

## PART C – Decision under Appeal

The decision under appeal is the Ministry of Social Development and Social Innovation (the ministry) reconsideration decision dated August 22, 2017, which found that the appellant did not meet three of the five 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 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,
- as a result of these restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

## PART D – Relevant Legislation

*Employment and Assistance for Persons with Disabilities Act* (EAPWDA), Section 2

Employment and Assistance for Persons with Disabilities Regulation (EAPWDR), Section 2

## PART E – Summary of Facts

### Information before the ministry at reconsideration

- PWD application comprised of the appellant's Self-Report (SR) dated June 5, 2017, a Medical Report (MR) and an Assessor Report (AR) dated April 27, 2017, completed by the appellant's general practitioner (GP) who has known the appellant since August 2015 and seen him 2-10 times. The GP used office interview and file/chart information to complete the AR.
- Referral Letter Report (RR) dated February 14, 2017 from a medical specialist.
- Appellant's Request for Reconsideration dated August 5, 2017 which included a list of medications he is currently taking.

### Diagnoses

In the MR, the GP diagnosed the appellant with major depressive disorder, COPD and degenerative disc disease of cervical spine. In the AR where asked to describe the appellant's mental or physical impairments that impact his ability to manage daily living activities, the GP wrote "Always tired".

In the RR, it was indicated that there was no significant soft tissue tenderness to suggest fibromyalgia and no demonstration of any diagnostic criteria for rheumatoid arthritis. The RR suggests the appellant might have obstructive sleep apnea, given his body habitus, history of snoring, symptoms and family history.

### Degree and Course Impairment

In the MR when asked "Is the impairment likely to continue for two years or more from today?" it is indicated yes with an explanation that "His conditions are chronic".

### Physical Impairment

In the MR, the GP reported that:

- In terms of health history, the appellant has depressed mood, social withdrawal and lack of motivation. Chronic pain due to degenerative disc disease of cervical spine and due to referred pain to his shoulder. He cannot do any heavy lifting. Chronic pain in shoulders, hands and knees.
- The appellant does not require any prostheses or aids for his impairment.
- For functional skills, the appellant can walk 4+ blocks unaided, climb 5+ steps unaided, lift 7 to 16 kg (15 to 35 lbs.) and has no limitation to remain seated.

In the AR, the GP reported that:

- The appellant is independent with walking indoors and outdoors, with climbing stairs, standing, lifting, and carrying and holding.

In the RR, the specialist reported that the appellant has good mobility of his neck, shoulders, hips and low back but significant discomfort with lateral bending and rotation of the neck, extension of the neck, elevation of the arms above 100 degrees, or extension of the low back.

In his Self-Report and Request for Reconsideration, the appellant wrote that:

- He has had lower back issues since 1980 and has had 2 back surgeries - L4 and L5.
- He has neck problems and dizziness when standing from a sitting position and when he turns his head.

- He has a sore neck, shoulders, arms and hands.
- He feels like he has severe flu symptoms - 24/7.
- He is always fatigued, has no energy and has to sleep.
- He has high blood pressure, COPD and asthma which make physical activity very difficult – good for 10 minutes.
- His knees are shot and he has trouble walking long distances.
- He suffers from fibromyalgia, osteoarthritis, pinched nerves at Level C10-T1, degenerative disc top to bottom, torn rotator cuff in both shoulders, torn ACL in both knees and lives with pain 24/7.
- He has had severe weight loss in 4 months.
- He is waiting for appointments with a neuro-surgeon, orthopedic surgeon and for a nerve conduction study.

## **Mental Impairment**

In the MR, the GP reported:

- The appellant does not have any difficulties with communication.
- The appellant has significant deficits with his cognitive and emotional function in the areas of emotional disturbance and motivation.

In the AR, the GP reported:

- The appellant has a good level of ability to communicate in areas of speaking, hearing, reading and writing.
- For the 14 areas of the AR assessing impacts to cognitive and emotional functioning and social functioning, the GP did not indicate any major impacts, while noting 2 moderate impacts, emotion and motivation.

