

## 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 February 1, 2017, 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 has confirmed that the appellant's impairment is likely to continue for at least 2 years.

However, the ministry was not satisfied 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

On October 17, 2016, the ministry received the appellant's PWD application comprised of a Physician Report (PR) dated October 12, 2016 and an undated Assessor Report (AR), both completed by the appellant's general practitioner (GP) of 10 months, and the appellant's Self-report (SR) which is dated October 13, 2016.

The appellant's request for PWD designation was denied on January 12, 2017. On February 1, 2017, the ministry received the appellant's Request for Reconsideration dated January 31, 2017.

### Information Provided on Appeal and Admissibility

Section 22(4) of the *Employment and Assistance Act* (EAA) provides that panels may admit as evidence (i.e. take into account in making its decision) the information and records that were before the minister when the decision being appealed was made and "oral and written testimony in support of the information and records" before the minister when the decision being appealed was made – i.e. information that substantiates or corroborates the information that was before the minister at reconsideration. These limitations reflect the jurisdiction of the panel established under section 24 of the EAA – to determine whether the ministry's reconsideration decision is reasonably supported by the evidence or a reasonable application of the enactment in the circumstances of an appellant. That is, panels are limited to determining if the ministry's decision is reasonable and are not to assume the role of decision-makers of the first instance. Accordingly, panels cannot admit information that would place them in that role.

On February 20, 2017, the Tribunal received the appellant's Notice of Appeal (NOA), in which the appellant describes balance problems, the need for assistance with shopping and cleaning, and writes that a scooter has been recommended.

At the hearing, the appellant submitted 22 pages of documents, including:

- information respecting medical transportation and appointments with a neurologist as well as an ear, nose and throat (ENT) specialist;
- a pain management clinic intake assessment (the assessment) and information respecting the risks of pain management procedures;
- information respecting medical imaging (electromyography) regarding the appellant's degenerative disc disease; and,
- a 1-page handwritten assessment (the assessment) signed by a physician identifying degenerative disc disease with L5 or S1 radiculopathy.

The panel determined that the above documentation provided at the hearing and the oral testimony respecting these documents, as well as the information describing balance problems and the need for assistance from others in the NOA, is consistent with the information at reconsideration regarding the appellant's degenerative disc disease and hearing loss and is therefore in support of the information before the ministry and admissible in accordance with section 22(4) of the EAA.

The balance of the documents submitted at the hearing relate to investigations respecting the appellant's eyes and heart, including transportation to appointments, and also includes a letter from

the appellant regarding a matter unrelated to his health. The appellant and his advocate also provided oral testimony regarding his eyes, heart and other as yet undiagnosed medical conditions, and the appellant's NOA and oral testimony introduced information respecting the need for a scooter. As the one document is unrelated to the appellant's health and there was no reference to any medical conditions other than degenerative disc disease, hearing loss, and kidney disease, or to the need for mobility aids at the time of reconsideration, the panel determined that the oral and written information respecting these matters does not corroborate or substantiate information available at reconsideration. Therefore, these written and oral submission are not admissible under section 22(4) of the EAA as they are not in support of the records and information at reconsideration. The inadmissible information should first be put before the ministry for assessment.

The relevant details of the admissible written and oral testimony are included in the summary below.

At the hearing, the ministry relied on its reconsideration decision.

### Summary of relevant evidence

#### Diagnoses

In the PR, the GP diagnoses the appellant with degenerative disc disease, hearing impairment, and chronic kidney disease.

#### Physical Impairment

The GP provides the following information.

- Long history of worsening bilateral hearing loss for which the appellant uses hearing aids which no longer help to the same degree.
- Severe progressive degenerative disc disease resulting in weakness in lower extremities and impaired ability to ambulate.
- The appellant is able to:
  - walk 4+ blocks unaided;
  - climb 5+ steps unaided;
  - lift 5 to 15 lbs; and
  - remain seated with no time limitation.
- Walking indoors, walking outdoors, and climbing stairs take significantly longer than typical ("Slowed gait. Some lower leg weakness.")
- Standing, lifting, and carrying/holding are managed independently.

