

## PART C – Decision under Appeal

The decision under appeal is the reconsideration decision dated June 5, 2017 made by the Ministry of Social Development and Social Innovation (the ministry) which determined 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* (EAPWDA) for designation as a person with disabilities (PWD). The ministry found that the appellant met the age requirement and that his impairment was likely to continue for at least 2 years. However, the ministry was not satisfied that:

- the appellant had a severe mental or physical impairment,
- that the appellant's mental or physical impairment, in the opinion of a prescribed professional, directly and significantly restricted daily living activities (DLAs) either continuously or periodically for extended periods, and
- that as a result of those restrictions, in the opinion of a prescribed professional, the appellant required help to perform DLAs.

## PART D – Relevant Legislation

The relevant legislation is section 2 of the EAPWDA and section 2 of the *Employment and Assistance for Persons with Disabilities Regulation* (EAPWDR).

## PART E – Summary of Facts

The information before the ministry at the time of the reconsideration decision consisted of the following:

1. A persons with Disabilities Designation Application consisting of a self-report (SR), a physician's report (PR) and an assessor's report (AR), the latter two both completed by the appellant's physician on March 4 and March 6, 2017, respectively.

In the SR the appellant describes his disability:

*This injury has disrupted my life – I am unable to do the things I did before = every day. It's a slower lifestyle with much stress and pain.*

The PR diagnoses the appellant with right leg (2015) and right arm (2011) weakness and anxiety (2014). The physician writes:

- 1. Has problems with weakness & loss of power in his right (dominant) arm – drops things with little or no warning.*
- 2. Right knee buckles without warning.  
Falls or drops items while trying to regain balance.*
- 3. Anxiety increasing due to #1 & 2 above.*

It is noted that the appellant has not been prescribed any medication and does not require any prostheses. The duration is noted as "indefinite".

Under functional skills the PR marks "unknown" for how far the appellant can walk unaided, how much he can lift and how many stairs he can climb. It indicates no limitation on how long he can remain seated. The PR indicates no difficulty with communication and no deficits in cognitive and emotional functioning.

Under Additional Comments, the physician notes: "Inconsistencies of arm & leg functions cause anxiety to worsen – unable to predict when grip or knee will fail him." The physician also notes that the appellant is unable to return to work despite rehab.

The AR indicates that the appellant's ability to communicate is good. The appellant requires periodic assistance from the person in relation to his mobility and physical ability. Regarding the impact of the appellant's cognitive and emotional functioning on his DLAs, the AR indicates that the appellant does not suffer major impacts but moderate impacts in the areas of bodily functions (sleep) and emotion (anxiety), and minimal impacts in the areas of attention/concentration, executive and motivation.

Regarding DLAs, the AR indicates that the appellant is independent except in the areas of going to and from stores, carrying purchases home (due to knee buckling and losing grip) and dealing appropriately with unexpected demands (due to anxiety) in which he requires periodic assistance. Good functioning is indicated in immediate social networks while extended social networks is left blank.

2. The appellant's reconsideration decision in which he writes:

*Sitting – go to stand up – right side goes completely numb. Can't walk for 5 min. It hurts.  
Headaches -- knee cramps, gives out.*

*Carry stuff – drop stuff sometimes.  
[Physician] verifies – “I can’t work!”*

3. A note from the appellant’s physician stating:

*[Appellant] is unable to R.T.W. Due to persistent right leg & arm pain and weakness in spite of rehab/physio.*

## PART F – Reasons for Panel Decision

The issue under appeal is whether the ministry's determination that the appellant has not met all of the eligibility criteria of section 2 of the EAPWDA for designation as a PWD was either a reasonable application of the legislation or reasonably supported by the evidence. The ministry determined that the age requirement and that his impairment was likely to continue for at least 2 years had been met, but was not satisfied that:

- the appellant had a severe mental or physical impairment,
- the appellant's mental or physical impairment, in the opinion of a prescribed professional, directly and significantly restricted DLAs either continuously or periodically for extended periods, and
- as a result of those restrictions, in the opinion of a prescribed professional, the appellant required help to perform DLAs.

