

## 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 March 13, 2017 which held that the appellant did not meet 2 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 determined that the appellant satisfied the other 3 criteria: he has a severe physical, though not a severe mental, impairment; he has reached 18 years of age; and his impairment in the opinion of a medical practitioner is likely to continue for at least 2 years.

However, the ministry was not satisfied that:

- 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 help, as it is defined in the legislation, 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 reconsideration consisted of the following:

- A PWD application with a Self Report (SR) from the appellant dated August 29, 2016.
- A Physician Report (PR) dated September 12, 2016 by the appellant's general practitioner (GP) who has had him as a patient since 2013 and seen him 2-10 times in the past 12 months.
- An Assessor Report (AR) dated September 8, 2016 by a registered Social Worker (SW) who has known the appellant for 8 months.
- A letter dated February 24, 2017 from the appellant.
- A copy of a referral letter for the appellant dated May 26, 2015 for a level 3 sleep study.
- A copy of a report on apnea dated May 29, 2015 indicating the appellant is suspected of having a pathological breathing disorder.
- A letter with recommendations for the appellant from 2 studies of apnea dated June 9, 2015.
- A copy of an apnea compliance report for the period of June 13, 2015 to July 27, 2015.
- A letter dated July 22, 2015 from a provincial sleep group indicating that the appellant was set up with an air sense auto pap device.
- A letter dated May 26, 2015 by an internist addressing the appellant's history, medications, drugs, allergies/sensitivities, past surgery, family history, functional inquiry, examination, investigations, and diagnostic impressions. The internist writes that "central to all of his health problems is the need to address his Extreme Obesity Class III and likely severe obstructive sleep apnea."
- A letter dated September 2, 2015 regarding a follow-up by an Internist who indicates that the appellant's moderate anemia will impact on his endurance.
- A letter from the appellant's (GP) dated February 19, 2016 regarding his ACL reconstruction which indicates that the appellant is coming along well, has a good range of motion and his knee is completely stable. The GP recommends that the appellant continue with physiotherapy, wean himself off crutches and work on getting rid of his limp.
- A report dated April 1, 2016 from the appellant's GP indicating that the appellant is finding pain with weight bearing although the knee is stable and has a full range of motion. Because of the appellant's pain, a review of x-rays was made showing no evidence of complication. The GP notes that he is unsure if the appellant's symptoms are related to arthritis or to poor conditioning and provided him with a prescription to see a chiropractor.
- A report dated May 16, 2016 from the appellant's GP indicating that the appellant is not doing very well. He cannot walk any distance because of pain. While he is no longer to use crutches he has seen some improvements since ACL reconstruction. The GP thinks that arthritis is the issue. In the short term exercise and physiotherapy should be continued and in the longer term potentially a knee replacement.
- A letter dated May 16, 2016 from specialist (1) indicating that he has made arrangements for the appellant to undergo a coronary angiogram in the upcoming two weeks.
- A copy of the appellant's Lab report dated May 17, 2016.
- A copy of the appellant's Lab report dated June 10, 2016.
- A note dated June 9, 2016 from the GP indicating that the appellant has demonstrated excellent stability and a good range of motion and requesting that the appellant focus on weight reduction.
- A cardiology consult dated June 17, 2016 from specialist (2) indicating that the appellant has single vessel disease with preserved LV systolic function and symptoms of angina. The appellant is to schedule a percutaneous coronary intervention (PCI) when he returns from his work camp in about 3 months. It is recommended that significant weight loss would help his overall wellbeing, improve his diabetes control and assist with planning for the PCI.

- A cardiology procedure summary for an angiogram for the appellant dated June 17, 2016.
- An operative report for the appellant's PCI dated August 19, 2016.

### **Diagnoses**

In the PR, the GP diagnosed the appellant with insulin dependent diabetes (unstable control), anemia (not yet determined), ischemic heart disease, right knee osteoarthritis, sleep apnea (attributed to fatigue) and obesity.

### **Mental Impairment**

In the PR, the GP reported that the appellant has no difficulties with communication and he has no significant deficits in his cognitive and emotional functioning.

