

### **PART C – DECISION UNDER APPEAL**

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the ministry) reconsideration decision dated September 6, 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 his 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**

### **Evidence before the Ministry at Reconsideration**

The evidence before the ministry at the time of the reconsideration decision included:

Appellant's Request for Reconsideration 2. Persons With Disabilities (PWD) Application comprised of the appellant's self report (SR) dated July 25, 2017, a medical report (MR) dated July 24, 2017 completed by a specialist in nephrology ("Dr. N"), who has known the appellant for 4 years and who has seen the appellant 2 to 10 times in the past 12 months, an assessor report (AR) completed on July 26, 2017 by a social worker associated with the kidney care clinic ("SW1") who has known the appellant for 6 weeks and has seen him 2 to 10 times in the past 12 months;

### **1. Request for Reconsideration**

The appellant's request for reconsideration submitted to the ministry on October 16, 2017 with attached letter from his mother and primary caregiver. In Section 3 the appellant adds the following information:

- he has needed 13 surgeries for removal of kidney stones and has passed more than 500 stones to date;
- he takes Dilaudid (derived from morphine) daily to deal with the intense pain;
- he seems to spend most of the time at the hospital emergency department receiving IV pain medication or at the laboratory where he is undergoing a series of tests related to his upcoming kidney transplant;
- his "bad days" are happening more frequently now. At least 5 days per week he can't do anything because of medication;
- without his mother's help he wouldn't still be alive: he wrecks his clothes, misplaces food and has attempted to use the TV remote control as a phone;
- home care has now provided him with bed rails so he can now get in and out of bed, and a bathtub rail, without which he would be unable to bathe;
- most days he sleeps on the couch because he can't get up and down the stairs;
- without the help of [the multidisciplinary kidney health team] he would be lost.

The appellant's mother lives with him. She writes that she sees a steady decline in the appellant's mental and physical activities and a severe impairment of his ability to function due to his pain and medication. He mistakenly uses bleach instead of soap to wash clothes and misplaces food in the cupboard instead of the fridge. She does his cooking, cleaning and driving to appointments. He now requires her help physically and mentally on a daily basis.

### **2. PWD Application**

#### **Diagnosis**

In the MR the GP notes that the appellant suffers from:

- chronic kidney disease
- kidney stones
- pyelonephritis

#### **Physical Impairment**

In his SR the appellant reports that when he experiences severe pain he needs help with DLA. When his toxin levels increase his eyesight becomes blurry and he requires a magnifying glass to see. Transplant testing and the surgeries have really impacted his quality of life.

In the MR Dr. N reported that the appellant suffers from chronic progressive kidney disease and chronic kidney stones which are refractory to preventative measures and lead to intermittent obstruction and or kidney infections which are painful and requires narcotic treatment. He adds that the appellant can walk 1-2 blocks unaided, climb 5+ steps unaided, can lift 2-7 kg (5-15 lbs) and can remain seated for 1-2 hours.

In the AR SW1 reported that:

- associated pain and side effects impact the appellant significantly over 50% of the time, along with consistent low energy;
- he is independent but takes significantly longer than typical with walking indoors and outdoors, climbing stairs and carrying/holding;
- he is independent with standing a lifting;
- when experiencing pain the above activities take at least twice as long or are avoided altogether.

### **Mental Impairment**

In the MR Dr. N noted that the appellant had no difficulties with communication, no significant deficits with cognitive and emotional functioning and is not restricted with social functioning.

In the AR SW1 noted that the appellant's reading and writing abilities are satisfactory ("*has blurred vision when his creatinine level is high*") and speaking and hearing levels are good. He experiences significant impacts due to pain and side effects of medication, as well as emotional stress. Impacts to cognitive and emotional functioning are classified as follows:

- major impact on bodily functions, consciousness, attention/concentration, motivation and stress associated with medication;
- moderate impact on impulse control, executive functions, memory and motor activity;
- minimal impact on other neuropsychological problems;
- no impact on impulse control, insight/judgement, language or psychotic symptoms.

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

In the SR the appellant reported that when he is in pain he needs help with DLA (shopping, meal preparation, housecleaning, etc.). When his toxin levels are high he has a really hard time with his eyesight and needs a magnifying glass to see. His eating and sleeping levels are also affected.

