

PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the “ministry”) reconsideration decision of October 20, 2016, which found that the appellant did not meet three of five statutory requirements of section 2 of the *Employment and Assistance for Persons With Disabilities Act* (“EAPWDA”) for designation as a person with disabilities (“PWD”). The ministry found that the appellant met the age requirement and that in the opinion of a medical practitioner the appellant’s impairment 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 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 that
- as a result of those restrictions, the appellant requires the significant help or supervision of another person, an assistive device, or the services of an assistance animal.

PART D – Relevant Legislation

EAPWDA, section 2

Employment and Assistance for Persons with Disabilities Regulation (“EAPWDR”), section 2

PART E – Summary of Facts

The information before the ministry at the time of reconsideration included the following:

- The appellant's PWD application form consisting of the appellant's self-report form dated March 9, 2016 ("SR"), a physician's report dated May 6, 2016 completed by the appellant's general practitioner ("PR") and an assessor's report dated March 15, 2016 ("AR"), completed by a social worker.
- Letter from the physician dated December 4, 2015 (the "December 2015 Letter")
- Medical clinic records from January 5, 2015 to April 18, 2016 (the "Clinical Records")
- Letter from the physician dated March 18, 2016 (the "March 2016 Letter")
- The appellant's Request for Reconsideration ("RFR") form signed by the appellant.
- Letter from the orthopedic surgeon dated May 19, 2016
- MRI Lumbar Spine report dated July 3, 2016
- Hospital consultation record of the orthopedic surgeon dated July 13, 2016 (the "Hospital Consultation")
- Letter from the physician dated August 22, 2016 (the "August 2016 Letter")

Diagnoses

- In the PR the physician (who has been the appellant's general practitioner since 2013 and has seen him 11 or more times in the past 12 months, diagnosed the appellant with diabetes and COPD (date of onset 2015), degenerative disk (lumbar spine), bilateral numbness (feet) and high blood pressure (date of onset 2015). The physician comments that the appellant is awaiting an MRI to further evaluate degenerative changes in his spine - query disk herniation.
- In the Health History portion of the PR, the physician states that the appellant has severe limitations in activities of daily living on account of pain from lower back and shortness of breath from debilitating COPD.
- For Section B – Mental or Physical Impairment in the AR, the social worker (who has known the appellant since March 9, 2016 and seen him once in the last year) states that the appellant's physical or mental impairments that impact his ability to manage DLA are diabetes mellitus, COPD, degenerative disk (lumbar spine), high blood pressure and bilateral numbness in feet.

Physical Impairment

- The Clinical Records include the MRI Requisition, chest x-ray, referral to the orthopedic surgeon, a copy of an Emergency/Ambulatory Care record dated October 12, 2015 noting COPD exacerbation but indicate that the appellant was not in acute distress, a CT lumbar spine dated January 26, 2016 indicating that the appellant has multifocal degenerative changes, and various lab test results
- In the December 2015 Letter the physician states that he fully endorses a disability application for the appellant.
- In terms of physical functioning the physician reported in the PR that the appellant can walk 1 to 2 blocks unaided, can climb 5+ steps unaided, can lift 5 to 15 pounds and can remain seated less than 1 hour. In Part F – Additional Comments, the physician indicates that the

appellant has significant functional impact due to pain from degeneration of his lumbar spine and that his condition is having a major impact on DLA.

