

## **PART C – DECISION UNDER APPEAL**

The decision under appeal is the Ministry of Social Development and Poverty Reduction (the ministry) reconsideration decision dated March 05, 2018 which found that the appellant did not meet two 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, that the impairment is likely to continue for 2 years or more and that the appellant has a severe physical impairment. However, the ministry was not satisfied the evidence establishes 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 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**

The information before the ministry at the time of reconsideration included the appellant's PWD application comprised of a Medical Report (MR) and an Assessor Report (AR) both completed by the appellant's general practitioner (the "GP"). The MR and AR were signed and dated December 6, 2017. The GP has known the appellant since 2005 and saw the appellant 11 or more times in the past 12 months prior to completing the PWD application. The PWD application also included the appellant's Self-Report (SR) dated November 29, 2017.

The evidence also included the appellant's Request for Reconsideration (RFR), signed and dated February 20, 2018. In the RFR the appellant described the pain he suffers as a result of a pinched nerve, how its impacted his mobility and some of the challenges he experiences with daily tasks (such as carrying and getting in/out of a vehicle). He also described that socially he is limited to a select group of friends.

A letter from a pain management specialist ('Pain Specialist'), signed and dated November 29, 2017, was provided with the RFR. The Pain Specialist stated, in part, the following:

- The appellant has constant radicular pain down his left leg and foot.
- The appellant had surgery unfortunately a scar formed around his nerve.
- The appellant did not respond to injections and alternative treatment will be attempted in 6 weeks.
- There is a need for physiotherapy but the appellant does not have the financial means.
- The symptoms will be ongoing.

### ***Diagnoses***

In the MR, the GP diagnosed the appellant with chronic low back pain syndrome and degenerative disc disease (spine), and both have an onset date of April 2015. The GP also stated "failed low back surgery (April 2015).

### ***Physical Impairment***

In the MR and the AR, the GP indicated the following:

- "Unfortunately this patient suffers from daily severe pain in the lower back area. Range of movement is limited and painful. Lifting objects is very difficult, virtually not possible".
- The appellant can, unaided, walk 4+ blocks and climb 5+ stairs, lift 5-15lbs and remain seated for 1-2 hours.
- "Severe daily/chronic low back pain. This affects mobility and limits his ability to do daily tasks"
- Walking indoors/outdoors, climbing stairs, standing, lifting and carrying/holding all take significantly longer without indicating how much longer. The GP commented "patient can lift only 10-15lbs [illegible]" and "patient usually gets help from wife or [illegible] family".

In the SR, the appellant described his pain, his limited mobility (difficulty in bending, twisting, standing, walking and sitting) and limitations to employment.

### ***Mental Impairment***

In the MR and AR, the GP indicated the following:

- There are no difficulties with communication
- There are no significant deficits with cognitive and emotional function.
- Ability to speak, read, write and hear are all satisfactory.
- All tasks listed under 'social functioning' are performed independently.
- Immediate and extended social networks have good functioning.
- All tasks listed under 'pay rent and bills' are performed independently.
- All tasks listed under 'medication' are performed independently.

In the SR, the appellant indicated that his pain and losses over the past 2 years and 7 months have taken an emotional and mental toll.

### ***Daily Living Activities***

In the MR and AR, the GP indicated the following:

- The appellant has been prescribed medications/treatments which interfere with his ability to perform DLA and the duration of medications/treatments is "unknown".
- All tasks listed under 'personal care' are performed independently.
- All tasks listed under 'shopping' are performed independently.

- All tasks listed under 'basic housekeeping' are not indicated as either independent, requires periodic assistance, requires continuous assistance, requires an assistive device or takes significantly longer. The GP commented "patient wife does most of these tasks as bending is difficult [illegible].
- All tasks listed under 'meals' are not indicated as either independent, requires periodic assistance, requires continuous assistance, requires an assistive device or takes significantly longer. The GP commented "patient wife does most of these tasks".
- All tasks listed under 'pay rent and bills' are performed independently.
- All tasks listed under 'medication' are performed independently.
- All tasks listed under 'transportation' are performed independently.
- The GP commented: "walking [illegible] is not impossible and lifting objects over 15-20lbs is not impossible. Employment for such a person plagued with such severe back pain is not possible".

### **Help**

In the AR, the GP indicated the following:

- The appellant does not require any prostheses or aids for the impairment.
- No equipment or devices are used by the appellant for assistance.
- Assistance is not provided by an assistance animal.
- Help with DLA is provided by his wife and family.