The criteria for being designated as a person with disabilities are set out in s. 2 of the EAPWDA and s. 2 of the EAPWDR. Section 2 of the EAPWDA states:

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;

**"health professional"** repealed

**"prescribed professional"** has the prescribed meaning;

(2) The minister may designate a person who has reached 18 years of age as a person with disabilities for the purposes of this Act if the minister is satisfied that the person has a severe mental or physical impairment that

(a) in the opinion of a medical practitioner is likely to continue for at least 2 years, and

(b) in the opinion of a prescribed professional

(i) directly and significantly restricts the person's ability to perform daily living activities either

(A) continuously, or

(B) periodically for extended periods, and

(ii) as a result of those restrictions, the person requires help to perform those activities.

(3) For the purposes of subsection (2),

(a) a person who has a severe mental impairment includes a person with a mental disorder, and

(b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires

(i) an assistive device,

(ii) the significant help or supervision of another person, or

(iii) the services of an assistance animal.

(4) The minister may rescind a designation under subsection (2).

Section 2 of the EAPWDR provides further clarification:

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.

### **The Appellant's Position**

At the hearing the appellant stated that he was injured at work when he was buried alive. He reiterated that he has difficulties with his right knee and hand and experiences significant anxiety. He has been told that he cannot return to work.

### **The Ministry's Position**

The ministry's position is that, based on the evidence before it at the time of the reconsideration decision it did not have enough information to determine that the appellant has a severe physical or mental medical condition that significantly impacts his ability to carry out DLAs and he requires significant assistance to carry out those DLAs.

The ministry acknowledged that the appellant does have some limitations to his physical functioning due to his medical conditions, but this does not indicate a *severe* physical impairment. The ministry also acknowledged that the appellant may experience some difficulties with social functioning due to his anxiety, but this does not constitute a *severe* mental impairment.

In terms of DLAs, the SR, PR and AR indicate that the appellant is independent in almost all of his DLAs or requires only periodic assistance in others. As well, where it was indicated that the appellant required periodic assistance, no details are given as to how long or how often that assistance is required.

### **Panel Decision**

#### Employability

The panel notes that both the appellant and the appellant's physicians placed significant emphasis on the fact that the appellant is not able to return to work. As employability is not a legislated criteria

when assessing eligibility for PWD status, the fact that the appellant is not able to return to work is irrelevant.

### Severe Physical Impairment

In making its determination that the appellant does not suffer from a severe physical impairment the ministry considered the evidence before it in the form of the SR, PR and AR. There is no indication that the ministry did not give appropriate weight to the SR as alleged by the appellant's advocate. There is nothing in the SR which is not covered in the PR and AR so that the ministry's consideration of the PR and AR included and was read in the context of the SR. The fact is that in both the PR and the AR (read in the context of the SR) there is nothing to indicate a *severe* physical impairment. The PR indicates unknown under the "Degree and Course of Impairment". The AR indicates that the appellant requires periodic assistance in the areas of mobility, but does not provide any details as to the duration or frequency.

### Severe Mental Impairment

Again, both the PR and AR indicate minimal mental impairment which is entirely the result of the appellant's anxiety concerning his knee and arm. The PR indicates that there are no cognitive or emotional issues. The AR indicates no "Major Impacts" and mostly "No Impacts" in terms of cognitive and emotional functioning. The appellant's SR provides some detail in this regard, but it does not add to or materially change these assessments which do not indicate a mental impairment.

### Daily Living Activities

Here, again, both the AR does not establish that the appellant's ability to carry out his DLAs is significantly restricted by his medical conditions. The AR indicates that he can carry out the vast majority of his DLAs independently, with only three in which he requires periodic assistance. The SR does not add to this assessment.

### Help is Required to Perform DLAs

There is no indication in the information before the ministry at reconsideration that the appellant requires assistance continuously or periodically for extended periods. The AR indicates that the appellant requires periodic assistance in a very few DLAs. This does not meet the legislative requirement.

### Conclusion

The panel finds that the ministry's decisions that it could not determine that:

1. the appellant has a *severe* physical or mental impairment;
2. the appellant's impairment directly and significantly restricts DLAs, and
3. the appellant requires assistance with DLAs were reasonable;

Accordingly, the panel concludes that the ministry's decision that the appellant does not qualify for PWD was a reasonable application of the relevant legislation and reasonably based on the facts before it. The panel therefore confirms the ministry's decision.