In his SR, the appellant provides a history of his leg and back pain. He has a hard time getting up in the morning, and uses rubbing alcohol to get down the swelling on his lower back left side. In the past, he had pain and cramps when it rained but, for the past 8 months he has pain, cramps and discomfort even on warm and sunny days. He has been starting to lose balance walking in stores, and has trouble stepping on or off a sidewalk curb. It is hard at times to lift his legs. If he stands for more than 2-3 minutes, it is hard to start walking again so he has to sit down for 5 minutes to rest,

then can get up and walk again. After cutting his grass for 5 minutes and resting, his hips and legs go numb. After a full day of being active, he soaks for about 20 minutes, which now only helps until he is out of the hot water. He tried going back to work but was unable to do his job.

In his reconsideration submission, the appellant reiterates that degenerative disc disease causes weakness and loss of balance in his lower legs and therefore, it takes him longer to walk and he needs to take frequent breaks. Hearing loss makes it difficult to attain any steady work and financial stability.

In his Notice of Appeal, the appellant writes that because of his ankles and hips, he loses his balance and that with bad weather, it is getting harder to walk outside. At the hearing, the appellant stated that he has difficulty getting in and out of a chair, and that he usually sits and waits while someone else shops for him, but if he does shop, he needs to rest after 2 aisles because his hips and ankles go numb; he finds it too depressing to look into the mobile scooters available in stores. His specialist wanted to perform back surgery, but the appellant felt it was too risky. The appellant further described the impact of hearing loss on his previous employment, with the advocate noting that the appellant has not been able to work for the last 4 years. The appellant stated that his hearing was tested on April 21, 2016, with the results being 42% in his right ear and 24% in his left ear, and reiterated that his hearing aids do not work as well as they used to. The appellant also stated that there is a possibility of surgery on his left ear.

The assessment recommends a nerve block, medications, physiotherapy, and that the appellant avoid bending and lifting when twisting, and use proper lifting techniques, with the goal of a 30% pain reduction.

### Mental Impairment

The GP reports:

- No significant deficits with cognitive and emotional function.
- No cognitive, motor, sensory, or other difficulties with communication.
- Ability to speak, read, write is satisfactory; hearing is poor (“Progressive decline.”)
- Social functioning is managed independently. Good functioning with immediate social network; marginal functioning with extended social networks.

### DLA

The GP reports increasing problems managing “ADL’s” due to increasing hearing loss and progressive weakness of the lower extremities. Hearing concerns make it difficult to attain any, financial stability. No medications or treatments have been prescribed that interfere with the ability to perform DLAs.

Move about indoor/outdoors

- Walking indoors and outdoors, and climbing stairs take significantly longer.
- Standing, lifting, carrying and holding are managed independently.

#### Personal care

- Dressing, grooming, and bathing take significantly longer than typical due to mobility concerns.
- Feeding self and regulate diet require continuous assistance from another person “secondary to financial concerns.”
- Toileting and transfers (in/out of bed and on/off chair) are managed independently.

#### Basic Housekeeping

- Both listed tasks – laundry and basic housekeeping - require continuous assistance from another person (secondary to financial concerns).

#### Shopping

- Going to and from stores and carrying purchases home take significantly longer to perform.
- Reading prices and labels and making appropriate choices are managed independently.
- Paying for purchases requires continuous assistance from another person.
- The GP comments “Again, increasing difficulty with mobility.”

#### Meals

- Meal planning and food preparation require continuous assistance from another person (“Unable to financially afford quality meals.”)
- Cooking and safe storage of food are managed independently.

#### Paying Rent and Bills

- All listed tasks – banking, budgeting, and pay rent and bills – require continuous assistance from another person (“financial strain.”)