In the MR Dr. N noted that the appellant is prescribed medication that interferes with the appellant's ability to perform DLA and impacts his cognitive status. He also indicated that the appellant's impairment periodically restricts his ability to perform DLA in all but 2 of the 10 DLA, including: meal preparation, medication management, basic housework, shopping mobility inside and outside the home, use of transportation and management of finances. He comments: "*During episodes of kidney stones or kidney infection these [DLA] are impaired*".

In the AR SW1 indicated that the following restrictions to DLA related to the appellant's impairment:

- Personal Care: independent but takes significantly longer: "*at least twice as long as normal. Avoids these tasks as much as possible during episodes.*" For transfers in and out of beds and chairs he requires an assistive device ("*uses bed rails and grab bars*")
- Laundry and Basic Housekeeping: requires periodic assistance with laundry and continuous assistance with housekeeping ("*mother assists with most laundry and housekeeping*")
- Shopping: independent but uses assistive device in reading prices and labels ("*uses magnifying glass/phone*"), independent but takes significantly longer in making appropriate choices and carrying purchases home ("*slower pace, frequent rests*"), independent in paying for purchases. SW1 also comments that "*the appellant is independent on tasks at this time but they take at least twice as long to complete as used to be normal. Some days he avoids tasks altogether due to pain.*";
- Meals: independent with meal planning but takes significantly longer ("*at least twice as long*"), requires periodic assistance in all other areas - food preparation, cooking, safe storage of food. ("*mother does food prep and cooking during episodes . . . mother occasionally notes improper storage of food (unsafe) due to forgetfulness*");

- Pay Rent and Bills: independent in all areas but takes significantly longer (“at least twice as long”) to budget;
- Medications: independent in all areas (“uses a dosette to manage his medications”);
- Transportation: takes significantly longer to get in/out of vehicles (“very slow/cautious to avoid falls”), independent in arranging transportation.

SW1 added the following comment: “[the appellant] is able to complete routine banking and meals tasks however planning tasks take significantly more time. During episodes of pain he does not eat or his mother assists him. Safety risk noted re storage of food errors, and dosette used to manage medications. Due to no public transportation relies on mother for transportation”.

### **Social Functioning**

In the MR Dr. N noted that the appellant’s social functioning is not restricted. In the AR SW1 did not complete the section entitled “Social Functioning” in addressing DLA restrictions.

### **Assistance Required**

In the MR Dr. N indicated that the appellant “gets help from mother, has falls at home, has railing at home”.

In the AR SW1 notes that help for DLA is provided by family, and comments: “If his mother was not available he would require assistance with shopping, housework, food preparation and transportation periodically”. He routinely uses bathing aids (“grab bars”) and bed rails. SW1 has made a referral to community rehabilitation services to assess for additional needed equipment.

In closing SW1 comments: “The applicant has chronic kidney disease and is initiating the transplant workup process, which requires additional medical testing/appointments. From writer’s perspective the combination of chronic disease and associated pain management has increased applicant’s need to rely on family for assistance with DLA. These factors have contributed to inability to work and negatively impact his mental health”.

### **Evidence Received after Reconsideration**

The appellant filed a Notice of Appeal on November 7, 2017 to which was attached a November 3, 2017 letter from a social worker (“SW2”) associated with the Pre-Transplant Assessment Clinic in Vancouver (“the Nov 3 letter”), summarized as follows:

- the appellant’s end-stage renal failure is rapidly declining to the point where he will require life-sustaining therapy in the near future;
- his end-stage kidney disease is compounded by recurrent kidney stones/obstruction;
- the appellant advises that he has passed approximately 532 kidney stones during the past 8 years;
- the pain associated with passing a kidney stone can be unbearable;
- his current symptoms include extreme fatigue/weakness, nausea, loss of appetite, sleep problems, decreased mental sharpness, muscle twitches/cramps, swelling feet/ankles, high blood pressure, shortness of breath;
- he is medically disabled and dependent on a caregiver for DLA for the majority of his day.