- In the AR the social worker reports that the appellant is independent with all aspects of mobility and physical ability commenting that he is able to independently complete all DLA but is unable to do any of the activities for a prolonged period of time and each causes a significant amount of pain and shortness of breath. The social worker indicates that it takes the appellant an inordinate amount of time – 2 times longer than prior to his diagnosis.
- In the SR the appellant states that he has a sore back and does not sleep well, which has been going on for years. He states that he has high blood pressure so he never has any energy, and that the pills he has to take make him feel sick to his stomach.
- In the RFR the appellant states that his condition is getting worse and he is always exhausted because he has trouble sleeping.
- In the March 2016 Letter the physician referred the appellant for a diabetic eye review indicating that he was diagnosed with diabetes in March 2015.
- In his letter dated May 19, 2016 the orthopedic surgeon states that the appellant originally had back pain but that his main issue now is pain in both buttocks but primarily the right, which gets worse with activity. The orthopedic surgeon indicates that the appellant has diabetes and he was not sure how well that was controlled as the appellant had noticed that he was losing sensation in his feet. The orthopedic surgeon indicated that he would see the appellant after his MRI, which was scheduled for July 2016.
- The MRI report dated July 3, 2016 indicates that the appellant has advanced spondylosis at L5-S1 with a mild posterior disc-osteophyte complex demonstrating minimal mass effect on the proximal right S1 nerve root.
- The Hospital Consultation letter dated July 13, 2016 indicates that the MRI was reviewed and there was not any significant areas of neural impingement to explain the appellant's lower limb symptoms so the hospital physician indicated that the reason for the numbness in his feet and sciatic pain, and even to a degree some of his back pain is probably due to plexopathy/neuropathy secondary to his diabetes. The Hospital Consultation indicates that the back pain issues may be in coordination and conjunction with degenerative disc disease.
- In the August 2016 Letter the physician indicates that the appellant is unable to sit, stand or walk for any prolonged periods of time, has poor sleep due to pain and experiences chronic exhaustion, is not recommended to lift more than 40 pounds in an isolated circumstance and that repetitive lifting of any weight is not recommended, that repetitive actions, especially lifting, bending or twisting are not recommended and that he requires prescriptions as part of his treatment plan, the side effects of which could further impair his ability to complete some workplace duties such as operating heavy machinery and DLA. The physician indicates that the appellant's condition is chronic and progressive in nature and it is unlikely that the appellant will recover to a point where he no longer experiences severe and debilitating symptoms, which impact his functional abilities. The physician indicates that any future employment opportunities would need to take his limitations into account, in order to be considered safe for him to engage in, and prevent further decline/exacerbation of symptoms.

Mental Impairment

- In the PR the physician indicates that the appellant does not have any significant deficits with cognitive and emotional function. The physician indicates that the appellant does not have any difficulties with communication.

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- In the AR the social worker has not completed Section B, question 4, cognitive and emotional functioning.

DLA

- In the PR the physician indicates that the appellant's impairment directly and continuously restricts his ability to perform DLA in the area of basic housework and that he is periodically restricted in the areas of meal preparation, mobility outside the home and use of transportation. For periodic, the PR indicates that the appellant's ability to complete activities depends on the amount of time available, support available (family/friends) and severity of pain/shortness of breath, on a given day. With respect to the degree of restriction the PR indicates that the appellant's medical conditions cause debilitating pain and shortness of breath, which become exacerbated when he exerts himself in any way, making it challenging to complete DLA.
- In the AR, the social worker indicates that the appellant is independent with all aspects of DLA except basic housekeeping with which he requires periodic assistance from another person, explaining that friends and family help with these tasks regularly as they require too much exertion. The social worker indicates that transfer are challenging in the morning, noting shortness of breath and pain. Under additional comments, the social worker indicates that the appellant is able to complete a number of DLA independently but it takes an inordinate amount of time for him to do so, due to extreme shortness of breath and severe pain as he is unable to exert himself in any way. The social worker states that his DLA takes twice as long, at minimum, than prior to his diagnosis.
- In the SR the appellant states that he has trouble maintaining his home, that he is often very exhausted and experiences ongoing pain. He states that it takes all of his energy to ensure that his children are well cared for and his home is maintained.
- In the RFR, the appellant states that it is hard for him to express all that he goes through but that every DLA is a struggle.
- In the August 2016 Letter the physician indicates that repetitive actions are not recommended and that the side effects of the appellant's medications could interfere with his DLA.