#### Medications

- All listed tasks are managed independently – filling/refilling prescriptions, taking as directed, and safe handling and storage.

#### Transportation

- Getting in and out of a vehicle and using public transit take significantly longer than typical.
- Using transit schedules/arranging transportation is managed independently.

#### Social Functioning

- All listed aspects managed independently – appropriate social decisions, able to develop and maintain relationships, interacts appropriately with others, able to secure assistance from others, and able to deal appropriately with unexpected demands.

In his SR, the appellant reports that he is starting to lose his balance walking in the stores and was lucky to have had his spouse beside him to hold his hand firmly on his daily outing.

At reconsideration, the appellant reports that hearing loss impairs his ability to function with day to day ADL, even though he uses hearing aids every day. The appellant reports that due to his degenerative disc disease, he needs support and assistance to manage his ADL on an ongoing

basis, i.e. shopping, cleaning, laundry, meals, and transportation.

*Need for Help*

The GP reports that assistance is provided by family and that the appellant uses hearing aids.

## 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 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).

#### **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.....

#### **Mental Impairment**

As the appellant is not diagnosed with a mental health condition or reported to have any cognitive, emotional, or social functioning functional limitations, the panel finds that the ministry reasonably determined that the information does not establish a severe mental impairment.



### **Physical Impairment**

The appellant's position is that he is severely impaired by the pain, numbness, and loss of balance he experiences due to degenerative disc disease and that as a result of his hearing loss, he has been unable to sustain employment.

The ministry's position is that while the appellant is limited in regard to his ability to hear and ambulate, the GP's assessments do not establish a severe impairment of physical functioning. The ministry notes that the GP only discusses the appellant's hearing loss and degenerative disc disease in detail, not the chronic kidney disease.

Respecting the appellant's hearing loss, the ministry notes that the GP describes the appellant's hearing as poor and that hearing aids no longer help to the same degree, but argues that none of the GP's narrative provides adequate detail to understand the severity of the condition and no physical assessments of the appellant's hearing have been provided. As such, the ministry is not satisfied that the appellant's hearing impairment creates a severe impairment of his physical functioning.

Respecting the appellant's ability to ambulate, the ministry's argues that the assessment in the PR of being able to walk 4+ blocks and climb 5+ steps unaided, and independently manage standing, lifting, and carrying/holding, conflicts with the GP's statement that the appellant has difficulty ambulating due to "severe progressive degenerative disc disease." Additionally, in the AR the GP reports that the appellant takes significantly longer than typical walking, indoors and outdoors, and climbing stairs, the GP does not describe how much longer, as requested in the PWD application. As a result, it cannot be determined that the extra time taken represents a significant restriction to the appellant's ability to manage these activities.

### **Panel Decision**

The appellant is diagnosed with degenerative disc disease, hearing loss and kidney disease, though no impact on functioning is attributed to kidney disease by either the appellant or his GP. On appeal, the appellant's advocate argues that not all of the details of the impact of all of the appellant's medical conditions were included in the PWD application.

The GP describes the degenerative disc disease as severe and progressive, commenting that it impairs the appellant's ability to ambulate and that the appellant has a slow gait. The appellant reports that it causes pain, numbness, weakness, and loss of balance, and that he has difficulty getting in and out of a chair and must take rests when walking. The assessment confirms that the appellant experiences pain, which hopefully will be reduced with various treatments, and that the appellant must be careful to avoid twisting when bending or lifting. While it is clear that the appellant's ability to mobilize is directly impacted by his degenerative disc disease, it is unclear from the information provided by the GP and the appellant how much longer he takes when mobilizing. Furthermore, although taking significantly longer, the GP assesses the appellant as being able to independently walk 4+ blocks, climb 5+ steps, and lift somewhere between 5 and 15 lbs., though it is unclear where in that range the appellant's abilities fall.