In his Self-Report and Request for Reconsideration, the appellant wrote that he is severely depressed and has often thought of suicide. He sleeps 4 hours per night due to pain and stress.

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

In the MR, the GP reports that the appellant has not been prescribed medication that interferes with his ability to perform DLA.

The GP reports a restriction in the appellant's ability to perform DLA in the area of basic housework. While not indicating whether the restriction is continuous or periodic, the GP provides the following comments regarding the degree of restriction; "Shoulder pain limiting him with household tasks to clean floors, any task that involves reaching down/ causes pain".

No restrictions are reported for the other listed DLA's: personal self care, meal preparation, management of medications, daily shopping, mobility inside or outside the home, use of transportation, management of finances and social functioning.

In the AR, the GP reports that the appellant is independent in all areas of DLA listed under personal care, basic housekeeping, shopping, meals, paying rent and bills, medications and transportation. Under social functioning DLA ; appropriate social decisions, interacts appropriately with others, able to deal appropriately with unexpected demands and able to secure assistance from others are managed independently while the appellant is noted to require periodic support with able to develop and maintain relationships. The appellant is reported to have marginal functioning with both the immediate and extended social networks.

The GP indicated under additional information relevant to understanding the nature and extent of the appellant's impairment and its effect on daily living activities; that the appellant lives alone, has minimal social contact and is isolated.

### **Need for Help**

In the MR when asked "What assistance does your patient need with DLA?" the GP does not respond.

In the AR, the GP does not indicate that assistance is provided for the appellant by other people. In the section of the AR relating to assistance provided through the use of assistive devices, the GP does not identify any appropriate items that the appellant routinely uses to help compensate for his impairment.

### **Notice of Appeal**

In the Notice of Appeal dated August 29, 2017, the appellant writes that the ministry is not aware of the severity of his condition or the supports he requires due to the fact that he wasn't aware of how or the wording to complete the requirements.

Upon appeal, the appellant's GP submitted a letter of support dated August 30, 2017. In the letter the GP lists some of the most important factors of the combined result of the appellant's comorbidities as follows:

1. Chronic major depressive disorder; he has low energy, lack of drive and motivation severely limits his ability to be gainfully employed. He is compliant with his antidepressant medications.
2. Cervical spine degenerative disc disease; he has chronic severe neck pain and is waiting to see a neurosurgeon for an opinion about this condition.
3. COPD; he has moderate airways disease.
4. Bilateral shoulder rotator cuff tendinitis, this causes chronic shoulder pain and a decreased ability to lift heavy items or do physical labour for any extended period of time.
5. Left arm paresthesia and is waiting for nerve conduction testing.
6. Bilateral knee pain, with previous ACL injuries, this limits his ability to walk for a long distances, x-rays and further investigations pending.

The GP indicates that the appellant's poverty has caused him to fall into a worsening state of despair and he recently attended the emergency department of the hospital after a situational crisis with threat of self harm. The GP adds that providing financial assistance to the appellant will greatly improve his situation; currently he feels destitute and unfortunately due to the chronic nature of his conditions, medical solutions will only provide temporary relief. Surgical procedures or medication are unlikely to offer any permanent relief.

A list of current medications is also provided along with a list of the appellant's active problems notably; Depressive disorder (start 1995), Hypertensive disorder (systemic arterial), COPD and Asthma, GERD, Degeneration of intervertebral disc and Bilateral shoulder rotator cuff tendinitis.

## **Hearing**

The appellant testified that his neck injury is making his life miserable. He can only walk between ½ to 2 blocks and his situation is becoming worse daily. The appellant states that he requires ministry resources to get help such as appointments with specialists, a walker and neck brace as well as someone to help with housecleaning. He admits to have suicidal thoughts and has tried it once. The appellant indicates that he spends his day sitting and watching TV, has no life and sleeps only for 4 hours a night. Most of his meals are made up of convenience foods purchased at the local general store. He states his left arm has withered away and can hardly be used. He had applied for CPP disability but was turned down because he had not worked in several years. At the hearing, the ministry relied on its reconsideration decision.