In the AR, it is noted that the appellant has a good ability to communicate with speaking, reading and writing, while hearing is satisfactory, some difficulty is noted with competing background noise.

For the sections of the AR regarding impacts to cognitive and emotional functioning, the SW assesses the degree of impact of the appellant's mental impairment on daily functioning as major for bodily functions (sleep disturbance), moderate for, emotion, memory, motivation and motor activity (not due to cognitive/emotional). Minimal impacts noted for attention/concentration and no impact for consciousness, impulse control, insight and judgment, executive, language, psychotic symptoms, other neuropsychological problems and other emotional or mental problems.

The SW indicates in additional comments that the appellant has significant disruptions with sleep, waking up several times per night which impact on his wellbeing, clarity, attention etc. He struggles with symptoms of depression including low mood, worry, lack of motivation and interest. "All of this impacts health, energy."

In his letter dated February 24, 2017, the appellant wrote that his physical disability impacts his mental wellbeing and he is more depressed, with less energy to engage in social activities due to fatigue.

### **Daily Living Activities (DLA)**

The appellant has been prescribed medications and/or treatments that interfere with his ability to perform DLA. (fatigue likely impacted by mobility, cannot read the rest) and states that the anticipated duration of treatment is lifelong.

In the PR, the GP indicates that the appellant's impairment directly and continuously restricts his ability to perform DLA in the area of basic housework, mobility outside the home and use of transportation. The PR indicates that the appellant is not restricted with personal self care, meal preparation, management of medications, daily shopping, mobility inside the home, management of finances and social functioning. With respect to the degree of restriction the GP indicates that the appellant's knee pain is the biggest issue, all activities take longer and he would probably benefit from assistance with shopping.

In the AR, the appellant is indicated as independently able to perform every task of the listed DLA, with the exception of carrying purchases home under Shopping with the noted explanations:

- Under Personal Care, the appellant takes significantly longer than typical with dressing, grooming and bathing (note: lack of energy and mobility, shortness of breath, extra time and frequent breaks needed), transfers in/out of bed and transfers on/off of chair (note: holds on to sturdy structure to pull himself from bed and to get

- out of a chair). No comments regarding toileting, feeding self or regulating diet.
- Under Basic Housekeeping, no comments regarding laundry and basic housekeeping.
  - Under Shopping, the appellant is independent with going to and from stores, reading prices and labels, making appropriate choices, and paying for purchases. He takes significantly longer than typical with carrying purchases home.
  - Under Meals, the appellant is independent with meal planning, food preparation, cooking and safe storage of food.
  - Under Pay Rent and Bills, while the appellant is independent with banking, budgeting and pay rent and bills, there is a comment that his biggest impact is lack of funds to accomplish these tasks in a timely fashion.
  - Under Medications, the appellant is independent for filling/refilling prescriptions, taking as directed and safe handling and storage with a comment that there is some adjustment while getting use to medication; however, he seems to be improving.
  - Under Transportation, the appellant is independent with getting in and out of a vehicle (note: requires holding on to a brace bar in vehicle to balance self), using public transit, using transit schedules and arranging transportation.
  - Under Social Functioning, the appellant is independent with making appropriate social decisions, ability to develop and maintain relationships, interacting appropriately with others, ability to deal appropriately with unexpected demands and ability to secure assistance from others.

The SW assesses how the appellant's mental impairment impacts his relationship with his immediate social network and his extended social network as good functioning.

In the additional comments in the AR, the SW wrote that DLA's take significantly longer. The appellant struggles with everyday home maintenance and requires additional assistance when attempting to manage more difficult tasks. There were no safety issues identified.

In his letter dated February 24, 2017, the appellant wrote that it takes him longer to complete DLA's, for example 5 times longer to prepare a meal because he runs out of energy and needs to take breaks which last 5-10 minutes each time. Grocery shopping completely fatigues him and sometimes he leaves them in the vehicle for several hours or even overnight. The appellant states he is so fatigued from attempting to complete his daily living activities that it takes him a whole day to complete tasks that other people do in a few hours. He also indicates that he has less energy to engage in social activity due to fatigue.