Respecting the appellant's hearing loss, both the GP and the appellant report that the hearing aids are no longer working as well as they had, and the GP indicates that the appellant's hearing is poor. The appellant explains that he was not able to continue with his previous employment, which involved loud machinery. However, the ability to maintain one's previous employment is not a legislative criterion, and neither the appellant nor the GP has described any other impacts on functioning, such as problems communicating with others.

Based on the level of independent functioning indicated by the available information, the panel finds that the ministry reasonably determined that while the appellant is limited in his ability to hear and ambulate, a severe impairment of his physical functioning has not been established.

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

The appellant argues that his ability to perform DLA is significantly restricted due to the limitations resulting from his degenerative disc disease, which impacts his ability to walk, shop and get in and out of a chair. The appellant also argues that he has not been able to work and attain financial stability due to his hearing loss.

The ministry comments that legislation requires that DLA restrictions be both significant and either continuous or periodic for extended periods, and that while not specifically required by legislation, information respecting the frequency and duration of restrictions is valuable in determining the significance of the restrictions. Further, there must be a causal link between the medical condition diagnosed and the impacts to physical and mental functioning assessed by the prescribed professional(s)'s position to the restrictions and need for assistance with DLA.

The ministry notes that the GP identifies several activities for which the appellant requires continuous assistance due to financial strain, not impairment resulting from the appellant's medical conditions. While continuous assistance is indicated for paying for purchases when shopping, the GP does not indicate whether this is due to financial strain or mobility issues. A number of activities are reported as taking significantly longer to complete due to increasing difficulty with mobility, but the GP does not describe how much longer, as requested in the PWD application. Additionally, while the appellant reports that he needs to take longer and requires frequent breaks when walking, the GP did not make any annotations to indicate the need for rest breaks.

The ministry argues that the appellant's statement at reconsideration, that hearing loss impairs his ability to function regarding his DLA does not provide enough detail regarding how his DLA are restricted. While the ministry empathizes with the impact on the ability to maintain employment from hearing loss, the ministry states that the PWD application is not meant to assess employability and that PD eligibility criteria cannot be met based on any restriction of these abilities.

Based on the information from the appellant and his GP, the ministry finds that there is not enough evidence to confirm that the appellant has a severe impairment that, in the opinion of a prescribed professional, directly and *significantly* restricts his ability to perform DLA *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. DLA, as defined in the legislation, do not include the ability to work.

The GP, a prescribed professional, reports that due to mobility concerns arising from degenerative disc disease, the appellant takes significantly longer than typical to manage the DLA of moving about indoors and outdoors, the physical tasks of the DLA of shopping and transportation, as well as half of the physical tasks listed for the DLA personal care. However, the GP does not indicate how much longer the appellant takes to perform these tasks in order to determine that this limitation represents a significant restriction and, as the ministry notes, while the appellant has indicated the need to take rest breaks, the GP has not, only noting that the appellant walks with a slow gait. For other physical DLA tasks, including toileting, feeding self, cooking, laundry, and basic housekeeping, no physical restriction is identified by the GP. However, some of these tasks, as well as meal planning, meal preparation, and all aspects of paying rent and bills, are reported to require continuous assistance from another person due to financial need. As the ministry notes, the legislation requires that the restriction and need for help be the result of physical or mental impairment, not financial circumstances. Respecting the appellant's hearing loss, the GP notes the impact on employability and finances, but does not identify any restrictions in the appellant's ability to perform any of the prescribed DLA due to hearing loss.

Based on the above analysis, the panel finds that the ministry has reasonably determined that there is not enough evidence to confirm that the appellant has a severe impairment that significantly restricts his ability to perform DLA continuously or periodically for extended periods.

**Help to perform DLA**

The appellant reports that he needs assistance from other people with shopping, meals, housekeeping, and transportation and that his hearing aids are not as effective as they were due to his increasing hearing loss. The GP reports that assistance is provided by family and that the appellant uses hearing aids.

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 a reasonable application of the applicable enactment, and therefore confirms the decision. The appellant is not successful on appeal.