### **Additional Information at the Hearing**

At the hearing the appellant provided the following oral evidence:

- he averages 2-3 kidney stones per week, but after surgery may pass as many as 20 stones. If a stone is too big to pass a stent must be inserted under anaesthetic;
- in 2016 he required 2 surgeries entering through his back in order to remove stones;
- it usually takes a week to recover from day surgery;

- he is not able to walk more than 1 block unaided, and while walking he experiences dizzy spells and becomes exhausted;
- he is unable to climb 5 steps without a handrail;
- on bad days he sleeps on the couch because he can't get up the stairs, even with a handrail;
- he needs help every time he does laundry. It is the laundry chore itself that is periodic, not daily;
- there is no warning or predictability to the onset of kidney infections and stones. It makes it difficult to indicate frequency.

**Admissibility of Additional Information**

The ministry did not object to the admissibility of the Nov 3 letter or the appellant's oral evidence. The panel admitted the Nov 3 letter and all of the appellant's oral evidence under EAA Section 22 (4) (b) as evidence in support of the information that was before the ministry at reconsideration because it added greater detail to the appellant's evidence at reconsideration and did not constitute new information.

The ministry relied on the reconsideration decision.

## PART F – REASONS FOR PANEL DECISION

The issue in this appeal is whether the ministry decision of October 26, 2017 that determined 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) 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 his 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.

The relevant legislation is as follows:

### EAPWDA:

2 (1) In this section:

**"assistive device"** means a device designed to enable a person to perform a daily living activity that, because of a severe mental or physical impairment, the person is unable to perform;

**"daily living activity"** has the prescribed meaning;

**"prescribed professional"** has the prescribed meaning.

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

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

- (i) directly and significantly restricts the person's ability to perform daily living activities either
  - (A) continuously, or
  - (B) periodically for extended periods, and
- (ii) as a result of those restrictions, the person requires help to perform those activities.

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

- (a) a person who has a severe mental impairment includes a person with a mental disorder, and
- (b) a person requires help in relation to a daily living activity if, in order to perform it, the person requires
  - (i) an assistive device,
  - (ii) the significant help or supervision of another person, or
  - (iii) the services of an assistance animal.

### EAPWDR:

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 Physical Impairment**

The appellant argues that his progressive kidney disease causes frequent, intense pain that severely restricts his physical and functional abilities.

The ministry's position is that the physical impairments described by Dr. N in the MR and by the SW1 in the AR are insufficient to establish a severe physical impairment.

### Panel Decision

A diagnosis of a serious medical condition does not in itself determine PWD eligibility. Under the legislation, eligibility for PWD hinges on an "impairment" and its severity. "Impairment" is more than a diagnosed medical condition. An impairment is a medical condition that results in restrictions to a person's ability to function independently, appropriately, effectively or for a reasonable duration.

To assess the severity of impairment one must consider the nature of the impairment and the extent of its impact on daily functioning, as evidenced by functional skill limitations and the degree to which the ability to perform DLA is restricted. The legislation makes it clear that the determination of severity is at the discretion of the minister, taking into account all of the evidence, including the evidence of the appellant. However, the legislation is also clear that the fundamental basis for the analysis is the evidence from a medical practitioner or a "prescribed professional" – in this case, Dr. N, SW1 and SW2. The legislation requires that for PWD designation, the minister must be satisfied that the person has a severe mental or physical impairment.

The appellant's evidence is compelling. He has required 13 surgeries for removal of kidney stones and has passed more than 500 stones to date. He averages 2-3 kidney stones per week, but after surgery may pass as many as 20 stones. In 2016 he required 2 surgeries entering through his back in order to remove stones. If a stone is too big to pass a stent must be inserted under anaesthetic, usually taking a week to recover from the day surgery. He takes Dilaudid (derived from morphine) daily to deal with the intense pain. When the pain is particularly severe he requires IV pain medication administered through the hospital emergency department. At least 5 days per week he can't do anything because of medication.

He is not able to walk more than 1 block unaided, and while walking experiences dizzy spells and becomes exhausted. He is unable to climb 5 steps without a handrail. Home care has now provided him with bed rails to enable him to get in and out of bed and a bathtub rail, without which he would be unable to bathe. On bad days

he sleeps on the couch because he can't get up the stairs, even with a handrail, and many days he sleeps on the couch because he can't get up and down the stairs. Without the help of his mother – who does his laundry, cooking and housecleaning – and [the multidisciplinary kidney health team] he would be lost.