Help

- In the PR the physician reports that the appellant does not require any prosthesis or aids for his impairment. The PR indicates that the appellant requires assistance from family and friends on an ongoing basis, with details provided in the AR. The PR indicates that the appellant requires assistance, especially with tasks that require too much exertion, such as meal preparation, basic housework and shopping.
- In the AR the social worker indicates that the appellant receives help from family and friends.
- The appellant does not use assistive devices or have an assistance animal.

Additional information provided

In his Notice of Appeal the appellant states that he feels that the worker who was helping him did not represent him properly so a fair decision could not be made.

Prior to the hearing the appellant provided a letter stating that since he started applying for PWD the pain in his back has increased and he now requires pain medication all the time. He states that between the pains not letting him sleep and the way the medication makes him feel sick, he cannot

manage day to day living now and cannot cut his own firewood or perform tasks such as folding laundry. The appellant states that he has a friend that has been coming in and helping him with his housework but is about to move away. He states that his older son helps a fair bit with tasks such as bringing in firewood, dishes, and helping with cooking. The appellant states that he believes children should have chores to do but he feels like he is putting a little bit too much on his son. The appellant states that he feels that he needs and deserves assistance so he can get a little more help and so he and his children can have a better life (the "Submission").

The appellant also provided a Functional Capacity Evaluation dated December 19, 2016 ("FCE") completed by a functional capacity evaluator. The FCE indicates that the appellant was referred for an assessment of his general physical and functional capacity and in particular, to determine his functional abilities and limitations and to determine whether these abilities meet the demands of typical low impact occupations or of a Class 1 Truck Driver. The FCE indicates that the appellant demonstrated the ability to stand for 42 minutes, sit for 1 hour, stoop for 9 minutes, perform reaching for 1 hour, walking for 9 minutes, kneeling for 30 second and looking down for 1 hour. The "ADL Scores by Type of Demand" indicate that the appellant is capable of 5% of heavy home maintenance, 34% of heavy housekeeping, 72% of light housekeeping and 89% of self-care. The evaluator concludes that the appellant's ability to work was limited due to difficulty with breathing (COPD), that he is able to reach overhead for a short duration only, that he is able to use his arms and hands to perform activity in front of the body in a sitting or standing position, that he is able to retrieve items from floor level but reported immediate pain increase to lower back pain.

The ministry provided a letter dated January 12, 2017 (the "Ministry Submission") indicating that it was relying on the reconsideration decision. The Ministry Submission also indicates that the ministry had reviewed the FCE and notes that the PWD application is not intended to assess employability or vocational abilities and that a medical barrier to an ability to engage in paid employment is not a legislated criterion for severity nor does it confirm a significant restriction in ability to perform DLA. The Ministry Submission states that while it is recognized that some information regarding basic functional abilities (unrelated to employment) is included in the FDCE, the minister submits that the information does not demonstrate significant restrictions in the appellant's ability to perform DLA. In particular, the Ministry Submission notes that the FCE indicates that the appellant demonstrated that he is capable of standing for 42 minutes, walking for nine minutes and sitting for one hour and that his "ADL Scores" include 72% capability in light housekeeping and 89% capability in self care. The Ministry Submission also states that the evaluator is not a medical practitioner and does not explain how long he has known the appellant or how many visits he has had with him.

Admissibility of New Information

The ministry did not object to the Submission or the FCE. The appellant did not object to the Ministry Submission. The panel has admitted the Submission and the FCE as they are evidence in support of information and records that were before the ministry at the time of reconsideration, in accordance with section 22(4) of the *Employment and Assistance Act*. In particular, the Submission corroborates the information at reconsideration respecting the appellant's reports of his impairment, his ability to perform DLA, and help needed. While the FCE provides information regarding the appellant's ability to work, which is not a criterion for PWD designation, the FCE does provide some information regarding the appellant's ability to perform DLA.