### **Help Required**

The GP indicates that the appellant requires a cane for walking as a prostheses or aid for his impairment.

The SW indicates the appellant is provided assistance through the use of the following assistive devices: cane crutches and a CPAP machine.

The GP indicates that the appellant does not have an assistance animal.

## **Notice of Appeal**

In his Notice of Appeal dated March 24, 2017, the appellant states that he is seriously ill and can hardly handle his daily tasks. He can barely walk, has no physical strength and endurance to do the easiest tasks such as grocery shopping, cooking and cleaning.

## **Hearing**

The appellant testified that his condition is deteriorating and that being self-sufficient is a difficult process and he can't handle tasks in his daily life to cover his basic needs. He indicated that his blood thinners have caused bleeding from his nose and ears and he wakes up some mornings covered in blood. He reported that he's been on other medication for years without a problem and there isn't enough time to get a Dr.'s opinion about the bleeding. He stated that he lives in a remote area and must always think twice about what he does and how he does it because he has no one to help him.

He indicated that he skips basic housekeeping, cooking (meals often consist of making a sandwich), washing dishes (sit unwashed for 5-6 days) and a lot of other things because they are too difficult. He indicated that he had heart surgery last summer, does the best he can and takes his time. He has 3-5 good days a month and can't explain his weakness other than his heart condition. In response to a question about his use of crutches, the appellant testified that he doesn't use crutches in town because he only comes to town to shop where he uses a grocery cart for balance and support; he uses a cane on even surfaces and is totally unable to walk on uneven surfaces. He provided an example of using a rake to pull things off his truck bed as he has no other means to remove them. The appellant stated that he used to be a cook and knows what nutritious food is and how it makes him feel better but he can't often afford healthy food and has to buy starchy food or go to the food bank. In response to a question, the appellant indicated that his GP did not fill out the physician's report with the appellant present and that while he was not present for her complete assessment, he had met the social worker about 10 times and knows her well. The appellant complained that neither the GP nor the SW had visited him in his home to see how he lives. He wants to live independently and not move into a shelter.

The ministry began by referring to the legislation and stating that the requirement is to have the prescribed professional's opinion rather than the appellant's or the ministry's opinion. The ministry representative explained that the GP did not provide any details or corroborate as to how much

longer it takes the appellant to perform DLA while the SW indicates that the appellant performs nearly all DLA independently albeit mentioning that he takes longer to perform DLA but doesn't show that the appellant is periodically or continuously restricted with any DLA. The ministry therefore stood by its position at reconsideration.

## **Admissibility of Additional Information**

The panel considered the information in the Notice of Appeal and the oral testimony on behalf of the appellant as corroborating the previous information from the appellant in his Request for Reconsideration regarding the impacts of his medical conditions, which was before the ministry at reconsideration. Therefore, the panel admitted this additional information as being in support of information and records that were before the ministry at the time of the reconsideration, in accordance with Section 22(4)(b) of the Employment and Assistance Act.

## PART F – Reasons for Panel Decision

The issue in this appeal is whether the ministry decision that determined that the appellant did not meet two of the five statutory requirements of Section 2 of the EAPWDA for designation as a person with disabilities is reasonably supported by the evidence or is a reasonable application of the legislation in the circumstances of the appellant. Specifically, the ministry determined that the information provided did not establish that the appellant's severe physical impairment, in the opinion of a prescribed professional;

- (i) directly and significantly restricts his ability to perform daily living activities (DLA) either continuously or periodically for extended periods; and,
- (ii) as a result of those restrictions, he requires help to perform those activities.

The ministry determined that the appellant satisfied the other 3 criteria: he has a severe physical, though not a severe mental, impairment; he has reached 18 years of age; and his impairment in the opinion of a medical practitioner is likely to continue for at least 2 years.

### Relevant Legislation

**The following Section of the EAPWDA applies to this appeal:**

**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 is in a prescribed class of persons or 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 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.

