that his condition is worse than when the PWD application was completed. The GP stated that the severe back pain and migraines together *can* amount to 7-10 days per month, and then added that the appellant *can* walk slowly, climb a few steps, and lift 10lbs. The imaging report that was submitted at the hearing provides evidence that the appellant has a medical condition of the spine that is consistent with DDD but the report does not speak to functional ability or mobility.

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 functional ability is moderate and there is no indication that he requires significant 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 physical impairment.

### **Severity of mental impairment**

The appellant did not argue that he suffers from a severe mental impairment.

The ministry's position as set out in the Reconsideration Decision is that there is not sufficient evidence to support a finding of a mental impairment that severely limits the appellant's ability to function independently.

### *Panel Decision*

On review of the evidence, in the PR, the GP has not diagnosed the appellant with a mental impairment and indicated that he does not have significant deficits with cognitive and emotional



function. In the AR, the GP indicated that the appellant has good speaking, reading, hearing and writing, and the GP did not complete the section regarding impacts to cognitive and emotional function. The GP also indicated that all listed areas of social functioning are independent and the appellant has good functioning with immediate and extended social networks. The panel finds that the ministry reasonably determined that the evidence does not support a finding of a severe mental impairment pursuant to section 2 (2) of the EAPWDR.

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

The appellant argues that since August 2016 when his pain become even more severe he cannot do his DLA and that his sister, niece and nephew must help with laundry, cleaning, cooking. He used to be active but now he cannot do anything.

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 severe 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 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 wrote in the PR that the appellant's chronic pain results in difficulty performing many DLA such as laundry and cleaning and addresses DLA in more detail in the AR. The GP indicated that the appellant takes significantly longer to complete 6 listed areas of DLA but did not provide information on how much longer it takes for the appellant to complete the tasks. The GP indicated that the appellant requires periodic assistance with 6 listed areas of DLA but did not provide information on the frequency, duration and degree of assistance required. The panel notes the legislative criteria is that assistance is required either continuously or periodically for *extended periods*. Without information on frequency and duration it is difficult to determine if the legislative criteria has been met. The GP also indicated that the appellant requires continuous assistance with laundry and basic housekeeping. However the information provided does not clarify the degree of assistance required given the GP's assessment that the appellant can slowly walk 1 to 2 blocks and climb 5 or more stairs unaided and lift up to 10 lbs.

In the questionnaire dated November 1, 2016 the GP was provided with an opportunity to update and clarify his assessment regarding the extent of restrictions to DLA and is asked “is the patient restricted in his ability to perform DLA?” and, “which DLA are restricted and are these restrictions continuous or periodic in nature?”, and the GP indicated “shopping is difficult (friends and family do this). Housework is also difficult (again friends and family help)”. The GP did not state whether or not the help provided was continuous or periodic in nature. The GP wrote that exacerbations of the appellant’s back pain and migraines can amount to 7 to 10 days per month, but did not specify how these exacerbations impact the appellant’s ability to perform DLA.

In making its decision in this matter the ministry must consider the evidence from the GP as it is set out in the PR and AR and in the additional questionnaire. Given this evidence, 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 argued that he needs help from his sister, niece and nephew with various DLA, without them he would not be able to complete his DLA, and that he occasionally uses a cane for ambulation, and he uses a shower chair and grab bars for bathing.

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.