The panel accepts the Ministry Submission as argument.

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*.

PART F – Reasons for Panel Decision

The issue on this 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 the appellant does not have a severe physical or mental impairment, and that in the opinion of a prescribed professional the appellant's impairment does not directly and significantly restrict him from performing DLA either continuously or periodically for extended periods, and that as a result of those restrictions the appellant does not require help to perform DLA?

The relevant legislation is as follows:

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.

EAPWDR section 2(1):

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.

Severe Physical Impairment

The ministry's position, as set out in its reconsideration decision, is that the information provided is not evidence of a severe physical impairment. In particular, the ministry states that the AR is problematic because it was completed by a social worker who met the appellant for the first time when completing the AR. The ministry's position is that the AR is intended to be completed by a prescribed professional having a history of contact and recent experience with the appellant and is to be based on knowledge of the appellant, observations, clinical data, and experience. The reconsideration decision indicates that the ministry is inclined to place more emphasis on the assessments provided by the physician, who has known the appellant for three years.

The reconsideration decision also states that due to the differences in handwriting between the PR and the AR it appears that the assessor completed portions of the PR (specifically Section 2-A Diagnoses and Section 2-E Daily Living Activities). However, as the physician completed and signed the PR after the assessor, the minister is satisfied that the physician agrees with the information. In addition, the ministry notes that the physician also lists the same diagnoses in the August 2016 Letter.

The ministry notes that although the physician in the PR indicates that the appellant has "*severe limitations in activities of daily living, on account of pain from lower back and shortness of breath from debilitating COPD*", the physician indicates that the appellant is able to walk 1-2 blocks unaided on a flat surface, can climb 5+ steps unaided, can lift from 5-15 pounds and can remain seated less than one hour. The reconsideration decision notes that neither the physician nor the assessor indicate that the appellant requires any assistive devices.

The ministry's position is that although the August 2016 Letter and the letter from the orthopedic surgeon indicate that the appellant's conditions and pain are worsening, the information provided does not establish that the appellant's current conditions meet the legislated criteria. The ministry's position is that the physician's August 2016 Letter and the letter from the orthopedic surgeon conflict with respect to the appellant's experience of pain and range of motion which creates uncertainty about the appellant's physical functioning and severity of his impairment.

The reconsideration decision also indicates that in the PR the physician indicated that the appellant was limited to lifting 5-15 pounds but in the August 2016 Letter the physician indicates that the appellant is not recommended to lift more than 40 pounds in an isolated circumstance. The ministry also notes that in the August 2016 Letter the physician indicates that the repetitive actions, especially lifting (any weight), bending or twisting, are not recommended, but that the physician does not state that the appellant is unable to lift, bend or twist. The reconsideration decision indicates that the August 2016 Letter appears to be written with regard to the appellant's workplace abilities and the PWD application is not intended to assess employability or vocational abilities. The ministry's position is that while the August 2016 Letter indicates some limitation, the information does not establish a severe impairment of the appellant's physical functioning.

The ministry's position is that it has considered the PWD application and all other supporting assessments provided at reconsideration, and that while the ministry acknowledges that the appellant is limited due to his pain and shortness of breath, a severe impairment of his physical functioning has not been established.

The appellant's evidence is that he has a severe physical impairment resulting from chronic and continuous physical pain due to his low back pain and left leg radiculopathy. The appellant's position is that his impairment causes him severe pain with all activities and that he has had to stop working, driving and needs help with the simplest of tasks due to his ongoing pain. The appellant's position is that the information provided demonstrates that he has ongoing pain and functional limitations that support his application for PWD designation.

Panel Decision

A diagnosis of a serious medical condition 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 as evidenced by functional skill limitations and the degree to which performing DLA is restricted. The legislation makes it clear that the determination of severity is at the discretion of the minister, taking into account all of the evidence. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a prescribed professional. The panel notes that employability is not a criterion for designation with PWD.