### **Evidence on Appeal**

Notice of Appeal (NOA), signed and dated March 23, 2018, and in part stated "The ministry agrees my injury is of a sever impairment but states they disagree it impacts my life daily". The appellant stated that the very detailed report provided by his doctor should give the tribunal a better understanding of his physical situation.

The appellant also submitted 4 letters prior to the hearing.

- A letter from the GP, signed and dated April 13, 2018, which stated that the appellant has a history of disc herniation, he suffers every day despite doing daily care exercise and despite all medications to date, he receives help from family and friends.
- A letter from the appellant's mother which in part stated that she helps the appellant every way she can, when the appellant pushes himself physically he has negative impacts on his daily life and routine, he has sluggish movements, difficulty walking, moving and getting up. She helps with the appellant's children and meal preparation.
- A letter from the appellant's friend, which in part stated that he has witnessed a deterioration in health, the appellant has difficulty with minor physical tasks, he helps with snow removal and de-icing, vehicle repair and maintenance and picking up medication.
- A letter from the appellant's partner, which in part stated that the appellant used to be athletic and in excellent physical shape. She stated that the appellant struggles with being on his feet for long periods of time and lifting anything over 15-20lbs. She stated that she completes many of the tasks the appellant used to do. She has taken over gardening, general home maintenance, majority of cooking, grocery shopping, completing errands and arranging child care. She has witnessed the appellant struggle to leave his bed.

### **Evidence at the Hearing**

At the hearing the appellant stated, in part, the following:

- The GP has confirmed in his written statements, which are included in the PWD application, that there is a significant restriction with DLA. Specifically, the GP stated "Severe daily/chronic low back pain. This affects mobility and limits his ability to do daily tasks" and "Unfortunately this patient suffers from daily severe pain in the lower back area. Range of movement is limited and painful. Lifting objects is very difficult, virtually not possible".
- The ministry did not consider the SR or ask for additional information or clarification.
- The ministry did not consider the information provided by the pain specialist.
- Help is given not just because they are family and friends but because he needs help.
- He cannot do physical work and his ability is limited compared to his pre-injury ability.
- Previously he did yard work, house maintenance and laundry but can no longer perform these tasks.
- He has had to adapt to everyday life.
- The pain shoots down his spine and into his left leg.
- The GP has provided a 'handicap' parking decal so that he does not walk too much.
- The GP has advised not to use a cane or other aid to prevent further weakening of the left.

At the hearing the ministry relied on its reconsideration decision and added, in part, the following:

- When it comes to DLA, it is legislatively required that the ministry rely on the prescribed professional to provide evidence which establishes that the appellant is directly and significantly restricted in the performance of DLA as a result of the impairment. Information provided in the self-report and by others (such as family) does not meet the criteria in the legislation.
- The narrative provided by the GP speaks to limitations but does not establish a direct and significant restriction to DLA.

#### **Additional Information**

The ministry did not object to the admission to the 4 letters that were submitted by the appellant prior to the hearing.

The panel found that the 4 letters submitted prior to the hearing provided additional detail or disclosed information that was in support of the information addressed in the reconsideration. Accordingly, the panel has admitted this new information as being in support of information and records that were before the ministry at the time of reconsideration, in accordance with s. 22(4) of the *Employment and Assistance Act*. However the panel notes that the GP's letter described the appellant's pain history, treatments and that he receives help from friends. However it did not describe how DLA are impacted, which DLA are impacted, is the appellant restricted periodically or continuously or the type help that is needed. The panel notes that the 3 remaining letters also did not speak to frequency of help needed. The panel also notes that the legislation clearly states that information regarding DLA must be in the opinion of a prescribed professional. For these reasons, the panel places little weight on the 4 letters submitted prior to the hearing.

## PART F – REASONS FOR PANEL DECISION

The issue on appeal is whether the ministry's reconsideration decision, which found that the appellant is not eligible for PWD designation, was reasonably supported by the evidence or was a reasonable application of the applicable enactment in the circumstances of the appellant. The ministry found that the evidence does not establish that 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 those restrictions, it could not be determined that 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 criteria for being designated as a PWD are set out in Section 2 of the EAPWDA as follows:

### Persons with disabilities

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 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).

The EAPWDR provides as follows:

### Definitions for Act

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.