The appellant's mother writes that she sees a steady decline in the appellant's physical activities and a severe impairment of his ability to function due to his pain and medication. He has mistakenly used bleach instead of soap to wash clothes and misplaced food in the cupboard instead of the fridge. She does his cooking, cleaning and driving to appointments and notes that he now requires her help physically and mentally on a daily basis.

In the MR Dr. N indicates that the appellant's functional skills include the ability to walk 1-2 blocks unaided, climb 5+ stairs unaided, lift 2-7 kg and remain seated for 1-2 hours. He comments that the appellant suffers from a chronic progressive kidney disease "leading to fatigue". He adds that the appellant's chronic kidney stones are refractory to preventative measures leading to intermittent obstruction and infection, and notes that he has falls at home. Although Dr. N does not describe the degree of fatigue experienced, clarify what he means by "intermittent" or suggest how frequently the appellant's falls occur he notes that the appellant's obstructions and infections are painful and require narcotic treatment.

In the AR SW1 notes that pain and side effects impact the appellant significantly more than 50% of the time. She indicates that he is independent with standing and lifting but takes significantly longer than typical with walking indoors and outdoors, climbing stairs and carrying/holding("at least twice as long or avoided altogether").

In the Nov 3 letter SW2 describes the appellant as experiencing "end-stage renal disease" which is rapidly declining to the point where he will require life-sustaining therapy in the near future. She notes that he has passed approximately 532 stones in the past 8 years, which averages more than 1 stone per week. Some stones can take more than 2 weeks to pass. The pain associated with passing a stone can be unbearable and has led to falls and the need for railings. When in extreme pain during the passing of a stone or stones he becomes completely dependent on his caregiver. SW2 also adds the following: "*[the appellant] has all the symptoms of end stage organ failure to contend with such as extreme fatigue/weakness, nausea, loss of appetite, sleep problems, decreased mental sharpness, muscle twitches/craps, swelling feet/angles, high blood pressure, shortness of breath and so forth*". This letter provides a powerful description of the debilitating pain experienced by a person in end-stage renal failure. The term "end stage renal failure" is not used by the appellant's kidney specialist in the MR. Also SW2 does not address the specific functional assessments set out in the PWD application form, and does not provide details relating to the foundation upon which she bases her opinion. She speaks only of having had a conversation with the appellant. There is no information provided as to whether she met with him, observed his functional abilities, or examined his medical files. She also relies on the appellant's inability to work and straitened financial circumstances, which are not factors that can be considered when determining severity of impairment. The panel must therefore be cautious in assigning significant weight to the Nov 3 letter.

In the reconsideration decision the ministry commented that an impairment that takes twice as long as typical to perform acts of mobility and physical functionality is not considered indicative of a severe impairment of physical functioning. As stated earlier in this decision the determination of severity of impairment is at the discretion of the minister. That discretion cannot be overturned unless it can be demonstrated that the ministry's finding was an unreasonable application of the information provided at reconsideration. The combined evidence of Dr. N, SW1, the appellant, the appellant's mother and to a lesser extent SW2 demonstrates that the appellant's mobility, physical ability and functional skills are severely impacted as a result of the debilitating pain that he experiences more than half the time. The panel therefore finds that the ministry's determination that the appellant does not have a severe physical impairment is not reasonably supported by the evidence.

### **Severe Mental Impairment**

The appellant argues that he suffers from stress and mental confusion which are caused by pain and the side effects of narcotic medication.



The ministry argues that the information provided in the MR and AR is not indicative of a severe mental impairment.

*Panel Decision*

In the MR Dr. N did not diagnose a mental illness or mood disorder or indicate that the appellant has significant deficits with cognitive and emotional functioning or communication. In Section B-4 of the AR headed "Cognitive and Emotional Functioning" SW1 noted that the appellant suffered major impacts in cognitive and emotional functioning in the areas of bodily functions, consciousness, attention/concentration, motivation and other emotional/mental functions and moderate impacts in the areas of emotion, executive function, memory and motor activity. SW2 referred to "decreased mental sharpness" in the Nov. 3 letter.