The ministry had no objection to the admissibility of the recent support letter dated August 30, 2017 from the appellant's GP as most details had already been referred to in the records.

## **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 three of the five statutory requirements of Section 2 of the EAPWDA for designation as a person with disabilities (PWD) is reasonably supported by the evidence or is a reasonable application of the legislation in the circumstances of the appellant. The ministry found that the appellant met the age requirement and that 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 DLA are, in the opinion of a prescribed professional, directly and significantly restricted either continuously or periodically for extended periods; and,
- as a result of these restrictions, the appellant requires the significant help or supervision of another person, the use of an assistive device, or the services of an assistance animal to perform DLA.

### **The following Sections of the EAPWDA apply 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 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 EAPWDR 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.

## **Severe Impairment**

In the reconsideration decision, the ministry was not satisfied that the information provided establishes a severe physical or mental impairment. Determining a severe physical or mental impairment requires weighing the evidence provided against the nature of the impairment and its reported functional skill limitations. A diagnosis of a serious medical condition does not in itself determine PWD eligibility or establish a severe impairment. "impairment" is a medical condition that results in restrictions to a person's ability to function independently or effectively for a reasonable duration. To assess the severity of impairment, the ministry must consider the nature of the impairment and the extent of its impact on daily functioning.

## **Severe Physical Impairment**

The ministry finds that the information provided in the appellant's PWD application by the medical practitioner does not identify any significant functional skill limitations. In assessing the appellant's mobility and physical ability the GP indicates that the appellant is independently able to manage all activities, including walking indoors and outdoors, climbing stairs, standing, lifting and carrying and holding. Further, the GP indicates that the appellant doesn't require the use of any prostheses or aids to manage his physical functioning. Based on this information, the minister is not satisfied that the information provided is evidence of a severe physical impairment.

In the MR, the GP diagnosed the appellant with major depressive disorder, COPD and degenerative disc disease of cervical spine. In the AR where asked to describe the appellant's mental or physical impairments that impact his ability to manage daily living activities, the GP wrote "Always tired".

The MR indicates that the appellant's functional skills are: can walk 1 to 2 blocks unaided, climb 5+ steps unaided, lift 15-35 lbs. and no limitation to remain seated. In the AR the GP reports the appellant is independent with walking indoors and outdoors, with climbing stairs, standing lifting, and carrying and holding.

In the RR, the specialist reported that the appellant has good mobility of his neck, shoulders, hips and low back but significant discomfort with lateral bending and rotation of the neck, extension of the neck, elevation of the arms above 100 degrees, or extension of the low back. Also reported is that muscle tone is normal in all four limbs and reports no signs of fibromyalgia.

Based on the above information, the panel finds that while the appellant suffers from chronic pain from degenerative disc disease of cervical spine and is always tired, the evidence does not

demonstrate that he has limitations to his physical functioning. The panel concludes that the ministry was reasonable to determine that the GP's assessment of current physical functioning does not reflect a severe physical impairment. Therefore, the panel finds that the ministry was reasonable in its determination that the evidence does not support a finding that the appellant suffers from a severe physical impairment pursuant to Section 2(2) of the EAPWDA.

### **Severe Mental Impairment**

The ministry finds the information provided by the appellant's GP reports that the appellant has deficits to cognitive and emotional functioning in the areas of emotional disturbance and motivation, noting "Chronic major depression. However in assessing the impact of cognitive and emotional function on daily living, the GP does not indicate that the appellant has any major impacts. While, the GP indicates that the appellant has a moderate impact in the areas of emotion and motivation he has no impact in all other areas of cognitive and emotional functioning. With regards to communication and the appellant's ability to communicate, the GP indicates good in all areas. Therefore, the minister is not satisfied that the information provided is evidence of a severe mental impairment."