**The following Section of the EAPWDA applies to this appeal:**

**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
  - (a) authorized under an enactment to practise the profession of
    - (i) medical practitioner,
    - (ii) registered psychologist,
    - (iii) registered nurse or registered psychiatric nurse,
    - (iv) occupational therapist,
    - (v) physical therapist,
    - (vi) social worker,
    - (vii) chiropractor, or
    - (viii) nurse practitioner, or
  - (b) acting in the course of the person's employment as a school psychologist by
    - (i) an authority, as that term is defined in section 1 (1) of the Independent School Act, or
    - (ii) a board or a francophone education authority, as those terms are defined in section 1 (1) of the School Act, if qualifications in psychology are a condition of such employment.

## **Mental Impairment**

### **Ministry Position**

The ministry's position is that the appellant's GP did not provide a diagnosis for mental impairment and reports that the appellant does not have deficits to cognitive and emotional functioning. The SW assesses one major impact of cognitive and emotional functions on daily functioning for bodily functions noting significant disruptions with sleep. Waking several times per night which impacts wellbeing, clarity, attention etc. The appellant struggles with symptoms of depression including low mood, worry, lack of motivation and interest. "All of this impacts health, energy." The SW further indicates that the appellant has moderate, minimal and no impacts in all other areas of cognitive and emotional functioning.

With regards to communication, the GP indicates that the appellant has no difficulties with communication and the SW reports that the appellant's hearing is satisfactory and his ability to speak, read and write is good. The minister is not satisfied that the information provided is evidence of a severe mental impairment.

### **Appellant's Position**

The appellant's position is that his physical disability impacts his mental wellbeing and he is more depressed, with less energy to engage in social activities due to fatigue. He struggles with symptoms of depression including low mood, worry, lack of motivation and interest.

### **Panel Decision**

A diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment. While the legislation does not define "impairment", the ministry's PR and AR forms define "impairment" as a "loss or abnormality of psychological, anatomical or physiological structure or functioning causing a restriction in the ability to function independently, effectively, appropriately or for a reasonable duration." While this is not a legislative definition, and is therefore not binding on the panel, in the panel's opinion, it reflects the legislative intent and provides an appropriate analytical framework for assessing the degree of impairment resulting from a medical

condition.

The panel notes discrepancies between the PR and the AR in terms of cognitive and emotional functioning. In the PR, the GP reported no significant deficits while in the AR the SW reported a major impact on bodily functions as well as moderate impacts on emotion, memory and motivation. It is also worth mentioning that the AR form at section 4 indicates that this section is to be completed for a person with an identified mental impairment or brain injury.

The panel also notes that for DLA that are specific to a mental impairment under Section 2(1)(b) of the EAPWDR, such as making decisions about personal activities, care or finances and relating to, communicating or interacting with others, the reports do not mention any restrictions in terms of decision making and social functioning.

Thus, the panel finds the ministry reasonably determined that the information provided did not establish that the appellant has a severe mental impairment.

## **Direct and Significant Restrictions in the Ability to Perform DLA**

### **Ministry Position**

The ministry's position is that the information does not establish that the appellant's impairment directly and significantly restricts DLA continuously or periodically for extended periods. The GP reports that the appellant is continuously restricted in his ability to do basic housework, mobility outside the home and use of transportation. In describing the degree of restriction the GP indicates that the appellant's knee pain is the biggest issue and all activities take longer. However, no information is provided to explain how much longer the appellant takes to manage these activities. With regards to assistance required, the GP reports "Would probably benefit from assistance-shopping." No further information is provided to explain the frequency, the degree, or the duration of the assistance required for the appellant to perform DLA. In addition, the GP indicates that the appellant is unrestricted in his ability to perform all other DLA, including personal self care, meal preparation, management of medications, daily shopping, mobility inside the home, management of finances and social functioning.

While the SW reports that the appellant takes significantly longer with personal care, carrying purchases home and getting in and out of a vehicle, no information is provided to explain how much longer the appellant takes to manage these DLA or to explain the type, the frequency and the duration of the assistance required. The SW adds that the appellant struggles with everyday home maintenance and requires additional assistance when attempting to manage more difficult tasks.