The panel notes that the PR has different handwriting in different portions. In particular, as noted by the ministry, Section 2-A Diagnoses and Section 2-E Daily Living Activities appears to be completed in the same handwriting as that of the AR indicating that the social worker completed those portions of the PR rather than the physician. It would have been helpful if the physician would have confirmed

that the assessor completed those portions of the PR to confirm that he agrees with the information provide by the assessor. However, as the reconsideration decision indicates that the minister is satisfied that the physician agrees with the information and makes the same diagnoses in the August 2016 Letter, the panel is satisfied that the PR accurately represents the physician's opinion at the time he signed the PR being May 6, 2016.

In the PR and the August 2016 Letter, the physician indicates that the appellant has been diagnosed with diabetes, COPD, degenerative disc lumbar spine, bilateral numbness (feet) and high blood pressure or hypertension. While the physician's diagnoses are consistent the information in the PR and the August 2016 Letter is not entirely consistent and the inconsistencies raise uncertainties about the appellant's physical limitations. For example, in the PR the physician indicates that the appellant can walk 1-2 blocks on a flat surface unaided, can climb 5+ steps unaided, is limited to lifting 5 to 15 pounds and can remain seated less than 1 hour. In the August 2016 Letter, the physician indicates that the appellant is unable to sit, stand or walk for any prolonged period of time, has poor sleep due to pain and experiences chronic exhaustion, is not recommended to lift more than 40 pounds in an isolated circumstance and that repetitive lifting of any weight is not recommended, and that repetitive actions, especially lifting, bending or twisting are not recommended. It is not clear what the physician means by the use of the word "prolonged" and it is not clear whether his assessment in the August 2016 Letter represents the same physical limitations as noted in the PR with respect to walking, climbing stairs and sitting or if it is different.

With respect to lifting, the August 2016 Letter indicating that the appellant should not lift more than 40 pounds in an isolated circumstance does appear to relate more to the appellant's vocational requirements than an assessment of the severity of his impairment and their impacts to DLA. In addition, the ability to lift 40 pounds far exceeds the limitations noted in the PR.

The panel notes that in the August 2016 Letter the physician indicates that the appellant's condition is chronic and progressive in nature and it is unlikely that the appellant will recover to a point where he no longer experiences severe and debilitating symptoms, which impact his function abilities. The physician indicates that any future employment opportunities would need to take his limitations into account. This statement further supports the ministry's position that the August 2016 Letter is an assessment more of the appellant's vocational limitations rather than the severity of his impairment in relation to the impacts on DLA.

The ministry argues that the discrepancy between the August 2016 Letter and the information provided by the orthopedic surgeon create further uncertainties. The panel notes that the physician indicates that the appellant experiences severe and debilitating chronic pain, shortness of breath and decreased range of motion. However the Hospital Consultation indicates that upon review of the MRI lumbar spine, the orthopedic surgeon did not see any significant areas of neural impingement to explain the appellant's lower limb symptoms. The orthopedic surgeon indicates that in his opinion the reason for the numbness in the appellant's feet and sciatic pains, and even to some degree his back pain, is probably due to plexopathy/neuropathy secondary to his diabetes. While there appears to be a question regarding the causation of some of the appellant's symptoms, the panel finds that both the physician and the orthopedic surgeon seem to accept that the appellant has the reported pain and symptoms in his back and lower limbs. However, the orthopedic surgeon does not provide any additional information to indicate the severity of the appellant's impairment or information to indicate that he has limitations resulting from his degenerative disc disease.

The panel notes that in the AR, the social worker indicates that the appellant is independent with respect to all aspects of mobility and physical ability. The social worker indicates that the appellant is independently able to complete all DLA but is unable to do any of the activities for a prolonged period of time and each causes a significant amount of pain and shortness of breath. However, the social worker also states that the appellant “...[t]akes an inordinate amount of time - 2x longer than prior Dx” but the social worker does not provide any further indication as the appellant’s limitations.