In the MR, the GP did diagnose that the appellant has a major depressive disorder and reported that the appellant experiences significant deficits with his cognitive and emotional function with emotional disturbance and motivation. For the 14 areas of the AR assessing impacts to cognitive and emotional functioning and social functioning, the GP did not indicate any major impacts, while noting 2 moderate impacts in areas of emotion and motivation. The GP indicated that the appellant has no difficulties with communication and in the AR indicated that the appellant's speaking, hearing, writing and reading are good. In the AR, the appellant was indicated as independent with 4 of 5 listed areas of social functioning; appropriate social decisions, interacts appropriately with others, able to deal appropriately with unexpected demands and able to secure assistance from others while the appellant is noted to require periodic support with able to develop and maintain relationships. Also, the appellant is reported to have marginal functioning with both the immediate and extended social networks. Additionally, no safety issues were identified.

The legislation requires that the minister must be satisfied that a person has a severe mental or physical impairment. While the panel notes that the appellant indicated that he is severely depressed and has often thought of suicide and sleeps 4 hours per night due to pain and stress; the assessment by the GP indicated deficits in cognitive and emotional functioning in the areas of emotion and motivation, and no information was provided as to how these deficits impact the appellant's functioning. Therefore, the panel finds that the ministry reasonably determined that the assessment provided by the GP does not establish a severe mental impairment pursuant to Section 2(2) of the EAPWDA.

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

The ministry relies on the medical opinion and expertise from the appellant's GP to determine that the appellant's impairment significantly restricts his ability to perform DLA either continuously or periodically for extended periods. The ministry makes the decision regarding Persons with Disabilities eligibility based on the physical, mental and daily living assessments provided by the medical practitioner as well as the appellant's self-report.

The ministry finds that as the majority of daily living activities are performed independently or require little help from others, the information from the appellant's prescribed professional does not establish that impairment significantly restricts daily living activities either continuously or periodically for



extended periods. Although the GP indicates that the appellant is restricted in his ability to perform basic housework, no information is provided to explain the frequency or the duration of the restriction. In assessing all other areas of daily living, the GP indicates that the appellant is unrestricted in his ability. With regards to social functioning, the GP indicates that the appellant requires periodic support/supervision with developing and maintaining relationships; however, no information is provided to explain the type, the degree or the duration of the assistance that the appellant requires to manage this area of social functioning.

Considering the appellant's medical history, it is reasonable to expect that the appellant would encounter some restrictions to his ability to perform DLA and require assistance as a result. In the MR, the GP reports that the appellant has not been prescribed medication that interferes with his ability to perform DLA.

The GP reports a restriction in the appellant's ability to perform only one DLA, basic housework with a comment that shoulder pain limits him from performing any task that involves reaching down, without providing any details on the type of assistance the appellant needs. The appellant did testify that he could use help with housework because he is unable to bend down to wash the floors. If he kneels, he can't get up without help.

In the AR, with regards to social functioning, the GP indicates that the appellant requires periodic support/supervision with developing and maintaining relationships; however, no information is provided to explain the type, the degree or the duration of the assistance that the appellant requires to manage this area of social functioning.

According to the legislation, the ministry must assess direct and significant restrictions to DLA in consideration of the opinion of a prescribed professional, in this case the appellant's GP. This does not mean that the other evidence is not factored in as required to provide clarification of the professional evidence, but the legislative language makes it clear that a prescribed professional's evidence is fundamental to the ministry's determination as to whether it is "satisfied." The prescribed professional completing the assessments has the opportunity to indicate which, if any, DLA are significantly restricted by the appellant's impairments either continuously or periodically for extended periods. In the opinion of a prescribed professional, a person's ability to perform daily living activities must be directly and significantly restricted either continuously, or periodically for extended periods.

The panel finds that the ministry's determination that this criterion is not met is a reasonable application of the legislation as there is insufficient information as to the frequency and duration of the periodic assistance that is required and no indication as to how much longer the appellant takes to perform DLA, thus it is difficult to determine if this restriction is significant. The panel finds that the ministry was reasonable in its determination that there is not enough evidence to confirm that the appellant's impairment significantly restricts DLA continuously or periodically for extended periods pursuant to Section 2(2)(b)(i) of the EAPWDA.

### **Help to perform DLA**

The ministry finds that as it has not been established that DLA are significantly restricted continuously or periodically for extended periods, it therefore cannot be determined that significant help is required from other persons.

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.

With consideration for the above, 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**

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.