In addition the SW indicates that the appellant is independently able to manage all DLA, including personal care, basic housekeeping, shopping, meals, paying rent and bills, medications and transportation.

With regards to social functioning, the appellant is independently able to manage all areas of social functioning. Further, the appellant has good functioning with his immediate social network and his extended social network. In describing the support/supervision that the appellant requires to help maintain himself in the community, the SW writes "N/A."

As the majority of DLA are performed independently or require little help from others, the information from the prescribed professional does not establish that the appellant's impairment directly and significantly restricts DLA continuously or periodically for extended periods.



### **Appellant's Position**

The appellant's position is that his medical condition is deteriorating and it takes him much longer to complete DLA's, or they don't get done as he has no one to give him a hand. For example it takes 5 times longer for him to prepare a meal because he runs out of energy and needs to take breaks which last 5-10 minutes each time. Basic housekeeping, meals and dish washing are skipped. Grocery shopping completely fatigues him and sometimes he leaves them in the vehicle for several hours or even overnight. The appellant states that he is so fatigued from attempting to complete his daily living activities that it takes him a whole day to complete tasks that other people do in a few hours. He also indicates that he has less energy to engage in social activity due to fatigue. The appellant argues that having disability designation would make his life easier.

### **Panel Decision**

Section 2(2) (b) of the EAPWDA requires that the ministry be satisfied that a prescribed professional has provided an opinion that an applicant's severe impairment directly and significantly restricts his DLA, continuously or periodically for extended periods. 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, the prescribed professionals completing these forms have the opportunity to indicate which, if any, DLA are significantly restricted by the appellant's impairments either continuously or periodically for extended periods. Also, there is a component related to time or duration. The direct and significant restriction may be either continuous or periodic. Accordingly, in circumstances where the evidence indicates that a restriction arises continuously, 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, the PR indicates that the appellant is continuously restricted with Basic Housework, Mobility Outside the home and Use of Transportation and with respect to the degree of restriction; the GP indicates that the appellant's knee pain is the biggest issue, all activities take longer and he would probably benefit from assistance with shopping. However, the AR indicates that the appellant is independent with Basic Housekeeping, Shopping (except for carrying purchases due to lack of energy, shortness of breath and mobility issues), Transportation which includes getting in and out of a vehicle (noting that he requires holding on to a brace bar in vehicle to balance self), using public transit, using transit schedules and arranging transportation. The SW indicates that it takes the appellant significantly longer and that he struggles with everyday home maintenance. She comments that the appellant's lack of energy, frequency of breaks and shortness of breath make it challenging for him to complete DLA but neither the GP nor the SW provide any indication that he is unable to complete his DLA.

The panel acknowledges that the appellant has serious medical issues and his statements that he can hardly handle his daily tasks, barely walk, has no physical strength and endurance to do the easiest tasks such as grocery shopping, cooking and cleaning. While the panel takes into consideration the appellant's testimony, the legislation specifically requires that the ministry be satisfied that a prescribed professional has provided an opinion that an applicant's severe impairment directly and significantly restricts his DLA, continuously or periodically for extended periods.

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 to Perform DLA**

### **Ministry Position**

The ministry's position is that as it has not been established that DLA are significantly restricted, it cannot be determined that significant help is required from other persons.

### **Appellant's Position**

The appellant's position is that he needs help with his DLA; he needs a cane, crutches and CPAP machine. The appellant argues that he needs to hang on to a sturdy structure for transfers out of bed and off a chair as well as using a brace bar to get in and out of a vehicle. He states that he can't manage most daily living activities and has no one to help him.

### **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 a DLA.

While several assistive devices used by the appellant were confirmed by the medical professionals, there were no details about the type of assistance required by or provided by other persons.

The panel finds that the ministry reasonably determined that as direct and significant restrictions in the appellant's ability to perform DLA have not been established, 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.

### **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 therefore confirms the decision. The appellant's appeal, therefore, is not successful.