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

Section 2(2)(b)(i) of the EAPWDA requires that the minister be satisfied that in the opinion of a prescribed professional, a severe mental or physical impairment directly and significantly restricts the appellant's ability to perform DLA either continuously or periodically for extended periods. While other evidence may be considered for clarification or support, the ministry's determination as to whether or not it is satisfied that the legislative criteria are met, is dependent upon the evidence from prescribed professionals. The term "directly" means that there must be a causal link between the severe impairment and the restriction. The direct restriction must also be significant. Finally, there is a component related to time or duration – the direct and significant restriction may be either continuous or periodic. If periodic, it must be for extended periods. Inherently, any analysis of periodicity must also include consideration of how frequently the activity is restricted. All other things being equal, a restriction that only arises once a year is less likely to be significant than one that occurs several times a week. Accordingly, in circumstances where the evidence indicates that a restriction arises periodically, 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.

DLA are defined in section 2(1) of the EAPWDR and are listed in both the MR and the AR sections of the PWD application with the opportunity for the prescribed professional to check marked boxes and provide additional narrative. DLA, as defined in the legislation, do not include the ability to be employed. Therefore the panel finds that employability is not a consideration for eligibility for PWD designation because employability is not a criteria in section 2(2) of the EAPWDA nor is it listed among the prescribed daily living activities in section 2 of the EAPWDR.

The appellant argued that he is significantly restricted with performing his DLA. and that the interpretation of his restrictions is "in the eye of the beholder." He takes 2 to 3 times longer, has limited mobility, and if asked to obtain this information, he could have easily done so.

The ministry found that though a severe physical impairment has been established, there is not enough evidence to confirm that a severe physical impairment significantly restricts the appellant's ability to perform his DLA continuously or periodically for extended periods.

In its reconsideration decision the ministry noted that the appellant's wife does most of the tasks associated with basic housekeeping and meals as bending is difficulty for the appellant, the level of the appellant's ability to perform these activities remains unclear and the degree to which he requires help is also unclear. The ministry noted that the GP indicated that the appellant is independently able to manage all activities under personal care, shopping,

paying rent and bills, medications, and transportation. The ministry also noted that the GP indicated that the appellant requires assistance from family and friends with 'everyday tasks', however the frequency, the degree and the type of assistance that the appellant requires remains unclear. The ministry noted that the appellant independently manages social functioning and has good functioning with immediate and extended social networks. The ministry concluded that the information from the GP does not establish that impairment significantly restricts DLA either continuously or periodically for extended periods and therefore the legislative requirements have not been met.

Section 2(2) of the *EAPWDA* requires that in the opinion of a prescribed professional a person's ability to perform DLA is directly and significantly restricted either continuously, or periodically for extended periods. While the panel finds that the appellant has some limitations to physical mobility and restrictions to DLA, the information provided makes it difficult to determine whether the appellant has significant restrictions to DLA. The panel notes that the GP indicated that all of the listed tasks under DLA are performed independently. The only exceptions to this are the tasks listed under basic housekeeping and meals. However the GP did not indicate whether or not the tasks listed under these categories are performed independently, or with either periodic or continuous assistance from another person. The GP only indicated that the appellant's wife "does" these tasks and did not indicate how often she does these tasks.

Given this evidence as a whole, the panel finds that the ministry reasonably concluded that the evidence provided by the GP is unclear and therefore does not demonstrate that the appellant's overall ability to perform his DLA is significantly restricted either continuously or periodically for extended periods, pursuant to Section 2(2)(b)(i) of the *EAPWDA*.

#### **Help to perform DLA**

Section 2(2)(b)(ii) of the *EAPWDA* requires that, *as a result of direct and significant restrictions in the ability to perform DLA*, a person requires help to perform those activities. Help is defined in subsection (3) as the requirement for an assistive device, the significant help or supervision of another person, or the services of an assistance animal in order to perform DLA.

The appellant's position is that he requires the help of his partner, mother, and friend to function.

The ministry argues that because it has not been established that DLA are significantly restricted, it cannot be determined that help is required.

Given that confirmation of direct and significant restrictions with DLA is a precondition of the need for help criterion and because the panel found that the ministry reasonably determined that direct and significant restrictions in the appellant's ability to perform DLA have not been established, the panel also finds that the ministry reasonably concluded that it cannot be determined that the appellant requires help to perform DLA as required by section 2(2)(b)(ii) of the *EAPWDA*.

#### **Conclusion**

The panel finds that the ministry's reconsideration decision, which determined that the appellant was not eligible for PWD designation, was reasonably supported by the evidence and is a reasonable application of the applicable enactment, and therefore confirms the decision. The appellant is not successful on appeal.