The Clinical Records provided do not provide any additional information to indicate the severity of the appellant’s impairment. In particular the Emergency/Ambulatory Care record dated October 12, 2015 indicates that the appellant attended a hospital in regards to a COPD exacerbation but the record indicates that the appellant was not in acute distress. The panel also notes that while the physician in the December 2015 Letter indicates that he fully endorses a disability application for the appellant, the letter does not provide any additional information regarding the severity of the appellant’s impairment.

The panel also notes that the information in the FCE indicates that the appellant is less restricted than the information provided by the August 2016 Letter even though it is the more recent assessment. Although the FCE’s primary purpose is to assess the appellant’s restrictions with respect to employment, the functional capacity evaluator indicates, in the section titled Positional Tolerances, that the appellant is able to stand for 42 minutes, sitting for 1 hour, stoop for 9 minutes, reach for 1 hour, walk for 9 minutes, kneel for 30 second and look down for 1 hour. Although the FCE was performed by the evaluator who met with the appellant on just one occasion, the detailed report indicates that the testing was thorough and perhaps more indicative of the appellant’s actual abilities than the PR or the AR given that the PR and AR are based significantly on the appellant’s self-reports. The FCE also indicates that the appellant is capable of 89% of self-care, 72% of light housekeeping, 34% heavy housekeeping and 5% of heavy home maintenance.

Given the various different opinions as between the PR, AR, the August 2016 Letter, the Hospital Consultation and the FCE the panel finds that the information provided does not present a clear picture of the appellant’s functional abilities or the severity of his physical impairment. In particular, despite the physician’s description of the appellant’s impairment as being severe, the functional limitations described seem to indicate a more moderate level of impairment.

The panel notes that while the appellant indicates in the Notice of Appeal that he felt that the worker who was helping him do not represent him properly so a fair decision could not be made, the additional information provided in the Submission and the FCE does not demonstrate that the appellant has a severe physical impairment. In particular, while the appellant in the Submission indicates that his pain has increased and he now requires medication all the time, there is no additional information from the physician indicating that the appellant’s medications have changed or increased.

Considering all of the information, the panel finds that the ministry’s decision that the information provided is not indicative of a severe physical impairment was reasonable.

Severe Mental Impairment

The ministry's position is that the information provided does not establish that the appellant has a severe mental impairment. The ministry's position is that the physician did not indicate a diagnosis of a mental disorder and that the physician indicates that the appellant does not have any significant deficits with cognitive and emotional function or restrictions to his social functioning.

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

Panel Decision

The physician did not diagnose the appellant with a mental disorder and indicates that the appellant does not have any significant deficits with cognitive or emotional functioning. The PR and AR both indicate that the appellant's communication is good and that his DLA of social functioning is not restricted.

As there is no diagnosis of a mental impairment, no significant deficits with cognitive and emotional functioning, no restrictions to DLA of social functioning, and the appellant is not arguing that he has a severe mental impairment, the panel finds that the ministry was reasonable in determining that the appellant does not have a severe mental impairment.

Significant Restrictions to DLA

The ministry's position, as set out in the reconsideration decision, is that the information provided by the physician and the chiropractor does not establish that a severe impairment significantly restricts DLA continuously or periodically for extended periods.

The ministry's position is that the information from the orthopedic surgeon does not address the appellant's ability to perform DLA and the other information provided has conflicting information. The ministry notes that in the RFR the appellant states that he cannot manage his DLA independently anymore but that the information in the PR, the August 2016 Letter and the Hospital Consultation do not indicate a severe impairment that would restrict the appellant to that degree.