Section B-4 of the AR is intended for use when a PWD applicant has an identified mental impairment or brain injury. SW1's assessment of impacts to the appellant's cognitive and emotional functioning is inconsistent with Dr. N's assessment in the MR and has no diagnostic basis.

In conclusion, although the evidence indicates that the appellant experiences episodes of stress and mental confusion arising from his illness and medication side effects the panel finds that the ministry reasonably determined that a severe mental impairment was not established due to the absence of a diagnosed mental illness and inconsistencies between MR and AR in the areas of cognitive and emotional functioning.

**Restrictions in Ability to Perform DLA**

The appellant argues that his ability to perform DLA is significantly restricted when he suffers periods of extreme pain. At times his eyesight and balance are also affected.

The ministry's position is that a severe impairment has not been established that directly and significantly restricts the appellant's ability to perform DLA, and that the information submitted by the prescribed professionals is not sufficient to establish that the appellant's DLA are directly and significantly restricted either continuously or for extended periods.

*Panel Decision*

The legislation in section 2(2)(b) of the EAPWDA requires 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. While other evidence may be considered, 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.

In the MR Dr. N indicates that the appellant's impairment periodically restricts his ability to perform DLA in all but 2 of the 10 DLA, including: meal preparation, medication management, basic housework, shopping mobility inside and outside the home, use of transportation and management of finances. He comments: "*During episodes of kidney stones or kidney infection these [DLA] are impaired*". Because Dr. N does not explain how often these episodes occur or how long they last it is difficult to ascertain whether the appellant's ability to perform DLA is restricted "periodically, for extended periods" as required by the legislation.

In the AR SW1 indicated that the "appellant is independent on tasks at this time" but requires continuous assistance with housekeeping and periodic assistance with laundry. The panel accepts the appellant's explanation that it is the laundry chore itself that is periodic and that his mother does all his laundry for him. Although independent with the majority of tasks the appellant takes twice as long as normal to complete most of them, and during episodes avoids these tasks as much as possible. These extreme pain episodes occur more than 50% of the time as indicated by SW1 in Section 3-B of the AR. . He requires bedrails and bathtub grab bars to transfer in and

out of bed and bath, and requires a dosette to take his medication as directed. When his toxin levels are high he requires a magnifying glass to read labels, and takes significantly longer to make appropriate shopping choices, carry his purchases and get in and out of vehicles.

The information contained in the AR indicates that the appellant is dependent on his mother for housekeeping and laundry, and periodically dependent on her for food preparation, cooking and safe storage of food. The AR also indicates that his physical impairment directly and significantly restricts his ability to perform several DLA at least 50% of the time, and that it takes him twice as long as normal to complete the majority of tasks. The panel therefore finds that the ministry's determination that in the opinion of a prescribed professional the appellant's ability to perform DLA is not directly and significantly restricted periodically for extended periods is not reasonably supported by the evidence.

### **Help in Performing DLA**

The appellant argues that he requires the significant help of his mother to perform DLA, as well as an assistive device in the form of bathing aids and bed rails.

The ministry's position is that because it has not been established that the appellant's DLA are significantly restricted as a result of a severe impairment it cannot be determined that significant help is required from other people.

### *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.

In the MR Dr. N indicates that the appellant gets help from his mother and uses railings to prevent falls. In the AR SW1 indicates that the appellant's mother provides significant help to enable him to perform DLA and that bed rails and grab bars are required to prevent falls. In the Nov 3 letter SW2 notes that the appellant is "dependent on a caregiver for his DLA".

The panel finds that the evidence establishes that the appellant requires the significant help of another person and needs assistive devices to perform DLA as required by EAPWDA Section 2(2) (b) (ii). The ministry did not make a determination on this final criterion because it did not find that that as a result of a severe impairment the appellant's DLA were directly and significantly restricted periodically for extended periods in the opinion of a prescribed professional.

### **Conclusion**

The panel finds that the ministry's reconsideration decision, which determined that the appellant was not eligible for PWD designation because he did not meet the designation criteria set out in EAPWDR 2 (2) (2), is not reasonably supported by the evidence, and rescinds the decision. The appellant is successful in his appeal.