The ministry's position is that in the PR and the AR, both the physician and the assessor indicate that the appellant can manage almost all of his DLA independently. The assessor indicates that the appellant takes twice as long (at minimum) to complete activities as compared to prior to his diagnoses, but this information alone does not establish a significant restriction, particularly when considered in context with the physician's assessments of the appellant's physical functioning. The ministry's position is that the assessments of the appellant's physical functioning indicate that the appellant is able to independently manage all activities requiring mobility and physical ability but that he is unable to engage in repetitive activities or tolerate any activity for prolonged periods of time so he takes twice as long to perform them. The ministry notes that this carries through to his ability to manage DLA but the ministry does not consider that taking twice as long to complete an activity as indicative of a significant restriction to one's ability to complete it.

The reconsideration decision indicates that in the PR the physician indicated that the appellant was

continuously restricted in his ability to manage basic housework and periodically restricted in his ability to manage meal preparation, mobility outside the home and use of transportation. However the physician does not indicate the frequency and duration of the periodic restrictions, so the ministry is unable to determine the significance of the restrictions. The ministry also notes that while the physician indicates that the appellant is continuously restricted in his ability to manage housework, the AR provides contradictory information, indicating that the appellant is periodically restricted in his abilities to manage basic housekeeping and laundry. The ministry notes that while the August 2016 Letter states that the appellant's impairments have a significant impact on his functional abilities, including his ability to complete DLA, the physician does not elaborate to identify any additional DLA that are restricted and whether they are restricted continuously or periodically for extended periods.

The ministry's position is that it relies on the medical opinion and expertise from the physician and other prescribed professionals to determine whether the appellant's impairment significantly restricts his ability to perform DLA either continuously or periodically for extended periods. The ministry's position is that reviewing all of the information provided, there is not enough evidence to confirm that the appellant has a severe impairment that significantly restricts the appellant's ability to perform DLA continuously or periodically for extended periods, so the legislative criteria has not been met.

The appellant's position is that he has a severe physical impairment that causes him to be in constant pain every day and that as a result every DLA is a struggle. The appellant's position is that it takes all of his energy to ensure that his children are well cared for and his home is maintained and that he requires assistance from family and friends. The appellant's position is that the information provided by the physician, social worker and other medical evidence, in combination with his self-reports demonstrates that his DLA are directly and significantly restricted.

Panel Decision

The legislation – s. 2(2)(b)(i) of the EAPWDA – requires that the minister be satisfied that in the opinion of a prescribed professional, a severe mental or physical impairment directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods. The term "directly" means that there must be a causal link between the severe impairment and the restriction. The direct restriction must also be significant. Finally, there is a component related to time or duration. The direct and significant restriction may be either continuous or periodic. If it is periodic it must be for extended periods. Inherently, any analysis of periodicity must also include consideration of the frequency. All other things being equal, a restriction that only arises once a year is less likely to be significant than one, which occurs several times a week. Accordingly, in circumstances where the evidence indicates that a restriction arises periodically, it is appropriate for the ministry to require evidence of the duration and frequency of the restriction in order to be "satisfied" that this legislative criterion is met.

The panel finds that there are significant inconsistencies between the information provided in the PR and the AR. For example, while the PR indicates that the appellant is continuously restricted with basic housework, the AR indicates that the appellant only requires periodic assistance with laundry and basic housekeeping. While the PR indicates that the appellant requires periodic assistance with meal preparation, mobility outside the home and use of transportation, the AR indicates that the appellant is independent with these aspects of DLA. While the AR indicates that it takes the appellant an inordinate amount of time to complete these tasks and that he requires assistance from

friends and family, the social worker has only described that friends and family help with laundry and basic housekeeping, not the other aspects of DLA. In the PR the comments provided indicate that the appellant's pain and shortness of breath make it challenging for him to complete DLA but the physician does not provide any indication that he is unable to complete his DLA.

The panel notes that the information provided by the orthopedic surgeon and the Clinical Records does not provide any information regarding the appellant's ability to perform DLA.

While the August 2016 Letter indicates that the repetitive actions especially lifting, bending or twisting are not recommended, the physician does not clarify how these limitations impact the appellant's ability to perform DLA and/or whether his opinion in the PR remains the same or whether it has changed.

In the August 2016 Letter, the physician indicates that the appellant requires prescriptions as part of his treatment plan, the side effects of which could further impair his ability to complete some workplace duties (such as operate heavy machinery) "and ADL". However, the panel notes that the words "and ADL" are handwritten on the letter and it is not clear if the physician added those notes or if the social worker or appellant did. It is also not clear if the physician supports the addition of those words and if so, how the prescriptions may impact the appellant's ability to perform DLA. This creates further inconsistency because in the PR, the physician indicated that the appellant has not been prescribed any medication and/or treatments that interfere with his ability to perform DLA. If in fact the physician's opinion changed from the time the PR was completed in May 2016 and the August 2016 Letter, the physician ought to have provided information as to why his opinion changed and information on what medications the appellant is being prescribed that impact his ability to perform DLA and provide information regarding the nature of the impacts.

The panel also notes that in the "ADL Scores by Type of Demand" section of the FCE, the evaluator indicates that the appellant is capable of 89% of self-care, 72% of light housekeeping and 34% of heavy housekeeping. While the evaluator is not a prescribed professional as defined in the legislation, the information provided appears to be somewhat consistent with the information from the physician and the social worker providing additional information indicating that the appellant is independent with the majority of his DLA.

The panel also notes that while the physician in the December 2015 Letter indicates that he fully endorses a disability application for the appellant; the letter does not provide any additional information regarding any restrictions to the appellant's DLA.

In the Submission, the appellant states that he cannot manage DLA and that he cannot cut his own firewood or do things like fold laundry. He also indicates that his oldest son helps with some DLA. While the information provided indicates that the appellant has difficulties with some aspects of some DLA, based on all of the information provided, the panel finds that the ministry was reasonable in determining that the evidence is insufficient to show that the appellant's ability to perform his DLA is significantly restricted either continuously or periodically for extended periods as required by EAPWDR section 2(2)(b).

Help with DLA

The ministry notes that while the assessor indicates that the appellant requires assistance from family and friends to manage his DLA, the appellant is able to complete them when support is unavailable. The ministry's position is that as it has not been established that DLA are significantly restricted; therefore, it cannot be determined that significant help is required from other persons.

The appellant's position is that he has severe physical and mental impairments and that he is in constant pain and needs help with DLA, as every DLA is a struggle.

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The PR indicates that the appellant does not require any prosthesis or aids for his impairment but that he requires assistance from family and friends on an ongoing basis. The PR also indicates that assistance is especially necessary with tasks that require too much exertion, such as meal preparation, basic housework and shopping. The AR indicates that the appellant receives help from family and friends and that his children help with a number of DLA. The AR indicates that the appellant does not require the use of assistive devices and does not have an Assistance Animal.

The appellant indicates that he receives help from family and friends and in the Submission he indicates that he feels poorly that he is relying so much on his oldest son for assistance.

Although the panel finds that the appellant requires some help with some tasks, a finding that a severe impairment directly and significantly restricts a person's ability to manage his DLA either continuously or periodically for an extended period is a precondition to a person requiring "help" as defined by section 2(3)(b) of the EAPWDA.

As the panel finds that the ministry was reasonable in determining that the appellant does not have a severe impairment that directly and significantly restricts his ability to manage his DLA either continuously or periodically for an extended period of time, the necessary precondition is not satisfied.

Accordingly, the panel finds that the ministry's decision that the appellant did not satisfy the legislative criteria of EAPWDA section 2(3)(b) was reasonable.

Conclusion

Having reviewed and considered all of the evidence and the relevant legislation, the panel finds that the ministry's decision finding the appellant ineligible for PWD designation is reasonable based on the evidence and is a reasonable application of the legislation in the circumstances of the appellant. The panel therefore confirms the ministry's decision and the appellant is not successful in his appeal.